



# **The (in)dependent agent as a permanent establishment**

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# Topics

- Dependent versus independent agents
- Provisions on agents in
  - ◆ OECD Model DTC
  - ◆ UN Model DTC
  - ◆ DTC's concluded by India
- Case law

# Dependent agent

## ■ Art. 5, par. 5, OECD Model

- ◆ A person is acting on behalf of an enterprise and has, and habitually exercises ... an authority to conclude contracts in the name of the enterprise.

## ■ Art. 5, par. 5, subpar. b, UN Model

- ◆ Maintaining a stock of goods or merchandise for delivery on behalf of the enterprise.

# Independent agents

- Art. 5, par. 6, OECD Model
  - ◆ A broker, general commission agent or any other agent of an independent status
  - ◆ Acting in the ordinary course of his business
  - ◆ Legally and economically independent
- Art. 5, par. 7, UN Model
  - ◆ Activities devoted (almost) wholly on behalf of an enterprise: arm's length test applicable
- Art. 5 Indian DTC:
  - ◆ Activities (almost) wholly ...: not independent

# OECD versus UN Model

- 2 extra situations that lead to a permanent establishment:
- Dependent agent in UN Model includes a person who has no authority to conclude contracts in the name of the enterprise but who maintains a stock of goods and merchandise from which he regularly delivers on behalf of the enterprise.
- An independent agent is not independent in case his activities are devoted (almost) wholly on behalf of that enterprise and conditions are made or imposed in their commercial or financial relations that differ from those between independent enterprises.

# Case law the Netherlands

- Ship broker resident in the Netherlands
- Agent for 15 shipping enterprises
- Contract with enterprise from Singapore contained detailed instructions
- Contracts concluded in the name of the Singaporean enterprise
- Still an independent agent

# Case law Italy: Philip Morris

- German company sold cigarettes to Italian State monopoly
- Associated Italian company inspects warehouses of monopoly
- Associated Italian company also collected information for German company

## Case law Italy 2

- Italian group company can be p.e. for other group entities
- Monitoring a contract is not an auxiliary activity
- Participation to a phase of the conclusion of contracts falls with the scope “authority to conclude contracts ...”
- Entrusting of management functions leads to a p.e., even when it concerns a certain area of operations
- Substance over form.