Borgarting Court of Appeal

Dated: 2 March 2011

Before:

Wenche Skjæggestad, Appellate Judge
Einar Høgetveit, Appellate Judge
Jan Erik Aarsland Olsson, Chief District Court Judge

Dell Products ... Appellant
(Represented by Attorney at law Ståle Rønneberg Kristiansen)

Tax East ... Respondent
(Represented by Attorney at law Morten Goller)

The matter at issue is the question of whether Dell Products are taxable to Norway for part of its profits for the years 2003, 2004, 2005 and 2006 or if the Tax Appeal Board's decision is invalid.

Presentation of the case

The following description relates to the years specified and does not take into account changes which have occurred at a later date.

The Dell Group manufactures and sells computer related goods all over the world. Dell Products is owned by Dell Products (Europe) BV, which in turn is owned by Dell Computer Corporation (USA). Dell AS is owned by Dell Computer Inc. (USA), which in turn is owned by Dell Computer Corporation (USA).

Dell Products is a company with limited liability, which has been formed and registered in the Netherlands, but which is resident in Ireland for tax purposes. . The company is the group's unit for the sale of Dell products in Europe (including Norway), the Middle East and Africa. The company buys products from Dell Products (Europe) BV, which runs manufacturing operations in Ireland, and sells products as commissionaire to the end user through its own commissionaires in each country. In Norway Dell AS is the commissionaire as far as large corporate customers and customers in the public sector are concerned. Sales to small companies and consumers in the Scandinavian market take place through a "call centre" in Denmark. Dell AS also has the opportunity, at its own expense and risk, to sell accessories to the end user, so- called LPP (locally procured products).

Dell Products did not consider itself taxable to Norway and submitted, after a notice from the tax authorities, tax returns where the taxable income was reported as nil. On 8 October 2008 the Tax Appeal Board came to the decision that Dell Products, for the years 2003 and 2004, is considered to have a permanent establishment in Norway according to Article 5 No 5 of the tax treaty between Norway and Ireland, which means that the company is liable to corporation tax. 60 percent of Dell Products' net profit on sales in Norway was attributed to the permanent establishment. Later, an assessment decision was also made for the years 2005 and 2006, based on the same legal understanding and facts. In the opinion of the tax authorities, the total taxable income for the relevant years is approximately NOK 85 million.

Dell Products contested the tax assessment decisions through a writ to Oslo District Court on 24 April 2009. On 16 December 2009, Oslo District Court handed down a judgment with the following conclusion:

1. The Court finds for the State by Tax East.

2. Dell Products shall pay the State represented by Skatt Øst (Tax East) NOK 707 317 - seven hundred and seven thousand three hundred and fourteen - in court costs within 2 - two - weeks from the service of this judgment.

For further details regarding the facts of the case we refer to the judgment by the District Court and the Court of Appeal's comments below.

Dell Products appealed the judgment to Borgarting Court of Appeal. The appeal hearing was held on 15-18 February 2011 at the premises of Borgarting Court of Appeal. The parties were represented by their counsels. Attorney at law Finn Backer-Grøndahl was also present as advisory counsel for the appellant. For the respondent senior tax lawyers Marianne Langeland and Frode Arvnes participated, both from Skatt Øst (Tax East), in accordance with Section 24-6, subsection two, of the Civil Procedure Act No witnesses were heard and the case was completed according to the "Supreme Court Model", cf. Section 29-18, subsection two, cf. Section 9-15, subsection ten, of the Civil Procedure Act. Regarding evidence reference is made to the Court Record. .

The parties' claims and basis for the claims

In brief, the appellant, **Dell Products**, has submitted:

There are two conditions that must be fulfilled if the activities of an agent shall constitute a permanent establishment of a foreign company: 1) The agent shall enter into contracts which bind the foreign company, and 2) the agent shall be a dependent, and not an independent, agent.

In relation to condition no. 1 the following is submitted:

- A permanent establishment only exists according to the tax treaty if the agent enters into agreements which are legally binding for the principal towards the Norwegian customer. In our case this means that a permanent establishment only exists if the appellant becomes legally bound *vis a vis* (and thus can be sued by) the Norwegian customers with which Dell AS enters into agreements. This follows from the wording of the tax treaty Article 5, para.. 5, OECD's comments to the Model Treaty, case law from other OECD countries and legal literature.
- The appellant will never have any legal obligations towards Dell AS' customers, cf. the commission agreement and Section 56 of the Commissionaire Act. The appellant will, on the other hand, have legal obligations towards Dell AS under the commission agreement, but this is not sufficient to create a permanent establishment in the meaning of the tax treaty.

In relation to condition no. 2 the following is submitted:

- In the assessment of whether Dell AS is dependent on the appellant, the State emphasised a number of circumstances that show that both parties are part of the same international group of companies. It follows clearly from the OECD Commentaries to the Model Tax Convention that such circumstances are irrelevant. Several of these circumstances do in

any case not indicate dependency on the appellant specifically, but on the Dell Group's parent company and all other companies within the group.

- The State has further emphasised that Dell AS makes use of standard contracts prepared by the appellant and that the appellant stipulates a price interval which Dell AS must adhere to. The State argues that this indicates that Dell AS is dependent on the appellant. The appellant submits that not even these factors are decisive and points out that Dell AS within the stipulated price interval is not subject to any control or instruction.

- In the opinion of the appellant it is true that Dell AS in its sales activities is dependent on the appellant in the sense that Dell AS, without the market research which the appellant does, the products which the appellant through its market research helps to develop, the strategic choices which the appellant makes, the training which the sales personnel receive from the appellant etc., would not have been able to sell PCs to any great extent to Norwegian customers. The sales work which Dell AS does, is thus to a large degree based on the functions which the appellant performs outside Norway. The appellant submits that Dell AS is thus independent within the meaning of the Tax Treaty, since the appellant does not have any control or instructional authority towards Dell AS within the powers of attorney which have been granted in the commission agreement.

Against this background it is submitted that the business that Dell AS carries on is carried on independently of the appellant's direct influence and Dell AS is therefore an independent agent within the meaning of the Tax Act.

