Boston Scientific International BV v Italian Revenue Agency

Judgment No 3769

Reference 137

ITALIAN SUPREME COURT OF CASSATION
JUDGES CICADA MARIO, CARACCIOLO JOSEPH, BASILE THOMAS
JUDGMENT DATE: 9 MARCH 2012

REGIONAL TAX COURT OF LOMBARDIA
JUDGMENT DATE: 10 JUNE 2009

Permanent establishment – Italy – Commissionnaire – Subsidiary company selling in its own name on behalf of foreign parent – Orders fulfilled directly by parent – Subsidiary having some autonomy, but acting exclusively for parent – Whether parent has a permanent establishment in Italy – Netherlands-Italy double taxation convention.

The respondent Boston Scientific International BV (BSI BV), a company resident in the Netherlands, held 99% of the shares in an Italian company, Boston Scientific SpA (BS SpA) which acted as its distributor of medical equipment in Italy. BS SpA sold only products on behalf of BSI BV, and did so on a commissionnaire basis: it contracted with its Italian customers, but orders were sent to BSI BV and were fulfilled directly by BSI BV from its warehouse. BSI BV acquired the medical products from other companies in the Boston group. BS SpA was subject to certain restrictions applicable to members of the Boston group, for example with respect to sponsorship. It also entered into contracts itself in respect of factorship and insurance.

Following a tax audit, the Italian tax authorities alleged that BSI BV was operating in Italy through a permanent establishment arising from the activities of BS SpA in 2000. BSI BV appealed to the Provincial Tax Court and was successful in arguing that it had no permanent establishment. This decision was upheld by the Regional Tax Court of Milan (the translation of the decision of the Regional Tax Court is included as that decision sets out more of the facts than the Court of Cassation). The Italian tax authorities appealed by way of cassation to the Supreme Court of Cassation.

Held (dismissing the appeal):

The Regional Court was correct in holding that the Dutch company did not have a permanent establishment in Italy in terms of art 5 of the Netherlands-Italy double taxation convention. The Italian company entered into contracts in its own name and for its own benefit and not in the name of its Dutch parent.

EDITOR'S NOTE

This is a further decision on whether or not a commissionnaire arrangement with an associated company gives rise to a permanent establishment in the host state, and it follows the French *Zimmer* case (*Société Zimmer Ltd v Ministre de l'Économie, des Finances et de l'Industrie* (2010) 12 ITLR 739) and the Norwegian *Dell* case (*Dell Products* (*NUF*) *v Tax East* (2011) 14 ITLR 371) in holding that a commissionnaire is not a dependent agent for the purpose of provisions patterned on art 5 of the OECD Model. (The Spanish *DSM* case, reported at (2012) 14 ITLR 892 is not clear on its facts as a commissionnaire case.) This now gives a score of three superior courts holding that a commissionnaire does not give rise to a PE.

The decision of the Court of Cassation is quite difficult to follow, and further facts can be seen more clearly in the decision of the Regional Tax Court. The Italian company was a 99% subsidiary of the Dutch company for which it acted as commissionnaire, selling only products of the Dutch company which it had acquired from various companies in the Boston group. As is usual in such multinational groups, there was a degree of common direction to the group activities, but not going beyond the usual level of common policy direction. The Italian company appears to have acted as a true commissionnaire, concluding contracts in its own name with Italian customers, but sending orders to a warehouse outside Italy operated by its Dutch parent for fulfilment and dispatch to the customers. The customers had recourse only against the Italian company and not the Dutch parent. The Italian company operated for its own benefit, and with a degree of independence.

What is less clear is whether the decision is based on the absence of authority to conclude contracts binding on the Dutch parent, or on the degree of independence of the Italian company: ie was the Italian company an agent at all, or was it an agent of independent status. The two elements seem to have been woven together in the decisions.

Cases referred to in judgment

Supreme Court decision no 3368/01.
Supreme Court decision no 6799/2004.

9 March 2012. The following judgment was delivered. *a*

JUDGMENT

SENTENZA CASSAZIONE CIVILE, SEZ TRIBUTARIA, 09-03-2012, N 3769—PRES. CICALA MARIO—EST. CARACCIOLO GIUSEPPE—P.M. BASILE TOMMASO *b*

SVOLGIMENTO DEL PROCESSO

1. Gli atti del giudizio di legittimità

Il 29.3.2010 è stato notificato alla 'Boston Scientific International B.V.' un ricorso dell'Agenzia delle Entrate per la cassazione della sentenza descritta in epigrafe (depositata il 2.12.2009), che ha disatteso l'appello dalla stessa Agenzia proposto contro la sentenza n.450/35/2007 della CTP di Milano che aveva integralmente accolto il ricorso proposto dalla parte contribuente avverso avviso di accertamento per IRPEG-ILOR relative all'anno 1997. *c* *d*

La società intimata si è difesa con controricorso e ricorso incidentale condizionato.