Alternatively, it is claimed that there is no basis for allocating any profit to a permanent establishment of the appellant in Norway. In this connection the appellant refers to the following:

- It follows from Article 7 of the Tax Treaty that the purpose of the allocation is to allocate a profit to the permanent establishment which is equal to what it would have had if it had been an "independent company" that carried on business on commercial terms. It follows from the OECD Commentaries to the Model Tax Convention that the allocation should be based on an assessment of the functions, assets and the risks relevant to the "activities of the permanent establishment". The determination of a commercial profit shall be done in accordance with the arm's length principle, cf. the OECD Commentaries to the Model Tax Convention and OECD's guidelines for transfer pricing for multinational companies and tax authorities.

- The principles for allocation of profits to a permanent establishment have been discussed in a separate report from OECD regarding the allocation of profits to permanent establishments. The report contains specific guidelines for the allocation of profits to permanent establishments under Article 5 No 5 of the Tax Treaty. First it should be determined if the agent is receiving market compensation for his services (step 1). Then it should be assessed whether there is any basis for allocating profits to the permanent establishment in addition to this, on the basis of functions, assets and risks other than those that have already been compensated through the compensation to the agent (step 2). It is expressly stated in the report that it cannot be assumed that there is any profits which can be allocated to a permanent establishment under Article 5 no. 5.

- It is the "activities of the permanent establishment" which should be assessed in order to establish if there is reason to allocate any profit to the permanent establishment. The

parties agree which functions, risks and assets are performed/owned by Dell AS as a commissionaire. The Tax Appeal Board has further accepted that the appellant does not have functions in Norway beyond those that Dell AS performs in Norway. Thus, there is no basis for allocating any profit to Norway in addition to the profit which Dell AS generates.

- The Tax Appeal Board states in its decision that the existence of a permanent establishment means that Norway is entitled to tax "something more and different" in addition to Dell AS's commissionaire activities, without specifying what "something more and different" means. This means that the Board has assessed tax on something which has not been defined. In the opinion of the appellant it is arbitrary guesswork to determine a price for services/functions that are undefined.

- It also follows clearly from the OECD guidelines that functions etc. which should be priced must be identified and analysed. The Tax Appeal Board uses a so-called "force of attraction" principle, i.e. that a part of the appellant's profit is allocated to Norway without any foundation in the functions etc. which are performed by the permanent establishment in Norway. Such a "force of attraction" principle is clearly contrary to the OECD report regarding allocation of profits to a permanent establishment.

Moreover, the Tax Appeal Board has argued that the appellant appears to be a pure "flow through company" without any particular functions, assets or risk connected to its business. This appears to be a main argument for allocating profits to Norway, cf. page 59 of the Board's decision. The appellant in this connection would like to point out that the company is a key company in the Dell Group, which carries on extensive business with corresponding functions, assets and risks.

Dell Products has submitted the following claim:

1. The tax assessment for Dell Products for the tax years 2003-2006 is overturned.

2. Dell Products is awarded costs for the District Court and the Court of Appeal.

The respondent**, the State represented by Tax East,** has submitted:

Dell AS is to be considered a dependent agent under Article 5 No 5 of the tax treaty. The following in particular indicates this:

- The degree of instruction and control. Dell AS is instructed and controlled by the appellant in Ireland.

- The number of principals. Dell AS, as a commissionaire, only sells goods on behalf of one principal, the appellant.

- The same sphere. In Norway Dell AS acts externally under the same name and logo as the appellant.

In particular the following factors indicate that Dell AS in reality binds the appellant:

- The use of the trademark "Dell". The customers of Dell AS relate not only to Dell AS but to a large degree also to the trademark "Dell". Through the highlighting of the trademark

"Dell" on offers and order confirmations, the impression is given that the Dell Group as a whole is behind Dell AS.

- The customers are not made aware that Dell AS is a commissionaire. The customers of Dell AS are not informed about the commissionaire agreement and that a binding agreement is subject to a subsequent transaction/agreement between Dell AS and the appellant.

- The lack of active involvement by the appellant. The appellant has not submitted a single example of Dell Products refusing to fulfil an agreement with a customer which has been entered into by Dell AS.

- Agreements which deviate from standard terms. The appellant submits that a substantial number of concluded agreements deviate from standard terms. The appellant submits that in these cases the appellant will become involved before the agreement is entered into and that there is therefore little or no risk of the appellant intervening after the contract has been concluded. The State's s opinion is that the assessment of whether Dell AS in reality binds the appellant must be done at the time of the agreement.

- The consequence of Dell AS acting beyond its powers. It is clearly unlikely that any violations of the standard terms or other orders/instructions from the appellant would result in the appellant refusing to fulfil contracts with clients of Dell AS. Such a practice would substantially weaken the Dell Group's reputation and standing. It is indicative of this case that the appellant has not been able to show a single incident where the appellant has refused to fulfil agreements with a customer of Dell AS. In the opinion of the State it lies in the nature of the case that the appellant will go a very long way to fulfil the agreements with the customers of Dell AS.

It is agreed that the allocation of income between the appellant and the permanent establishment in Norway must be done on the basis of the methods which are described in Article 7 of the Tax Treaty. The parties also agree that the OECD's report on the allocation of profits to permanent establishments is normative for this issue. On the basis of the legal authority available, the allocation should, in the opinion of the State , be based on the following principles:

- Article 7 para.. 4 of the Tax Treaty allows that the indirect allocation method can be used. This method distributes the principal's net income between the principal (here Dell Products) and the permanent establishment (here Dell AS). The tax authorities have concluded that the direct method in practice cannot be used in the current case, but that the indirect method is applicable.

- When a permanent establishment has its origin in the activity of a dependent agent (here Dell AS), Norway is granted the taxation right to two legal entities, both the commission activities of Dell AS and the permanent establishment in this country, cf. paragraph 269 of OECD's report on the allocation of profits to permanent establishments. It is evident in paragraph 270 of OECD's report that profits which should be allocated to the permanent establishment shall be based on the risks, functions and assets used that are connected to the permanent establishment. In the view of the State this assessment must be based on the permanent establishment's risks, functions and assets seen in relation to the appellant's risks, functions and assets.

When it comes to the actual exercise of discretion, the State submits:

- The function and risk analysis which has been relied on for the tax assessment decisions, indicates that the most important function for the appellant seems to be the role as principal in a commission relationship. The role seems, however, not to result in any essential real functions beyond that this company acts as a "flow through company" for the goods and services that are produced by other companies in the Dell Group as well as any independent companies.

- In the opinion of the State it is the sales function which is the most essential value driver in connection with the activities which are necessary for the sale of Dell products in Norway, since this is where the revenue is created and this is where the major risk lies. This is what constitutes the value driving function. On the basis that most of the major functions and risks (as well as the accompanying resources) are located in Norway and not with the appellant, a corresponding major part of the appellant's net profit should be allocated to the permanent establishment in this country.

- The tax authorities in its decision therefore arrived at an allocation of the appellant's "Norwegian profits" with 60 percent to the permanent establishment in Norway and the remaining 40 percent to the head office in Ireland. The exercise of discretion itself cannot be reviewed by the courts and, as has been assumed by the District Court, no form for arbitrariness or great unreasonableness is connected to the assessment. On the contrary, the tax authorities have taken a cautious position.

The State represented by Tax East has submitted the following claim:

1. The appeal is dismissed.

2. The State represented by Tax East should be awarded costs for the Court of Appeal.

Assessment by the Court of Appeal

The Court of Appeal has arrived at the same conclusion as the District Court and can essentially endorse the District Court's judgment.

Tax liability to Norway for individuals and companies that are non-resident is regulated by Section 2-3 of the Tax Act. According to the first subsection, b) tax is due in relation to "assets in and revenues from activities which the taxpayer performs or participates in, and which are managed from Norway". Norwegian tax jurisdiction is, however, limited by tax treaties with other countries. Such a tax treaty for the "avoidance of double taxation and the prevention of tax evasion with regards to tax from income and wealth" was signed by Norway and Ireland on 22 November 2000. It follows from Article 7 No 1 of the Tax Treaty that a foreign company must have a "permanent establishment" in Norway in order to become liable for tax in Norway.

The parties disagree whether Dell Products through Dell AS can be held to have created a permanent establishment in Norway. This depends on an interpretation Article 5 No. 5 of the tax treaty which in the Norwegian version reads:

> "When a person, who is not an independent middleman such as Article 6 is applicable to, acts on behalf of a company and has, and habitually exercises, in a contracting State, an authority to conclude contracts on behalf of the company, the company shall

notwithstanding the provisions of Articles 1 and 2 be considered to have a permanent establishment in this State for any activity that this person undertakes for the company."

In order for Dell AS to be considered a permanent establishment for Dell Products, the following two conditions must thus be fulfilled: 1) Dell AS is dependent - not independent - of Dell Products, and 2) Dell AS can conclude contracts in the name of Dell Products.

The appellant has stressed that it concerns two separate conditions, while the Government maintains that the permanent establishment issue must be resolved based on a total overall assessment where the same factors are relevant for the assessment of both conditions. The Court of Appeal on the other hand cannot see that the choice of approach would be crucial to the result. The Court of Appeal agrees with the State that the same aspects can be relevant for the assessment of both conditions, but has nevertheless - like the District Court - dealt with them separately below.

If the conditions for the creation of a permanent establishment have been fulfilled, Dell Products' profits can be taxed in Norway according to specific provisions in Article 7 of the Tax Treaty, the so- called allocation provision. The main view is that the profits can be taxed as long as they can be attributed to the permanent establishment.

The issues relating to the permanent establishment and allocation will be discussed below. However, the Court of Appeal would first like to address the sources of law that are applicable to this case.

This case concerns the interpretation of a tax treaty. Tax treaties are part of Norwegian law on an equal level with other Norwegian law, cf. the Double Taxation Act of 28 July 1949 no.15.

According to Article 31 of the Vienna Convention of 23 May 1969 regarding the law of treaties, 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". This Convention has not been ratified by Norway, but Article 31 is an expression of customary international law. The wording is thus central,. The Norwegian and the English texts have equal validity, cf. Proposition to the Storting, No 33 (2000-2001) page 2, and Article 33 of the Vienna Convention..

The objective of the provision is also relevant. The objective of international tax treaties is i.a. to prevent double taxation. The objective of avoiding double taxation should nevertheless not be over-emphasised, if there is no support for this in the wording, cf. Frederik Zimmer, International Income Tax Law, 4th edition (2008) page 75. On page 76 he states:

> "*In Supreme Court Judgements 1994 page 752 Alphawell (on page 762) - which concerned the extent of the expression permanent establishment - it is said that the objective of the tax treaty "provides ... little assistance in this case. The objective of the tax treaty is.... to prevent double taxation ... Its delimitation criterion is a compromise between the home country's and the source country's interests". This is referred to in Supreme Court Judgements 1997 page 653 Siemens (on pages 661-662) and Supreme Court Judgements 2004 page 957 PGS (paragraph 42, which uses to-the-point wording a little too harshly: "The consideration of the objective and efficiency is thus of very limited importance to the interpretation of tax treaties." It is evident from the context that the remark refers to the fact that the general objective of tax treaties is to avoid double taxation, and the wording therefore does not distance itself from the objectives of tax treaties in general: the result of the judgment, incidentally, resulted in double taxation).*"

The tax treaty between Norway and Ireland has been constructed in accordance with the OECD model agreement. The commentaries to this agreement are therefore seen as an important source of law; cf. Supreme Court Judgements 2004 page 957 Chapter 46 and Supreme Court Judgements 2008 page 557, Chapter 49. See also Zimmer op. cit. page 78-80 which i.a. states that it is controversial to what degree more recent comments can be used for interpreting older treaty provisions.

Case law from third countries, mainly judgments from the highest authority, should also be considered relevant, cf. Zimmer op. cit. page 77.

Statements of interpretation from the administration in one country carry, according to Zimmer l.c., little or no weight. Nevertheless, he makes a reservation for the event that it can be relied on that the statement also reflects the other country's interpretation of the law.

Finally, legal literature can also be of significance.

As mentioned, in order for Dell Products to be considered to have a permanent establishment in Norway through Dell AS - so that Dell Products becomes liable to tax in Norway - it is a condition that Dell AS can enter into binding contracts on behalf of Dell Products. This condition follows from the wording of Article 5 no. 5 of the Tax Treaty. The Norwegian text talks about "authority to conclude contracts on behalf of the company" and the English text "authority to conclude contracts in the name of the enterprise".

The appellant thinks that this must be understood literally, particularly on the basis of the English text "in the name of", which is similar to the text in the OECD Model Convention. It must be assumed that the Norwegian text has the same meaning. Dell AS is a commissionaire for Dell Products and enters into agreements in its own name. Both the commission agreement and Section 56 of the Commission Act establish that Dell AS as a commissionaire can never bind its principal Dell Products.

The State on the other hand believes that a more functional approach should be applied, by questioning if Dell AS "in reality" binds Dell Products. Reference is also made to Section 32.1 of the commentaries to Article 5 no. 5 of the OECD model treaty, which corresponds to Article 5 No 5 of the Tax Treaty, and reads:

> “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 authority to an agent. For example, an agent may be considered to 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.”

In the view of the Court of Appeal, the approach taken by the State Government is justified.

True enough, the text in Section 32.1 was added in order to address specific problems which are raised based on the wording "in the name of". The first sentence, "Also ...", was included based on the situation in common law systems, where the principal is legally bound by the actions of the

agent independent of whether the agent acts on behalf of the principal or for himself. The rest of the Section, from "Lack of ...", was included to open up for taxation in the so called "rubber stamp" cases, i.e. where all the contract work in reality has been done by an agent in one country whilst only the formal signing takes place in the other.

Section 32.1 illustrates in itself that "in the name of" cannot be interpreted literally. A more functional approach such as this cannot in the view of the Court of Appeal be limited to the situations which the text in Section 32.1 were based on. The objective of Article 5 no. 5 is to protect the principle of source taxation, i.e. that the tax shall be due to the country where the revenue was created. It would be too easy to disregard this principle if just the establishment of a commission relationship would result in source taxation being avoided even if the financial and legal attachment between the agent and the principal is strong. To ask if Dell AS "in reality" binds Dell Products is therefore in accordance with a functional interpretation of the wording of Article 5 no. 5, cf. Article 31 of the Vienna Convention.

This functional approach to the question of whether an agent in reality binds the principal, can also be found in several other countries as described in the report from the IFA Congress in Vancouver in 2009. On page 51 of the report it is i.a. Stated:

> The guidance that is referred to in the branch reports supports the conclusion that an agency PE [Permanent Establishment, *comment by the Court of Appeal*] may be found even where the agent does not formally conclude the contract and that no formal granting of power of representation is required: see, for instance, the branch reports for Austria, Finland, Korea, Sweden, Belgium, the Netherlands, Denmark and Germany.
>
> An important issue that is discussed in many reports is the exact meaning of the phrase "in the name of". As explained … below, this issue is crucial in analysing commissionaire arrangements.

On page 54-55 of the report it appears that in Switzerland some commissionaires are regarded as permanent establishments according to the OECD Model Convention and Switzerland is proposing that it is included in a national directive that "the PE qualification does not require that the actions of the agent legally binds the foreign principal".

On page 126 of the report the following appears regarding the situation in Austria:

> Whether or not a person has the authority to conclude contracts in the name of the non-resident enterprise must be decided according to the actual behaviour of the contracting parties. … A commission agent can constitute the principal's PE in case of dependency.

In the so called Philip Morris case in 2002 the Italian Supreme Court established, according to the report on page 408, i.a. the following:

> [A]ssessment regarding the existence of the elements of a PE in Italy, including that of dependence and that of the authority to conclude contracts, should be made on the basis of the substance rather than exclusively on the basis of the mere legal form of the business transactions.

From a decision by the Court of Appeal in the Netherlands dated 1978, according to the report on page 477, it can be derived that

> … it is not the legal form that is decisive when determining whether there is an authority to conclude contracts. In this respect, the Amsterdam Court of Appeal considered the factual behaviour of the non-resident principal and the representative and construed an authority to conclude contracts on that basis.

According to page 628 of the report, a Swedish lower court judgment dated 2008 relied on the fact that the relevant representatives had,"...an informal power of attorney to bind the principal in the business and that it was used on a habitual basis." Consequently the principal had a permanent establishment in Sweden.

The French administrative Supreme Court (Conseil d'Etat) concluded in a decision of 29 January 2010, the so called Zimmer case, that a French commissionaire for the UK company Zimmer Ltd did not conclude contracts that were binding for Zimmer Ltd, "whatever may be the degree of its dependence on the company Zimmer Ltd, …". The commissionaire could then not constitute a permanent establishment for Zimmer Ltd according to the tax treaty between France and the UK. French law is also not based on a purely literal interpretation, which follows from the following statement earlier in the decision (in English translation):

> [C]ontracts 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, *unless* [*Court of Appeal's italics*] it appears either from the express terms of the contract of commission, or from other factual elements relating to its appointment, that despite the 'commission' title given by the parties to the contract between them, the principal is personally bound by the contracts concluded with third parties by his commissionaire who must, therefore, for this reason, be regarded as his representative and constitute a permanent establishment.

This case concerned a tax treaty from 1968, and under French law the court was unable to consider later statements on the interpretation of the OECD Model Convention, particularly the comments to Section 32.1.

It is possible that the reservation after "unless" is only aimed at pro forma commission relationships. In that case Brian J. Arnold considers that tax planners should welcome the Zimmer decision, cf. Bulletin for International Taxation 2010 page 354. The Court of Appeal thinks that less importance should be attached to the Zimmer decision.

The understanding of the condition in Article 5 no. 5, that the agent shall have authority to conclude contracts on behalf of the company, is dealt with in legal literature. The Court of Appeal would first like to point to a discussion by Arvid A. Skaar, Permanent Establishment (1991) page 487. Skaar stresses that according to the OECD comments paragraph 31 (which later became paragraph 32) it is sufficient for the creation of a permanent establishment that the agent,"...has sufficient authority to bind the enterprise's participation in the business activity...", and that the agent's,"...activity involve[s] the enterprise to a particular extent in business activities." He thinks these statements support a functional interpretation method and states:

> Contrary to the text of the model treaty, this statement seems to emphasize the material relationship between the agent and the principal, and not the parties in the formal conclusion of the contract.

Even though he thinks that a functional interpretation method is best, he still concludes that in accordance with the appellant's view which is that de lege lata, the Model Convention's text must be adhered to. This requires that the agent must enter into agreements "in the name of" the principal, for a permanent establishment to exist. According to the State's overnment's view, which is shared by the Court of Appeal, this conclusion is weakened by age and by being formulated before the text of paragraph 32.1 of the OECD commentaries was written. Skaar too has later taken the view that a more functional approach should be applied, cf. Arvid Aage Skaar et al., Norwegian Tax Treaty Law (2006) page 183.

The same point of view is taken by Klaus Vogel on Double Taxation Conventions (1997) page 331-332:

> The question whether such a person has an **authority to conclude contracts** within the meaning of treaty law must be decided not only with reference to private law but must also take into consideration the **actual behaviour** of the contracting parties. An approach relying solely on aspects of private law (the law of contracts) would make it easily possible to prevent an agent from being deemed a permanent establishment (and, therefore, to prevent the enterprise from being taxed by the Government in question) even where he is engaged most intensively in the enterprise's business: …

In addition several other authors deal with the understanding of permanent establishments in Article 5 no. 5 with regards to that the representative shall have the authority to conclude contracts on behalf of the company. Those who are open to putting "substance" over "form" seem first and foremost to be concerned with the particular cases which form the basis for the OECD comments paragraph 32.1. This is also relevant for Skaar (2006) and Vogel, who have been mentioned above. The Court of Appeal is not aware that any explicit support exists in legal literature for the State's view that an agency permanent establishment may be created by a commissionaire relationship, as in this case. (An exception is Arnold, who in Bulletin for International Taxation 2010 page 602 et seq., is positive to the District Court judgment in this case).

In the sources of law mentioned above, there is nevertheless a common feature in that a sensible and functional solution is sought for the application of Article 5 no. 5. As mentioned above, the Court of Appeal finds that making a real assessment as opposed to a purely literary interpretation, in establishing the understanding of the Article, is well-founded on the objective of the provision. The fact that a commissionaire under the Commissionaire Act and the commission agreement does not bind the principal through his sales is therefore in itself not enough to rule out that a permanent establishment exists. The question is whether Dell Products in reality is bound by the agreements which Dell AS enters into with customers.

Already in a statement from 2000 the Ministry of Finance was of the opinion that this was the correct angle for the understanding of the current interpretation of Article 5 no. 5, cf. Committee 2000, page 949. The same opinion has been followed up by a binding ruling from the Directorate of Taxes on 31 December 2003 (updated on 25 February 2004), cf. BFU 107/03.

In the view of the Court of Appeal, the following factors indicate that Dell Products in reality is bound by the contracts concluded by Dell AS:

- All sales are made under the trademark Dell without any appearance of the fact that the principal or the group is not behind the sale.

- The sales are made partly on standard conditions, which have been drawn up in detail by Dell Products. Sales on other conditions require advance approval by Dell Products.

- In practice, no subsequent review is made by Dell Products of the agreements Dell AS enters into. The agreements are honoured without anyone at Dell Products checking them.

- The appellant has not shown any case where Dell AS has made sales which have not been accepted by Dell Products.

- Even if Dell AS were to exceed its authority, it is unimaginable that Dell Products would refuse to deliver goods to Dell AS's customers.

In summary, the Court of Appeal believes that Dell AS in reality binds Dell Products through its agreements. The sales are final, also for Dell Products, when they are made in Norway.

There is also a condition according to Article 5 No. 5 in order for Dell Products to be considered to have a permanent establishment in Norway, that Dell AS must be considered dependent on Dell Products.

This condition has been dealt with in the following way in paragraph 38 of the commentaries to the OECD model treaty:

> "Whether a person is independent of the enterprise represented depends on the extent of the obligations which this person has vis-à-vis the enterprise. Where the person's commercial activities for the enterprise are subject to detailed instructions or to comprehensive control by it, such person cannot be regarded as independent of the enterprise. Another important criterion will be whether the entrepreneurial risk has to be borne by the person or by the enterprise the person represents."

The District Court was "in no doubt" that Dell AS is not an independent middleman in relation to Dell Products. The Court of Appeal agrees with this.

On the whole the parties agree on which factors are relevant for the assessment of dependency. One of them is the degree of instruction and control. The appellant argues that control as a consequence of the group attachment is irrelevant. In this connection reference is made to paragraph 38.1 of the OECD commentaries. The first paragraph reads:

> "In relation to the test of legal dependence, it should be noted that the control which a parent company exercises over its subsidiary in its capacity as shareholder is not relevant in a consideration of the dependence or otherwise of the subsidiary in its capacity as an agent for the parent."

The Court of Appeal finds it difficult to see that this point has much relevance for the question of dependency in our case. The regulation concerns control as a consequence of ownership in another company. But Dell AS is not a subsidiary of Dell Products. In addition it is evident from the last part of paragraph 38.1, which also refers to paragraph 41, that a subsidiary can be considered dependent on the parent company according to the same criteria as a company which is not part of the same group.

With regards to instruction and control the Court of Appeal would like to point to the following: Even though the commission agreement section 2.2 determines that the companies are independent of each other, it appears from section 4 that Dell AS is only allowed to sell permitted products on conditions – including prices and guarantees – which have been determined by Dell Products.

The circumstance that there is an overlap of board members in the two companies and that a board member of Dell Products was the general manager of Dell AS up to October 2005, is in the opinion of the Court of Appeal also factors which point in the direction of Dell Products exercising control over Dell AS.

Through the integrated accounting system of the Dell companies Dell Products has full insight to the finances of Dell AS. According to the commission agreement section 7.2 Dell Products has access to Dell AS' premises. These circumstances too indicate that Dell Products has control over Dell AS.

For the assessment of the question of dependency it is also relevant that Dell AS sells goods as a commissionaire only on behalf of one principal, which is the appellant. Indeed the commission agreement does not exclude acting for other principals, but this opportunity has not been used, and it is not very likely that it would be used. Dell AS is fully dependent on sales of Dell goods and their accessories. Without this commission assignment Dell AS may as well close down operations.

All business of Dell AS is done under the trademark Dell. The company acts externally with letterheads with the logo Dell. It advertises and enters into agreements under the logo Dell. The company is thus "branded" identically as the rest of the Dell Group, but without owning the brand. This makes Dell AS even more dependent on the principal.

In the opinion of the Court of Appeal the above mentioned factors indicate that Dell AS shall be considered dependent on Dell Products within the meaning of the Tax Treaty. That does not change the fact that Dell AS acts independently in some contexts, i.a. in connection with staff hire, purchase and lease of assets and premises, which LPP shall be offered and from which suppliers. The big picture still shows that Dell AS is dependent on Dell Products.

The conclusion reached so far is then that Dell Products has a permanent establishment in Norway according to the Tax Treaty Article 5 no. 5.

It then follows from the allocation regulation in the Tax Treaty Article 7 no. 1 that the profit of Dell Products can be taxed in Norway, "but only so much of it that is attributable to this permanent establishment". The provision rejects a so called "force of attraction" principle, which means taxation of all revenues which occur for the principal in a country where he has a permanent establishment, even if the revenues cannot be attributed to the permanent establishment.

The appellant argues that there is no profit which can be taxed in Norway, while the State argues that the Tax Appeal Board's allocation of the profits of the activity in Norway, with 60 per cent here and 40 percent to Ireland is correct.

The parties also disagree to what extent the courts can review the Tax Appeal Board's estimates. The appellant argues that the courts can fully review the Board's decision, both the assessment of evidence and the application of the law, even when the assessment of evidence and the

application of the law include discretionary items. The appellant has referred to Supreme Court Judgements 2009 page 105 paragraph 112. The State on the other hand argues that the right to review is limited to the misconduct doctrine and has referred to Supreme Court Judgements. 2000 page 772. With the result the Court of Appeal has arrived at below, it is not necessary to make a decision on this issue.

In the opinion of the Court of Appeal, the Tax Appeal Board is correct when it stresses (on page 38 of the decision)

> … that the revenues of the permanent establishment shall be determined to what it would have been if the establishment had been completely independent of the head office. The Board assumes that it should be pretended that the establishment is a separate taxpayer which does business with the head office on commercial terms. This means that the settlement between the head office and the establishment for the rendering of goods and services shall be done at market price.

With regards to further details about the method for arriving at the taxable profit, the tax treaty differentiates between the so called direct and indirect methods. The starting point is that the direct method should be used. This is dealt with in Article 7 No. 2 and means that in principle, each separate item in the accounts of the head office, both the revenue and the deductible items, should be separately assessed and allocated to either the head office or the permanent establishment. By using the indirect method, dealt with in Article 7 no. 4, the head office's total result is divided between the head office and the permanent establishment according to a certain key. According to Zimmer op. cit. page 194 the most relevant distribution keys are sales, revenues, expenses, number of employees, capital structure or a combination of these factors.

It follows from the wording of Article 7 no. 4 that it is a presumption for the use of the indirect method firstly that it has been common practice in Norway to use it and secondly that the method gives a result which in other respects is in accordance with the principles of Article 7, i.e. the arm's length principle. From Article 7 no. 6 it follows that the same method for allocating revenues shall be used each year, unless a satisfactory reason exists for using a different method.

The use of the indirect method is accepted in Norwegian practice, cf. Skaar et al. op. cit. page 204 with further references. It is the indirect method which has been used by the tax authorities in this case. This has been done for practical reasons, since the accounts of Dell Products have not been arranged in a way which allows for sufficient information on individual items of revenue and expense to be identified, in order to make a distribution according to the direct method. OECD no longer recommends that the indirect method should be used, cf. the OECD Report on the Attribution of Profits to Permanent Establishments (2008) para. 296 and Zimmer op. cit. page 194. However, it forms part of the tax treaty between Norway and Ireland and must therefore be usable in this case. In this connection the Court of Appeal finds – as did the District Court – reasons for pointing to the following statements from the Tax Appeal Board (on page 39 of the decision):

> In the view of the Tax Appeal Board the intention cannot be that Norwegian tax authorities shall be prevented from carrying out a correct tax treatment because the accounts of the company have been arranged in a way which means it is not possible to derive each separate revenue and expense item. Against this background the Board is of the opinion that the net method – i.e. that the net profit shall be distributed – is applicable.

In the view of the Court of Appeal the tax authorities have against this background used a correct method when, on the basis of numbers which Dell Products itself has provided as having earned from its activities in Norway, they have divided the revenues between Norway and Ireland according to a functional analysis.

The appellant has argued that Dell Products has no functions in Norway beyond the sales work which is remunerated through the commission revenues. These are taxed in the normal way in Norway and there is nothing further to be taxed here. In this connection it is pointed out that according to para. 264 of the previously mentioned OECD report dated 2008 there is no – even if a permanent establishment exists – presumption that any profits may be allocated to it. On the other hand in para. 272 exception is taken to the so called "single taxpayer approach", which means that the permanent establishment cannot be taxed for more than the commission revenue when this has been determined based on the arm's length principle.

The appellant has submitted that OECD States a two-step procedure: First a commercial remuneration must be determined for Dell AS and thereafter a commercial profit for any other functions which are performed by the permanent establishment must be determined.

However, as the State has correctly pointed out, the two-step procedure applies to Article 7 No. 2, and not to No. 4. With the use of the indirect method it is sufficient that the result to a reasonable degree corresponds to the arm's length principle, cf. paragraph 52 of the OECD Commentaries to the Model Tax Convention. The method involves that the permanent establishment shall be allocated revenues in accordance with its functions, risk and assets used.

The key question is really how large a part of the value creation occurs in each of the two companies. The value creation primarily occurs through sales and sales are primarily done by Dell AS. The Court of Appeal agrees with the Government that Dell AS is the major value driver of the two companies. Dell Products' functions and contribution to the value creation is limited compared to the activity of Dell AS. The Court of Appeal refers to and generally endorses the Tax Appeal Board's review of this issue.

With regards to 2003, sales of Dell products in Norway generated NOK 44 million in profits (NOK 10 million in commission income for Dell AS plus NOK 34 million in profits as stated by Dell Products). By 60 percent of Dell Products' profits from sales in Norway – NOK 21 million – being allocated to the permanent establishment in Norway, a total of NOK 31 million is taxed here. Of the total sales of Dell products in Norway during that year of NOK 1.4 billion the profit liable to tax amounts to approx. 2.5 percent. The Tax Appeal Board has relied on the same method for the subsequent years.

The view of the Court of Appeal is that the Tax Appeal Board's method is justifiable and the result is reasonable. The decisions by the Tax Appeal Board are therefore valid.

The State has been successful in the case and is entitled to compensation for its legal expenses; cf. Section 20-2, first and second subsections of the Civil Procedure Act. The exemption rules contained in the third subsection do not apply. The State has submitted a cost statement for a total of NOK 369 312 including VAT. The appellant has not had any comments to the statement.

The Court of Appeal finds the expenses necessary.

This judgment is unanimous.

D e c i s i o n:

1. The appeal is dismissed.

2. In case costs for the Court of Appeal Dell Products shall pay NOK 369 312 – three hundred and sixty nine thousand three hundred and twelve – to the State represented by Tax East within two weeks from the service of this judgment.

Wenche Skjæggestad Einar Høgetveit Jan Erik Aarsland Olsson

Confirmed for the
Senior Presiding Court of Appeal Judge:

Conseil d'État (Council of State)

No. 304715
Published in the Lebon
9th and 10th sub-sections together
M. Martin, President
Gilles Pellissier, rapporteur
Ms. Julie Burguburu, rapporteur public
SCP Boulle, lawyers

Reading Wednesday, March 31, 2010

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

Given 1), under number 304715, the appeal summary and additional memory, recorded on 12 April and 12 July 2007 the secretariat of the Conseil d'Etat, presented to ZIMMER COMPANY LIMITED, whose registered office is The Courtyard , Lancaster Place, South Marston Park, Wiltshire SN3 4UQ Swindon (Great Britain), the ZIMMER LIMITED COMPANY requests the Council of State:

1) set aside the decision of February 2, 2007 by which the Administrative Court of Appeal in Paris rejected his appeal aimed, firstly, the cancellation of the decision of 27 January 2005 the Administrative Court of Melun rejecting his request to discharge additional contributions from corporate tax and 10% contribution of the corporate tax, with penalties, which it was subject for the years 1995 and 1996, on the other in defense of these charges and penalties;

2) to be borne by the State the sum of 5000 euros under Article L. 761-1 of the Code of Administrative Justice;

Given 2), under number 308525, the appeal summary and additional memory, recorded on 13 August and 13 November 2007 the secretariat of the Conseil d'Etat, presented to ZIMMER COMPANY LIMITED, whose registered office is The Courtyard , Lancaster Place, South Marston Park, Wiltshire SN3 4UQ Swindon (Great Britain), the ZIMMER LIMITED COMPANY requests the Council of State:

1) set aside the decision of 25 May 2007 by which the Administrative Court of Appeal of Paris, after having dismissed the appeal of the Minister of Economy, Finance and Industry, has welcomed the part of the appeal ZIMMER COMPANY LIMITED, reducing the sum of 369 882.93 euros based business tax to which it was subject under the year 1996;

2) to be borne by the State the sum of 5000 euros under Article L. 761-1 of the Code of Administrative Justice;

....

Given the other parts of the records;

Given the agreement between France and the United Kingdom of Great Britain and Northern

Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed May 22, 1968;

Given the commercial code;

Given the tax code and the book of tax procedures;

Given the code of administrative justice;

After hearing in open session:

- The report of Mr. Gilles Pellissier, Master of Requests,
- Comments from the SCP Boulle, lawyer ZIMMER COMPANY LIMITED,
- The conclusions of Julie Burguburu, Rapporteur public;

The word was again given to the CPS Boulle, lawyer ZIMMER COMPANY LIMITED.

Considering that the applications referred above have to judge similar issues, it is necessary to attach them to rule by a single decision;

Whereas it appears from the documents of the dossiers submitted to the courts below that the British company ZIMMER LIMITED specializing in the commercialization of orthopedic products, concluded March 27, 1995 with the company that was previously a distributor on the French territory, the Zimmer SAS, a commission contract, under which the latter was responsible for selling its products in France, in his own name but on behalf and at the risk of his principal, that the two companies were audited accounting after which the tax authorities, believing that the British company in France had a permanent establishment through the Zimmer SAS, has the responsibility of the COMPANY LIMITED ZIMMER additional contributions to corporate tax and 10% contribution of the corporate tax, with penalties, for the years 1995 and 1996, on the one hand, business tax due to the activity of the company Zimmer SAS As of 1996, on the other hand, that, by two judgments of the October 7, 2004 and January 27, 2005, the Administrative Court of Melun was firstly recognized the soundness of the imposition of business tax but reduced amount, the other rejected his application to landfill additional contributions from corporate tax and contribution of 10% on corporate tax and that, by two judgments of 2 February and 25 May 2007 Administrative Court of Appeal of Paris upheld the decision dismissing the application for discharge of taxes on companies and further reduced the amount of tax to the tax professional that ZIMMER LIMITED COMPANY requests the annulment of the first stop and of Article 6 of the second decision rejecting the conclusions of its surplus in trade tax;

Regarding the corporate income tax:

Whereas under Article 209 of the General Tax Code: I. Subject to the provisions of this section, the profits liable to corporation tax are determined (...) considering only profits in businesses operating in France and those whose tax is attributed to France by an international convention on double taxation (...); that under Article 6 of the Franco-British Convention of 22 May 1968 with respect to taxes on income: 1. The business profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the business profits of the enterprise may be taxed in the other State but only to the extent they are attributable to that permanent establishment (...) and that, according Article 4 of the Convention: 1. For the purposes of this Convention, the term permanent establishment means

a fixed place of business in which the enterprise is wholly or partly carried on. / 2. The term permanent establishment includes especially: / a) a place of management; / b) a branch; / c) an office (...) / 4. A person acting in a Contracting State on behalf of an enterprise of the other Contracting State, other than an agent of an independent status to whom paragraph 5, is considered the first permanent establishment in the State if he has in that State and habitually exercises authority to conclude contracts on behalf of the company, unless the activities of such person are limited to the purchase of merchandise for the enterprise. / 5. Is not considered an enterprise of a Contracting State a permanent establishment in the other Contracting State merely because it carries on business through a broker, general commission agent or any other agent of independent status, provided that such persons are acting in the ordinary course of their business. (...) / 6. The 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 carries on business (whether through an establishment stable or not) is not sufficient in itself to make one either company a permanent establishment in the other (...) and that, for the purposes of these provisions, a company resident in France controlled by a company resident in the United Kingdom can not be a permanent establishment only if it can not be considered an independent officer of the company resident in the UK and usually if it has powers to France to engage the company in a commercial relationship relating to operations which constitute the specific activities of this company;

Whereas under Article 94 of the former Commercial Code, set out in Article L. 132-1 of the new code: The commission is acting in its own name or under a corporate name on behalf of a principal (...); is clear from these provisions that the contracts concluded by the agent, even when they are concluded on behalf of his principal, the latter do not engage directly vis-à-vis the contracting partners of commission and that, consequently, a commission can in principle be, simply because of what in execution of the contract of commission he sells, while signing the contracts in his own name, products or services on behalf of the principal of it, a permanent establishment of the customer, unless it appears to be the very terms the contract of commission, or any other element of training, in spite of the qualification commission given by the parties to the contract between them, the principal is personally involved in contracts with third parties by the commission which must, therefore, be regarded as his representative and constitute a permanent establishment;

Whereas in holding that the fact that Zimmer SAS because of its status as the commission ZIMMER COMPANY LIMITED, acting on its own behalf and as a result could actually conclude contracts on behalf of his principal did not affect the ability of the company to commit his principal in a business relationship and therefore, its characterization of the permanent establishment ZIMMER COMPANY LIMITED as defined in the aforementioned provisions of the Franco-British, not whether, despite the name of commission contract binding it to the latter, the contracts concluded by the personal commitment Zimmer SAS SOCIETE ZIMMER LIMITED vis-à-vis the contracting partners of the commission, the Administrative Court of Appeal of Paris made an error of law;

As for business tax:

Whereas the finding that ZIMMER COMPANY LIMITED owed in France of the business tax on the ground that Zimmer SAS was the quality of dependent agent, the Administrative Court of Appeal, for the reasons stated above, committed an error of law;

It follows from the foregoing that the COMPANY ZIMMER LIMITED is entitled to request cancellation of the Judgement of February 2, 2007 the Administrative Court of Appeal of Paris in

terms of corporate tax and the Article 6 of the Judgement of 25 May 2007 the same court in business tax;

Whereas, in the circumstances of the case, adjust to that extent, the merits cases under the provisions of Article L. 821-2 of the Code of Administrative Justice;

Regarding the corporate income tax:

Considering, first, that if the minister says, on the basis of the combined provisions of I of Article 209 of the General Tax Code in the wording taken from Article 3 of the Act of December 28, 1959, and provisions of Article 4 of the tax treaty between France and Britain, it appears from the terms of the contract between the company board to ZIMMER LIMITED Zimmer SAS that it's unique selling activity on behalf of and risk ZIMMER LIMITED COMPANY the products thereof, which supports the cost of such marketing and controls most of the general conditions of sale, it does not follow the stipulations of these contracts the company would hire Zimmer SAS SOCIETE ZIMMER LIMITED in respect of its contractors, thus, whatever the degree of dependence vis-à-vis the ZIMMER COMPANY LIMITED, which is not disputed, the Zimmer SAS can not be regarded as an agent of the COMPANY LIMITED ZIMMER be a permanent establishment of the latter as defined in paragraph 4 of Article 4 of the Franco-British;

Whereas, second, that, contrary to what the minister, the premises and staff Zimmer SAS, which are available to it for its own activity as a commission, do not characterize an office constituting a fixed place of business of the COMPANY LIMITED ZIMMER set forth in paragraphs 1 and 2 of Article 4 of the Franco-British;

It follows from the foregoing that the COMPANY LIMITED ZIMMER is justified in arguing that it is wrong that the decision under appeal, the Administrative Court of Melun ruled that the applicant company should be subject, on the basis of aforementioned provisions of the Franco-British, the corporate tax and rejected his claim for discharge additional contributions from corporate tax and 10% contribution of the tax imposed on him for the years 1995 and 1996, and the corresponding penalties;

As for business tax:

Whereas under Article 1447 of the General Tax Code in the version applicable to the tax year in dispute: The business tax is due each year by persons or entities engaged in the regular activity self-employment, that under section 1467 of the Code, in the version applicable to the tax year in dispute: The business tax is based: / 1 ° In the case of taxpayers other than holders for non-commercial profits, business brokers and intermediaries business employing fewer than five employees: / a) (...) the rental value of tangible assets which the debtor has arranged for the needs of his professional activity (.. .) that under section 1473 of the Code, in the version applicable to the tax year in dispute: The business tax is established in each municipality where the taxpayer has premises or land, because of the rental value assets that are located or attached and salaries for personnel (...) and that he is not the result of the instruction that ZIMMER LIMITED COMPANY would have had assets in France, at least of premises, other than those available to the Zimmer SAS for the needs of its own affairs as a commission, thus the ZIMMER COMPANY LIMITED is entitled to ask of Judgement attacked the Administrative Court of Melun and discharge additional contributions remaining in business tax proceedings for the year 1996;

The claims of ZIMMER COMPANY LIMITED aimed at implementing the provisions of Article L. 761-1 of the Code of Administrative Justice:

Whereas, in the circumstances of the case, to apply these provisions and to charge the state for the payment to ZIMMER LIMITED COMPANY the sum of 6,000 euros;

D E C I D E:

Article 1: The Judgement of February 2, 2007 the Administrative Court of Appeal of Paris, as well as Article 6 of the Judgement of 25 May 2007 the same court are canceled.

Article 2: ZIMMER COMPANY LIMITED is discharged additional contributions from corporate tax and 10% contribution to the corporate income tax imposed on him for the years 1995 and 1996, corresponding penalties and additional contributions business tax imposed on him under the year 1996.

Article 3: The judgments of the Administrative Court of Melun, 7 October 2004 and January 27, 2005 are reformed in that they have contrary to this Decision.

Article 4: The State will pay to ZIMMER LIMITED COMPANY the sum of 6000 euros under Article L. 761-1 of the Code of administrative justice.

Article 5: This decision shall be notified to ZIMMER COMPANY LIMITED and the Minister of Budget, Public Accounts and State Reform.