La controversia è stata discussa alla pubblica udienza del 29.2.2012, in cui il PG ha concluso per il rigetto del ricorso. *e*

2. I fatti di causa

Con il menzionato avviso – adottato a seguito di PVC di data 6.12.2005 redatto dal Nucleo di PT della Liguria – sono stati ripresi a tassazione i redditi prodotti dalla società di diritto olandese BSI BV, redditi ritenuti imponibili in Italia sulla premessa che essi siano stati realizzati per il tramite di una stabile organizzazione italiana. Quest'ultima è stata identificata nella Boston Scientific spa che è società di diritto italiano ed ha sede in Milano, risultata controllata per il 99% dalla BSI BV e per il restante 1% dalla Boston Scientific Corporation, quest'ultima identificabile come capogruppo ed esercente un'attività finalizzata alla 'ideazione, produzione e commercializzazione di dispositivi medicali meno invasivi', la cui distribuzione in Europa è affidata a società che appartengono al gruppo ma che hanno sede nei vari paesi Europei. *f* *g* *h*

In questo organigramma la BSI BV svolge il ruolo di committente per la vendita dei prodotti del gruppo e stipula contratti di commissione con le controllate che hanno sede nei vari paesi Europei e che si occupano della commercializzazione e distribuzione dei prodotti (e perciò operando in nome proprio ma per conto della BSI BV), ricavandone poi una provvigione pattuita contrattualmente. *i*

Acclarato che la BS spa non risulta essere nè giuridicamente nè economicamente indipendente dalla sua controllante e che la società di diritto olandese risulta essere anche l'unico cliente della società italiana.,

a l'Agenzia ne ha tratto la conseguenza che la prima ha operato come stabile organizzazione in Italia della seconda, sicchè ha ritenuto che quest'ultima sia soggetto passivo d'imposta in Italia e che avrebbe dovuto contabilizzare distintamente i ricavi delle cessioni di prodotti effettuate in Italia, ai sensi del D.P.R. n. 600 del 1973, art. 14, comma 4, ed effettuarne dichiarazione
b fiscale nel nostro Paese.

Avverso l'avviso di accertamento la società olandese ha proposto ricorso alla CTP di Milano che ne ha fatto accoglimento integrale (ritenendo insussistente il carattere di stabile organizzazione in Italia attribuito alla BS
c spa), sicchè poi l'Agenzia ha interposto contro detta sentenza di primo grado un appello che è stato totalmente reietto.

3. La motivazione della sentenza impugnata

d La sentenza oggetto del ricorso per cassazione è motivata nel senso che ai fini di stabilire se sussista o meno stabile organizzazione è necessario prendere in considerazione tutti gli elementi di fatto valorizzati dalla parte pubblica, perchè solo il complesso di detti elementi consente (alla luce dell'art. 5 della Convenzione Italia/Paesi bassi contro le doppie imposizioni
e in materia di imposte sui redditi) di risolvere il nucleo della questione controversa, che consiste nello stabilire se la società Italiana 'aveva il potere di stipulare contratti a nome dell'impresa superiore', ai quali fini peraltro non è significativo nè l'esistenza di un rapporto di mediazione/agenzia; nè l'esistenza di un controllo azionario, per quanto
f stringente.

Ciò posto, e dopo avere esaminato nello specifico i rapporti societari; i rapporti negoziali; i rapporti aziendali; i rapporti commerciali esistiti tra BSI BV e BS spa, la Commissione Regionale è pervenuta alla conclusione
g che BS spa -avendo sopportato in via del tutto autonoma i rischi d'impresa della vendita di prodotti del genere di cui si è detto; avendo avuto una propria struttura commerciale ai cui costi ha fatto fronte con le commissioni che ha ricavato dalla sua attività- non può considerarsi una mera propaggine di BSI BV, ma una autonoma entità imprenditoriale A tali
h connotati deve essere poi aggiunto il fatto che il reddito prodotto da BSI BV in virtù dei rapporti commerciali con BS spa è stato comunque sottoposto a tassazione dal Fisco olandese, Paese appartenente all'Unione Europea e perciò provvisto di pressione fiscale non dissimile da quella esistente in Italia, sicchè non sarebbe infondato il rischio che tassare in
i Italia il reddito della BSI BV significhi tassarlo due volte, rischio a fronte del quale resta recessivo il pericolo che un'interpretazione letterale del sistema nei rapporti tra i due Paesi possa finire per agevolare pratiche di elusione fiscale realizzate avvalendosi di meri interposti travestiti da soggetti autonomi, appunto perchè – trattandosi di realtà imprenditoriali

collocate in paesi omologhi – detto pencolo è di genere meramente apparente. *a*

4. Il ricorso per cassazione

Il ricorso principale per cassazione è sostenuto con tre motivi d'impugnazione e si conclude – previa indicazione del valore della lite in Euro 50.000.000,00 circa- con la richiesta che sia cassata la sentenza impugnata, con ogni consequenziale pronuncia anche in ordine alle spese di lite. *b*

Il ricorso incidentale condizionato per cassazione è sostenuto con due motivi di ricorso e si conclude – previa dichiarazione che l'impugnativa incidentale non comporta modificazioni del valore della controversia – con la richiesta di rigetto del ricorso principale ovvero di accoglimento dei motivi di ricorso incidentale, con annullamento della sentenza impugnata e conseguente annullamento degli avvisi di accertamento. *c* *d*

MOTIVI DELLA DECISIONE

5. Il primo motivo di impugnazione principale

Con il primo motivo di ricorso principale (rubricato come: 'In relazione all'art. 360 c.p.c., comma, n. 5: motivazione insufficiente su fatto decisivo e controverso') la parte ricorrente si duole che il giudice di appello abbia ritenuto che la BS spa debba considerarsi agente 'indipendente', nonostante dalla verifica della GdF fossero emersi chiari elementi comprovanti la dipendenza giuridica di detta BS spa nei confronti della BSI BV o, più in generale, del 'Gruppo Boston'. *e* *f*

Tali elementi sono costituiti dalla posizione di controllo azionario che l'impresa olandese aveva nei confronti della commissionaria italiana; dalle dichiarazioni rilasciate ai verbalizzanti dal Dott. V.U., direttore vendite delle divisioni endoscopia ed urologia della BS spa, da cui emergeva la 'diretta ingerenza del gruppo Boston sulle modalità di svolgimento dell'attività di BS spa'; dalle dichiarazioni rilasciate ai verbalizzanti da T. M., direttore generale di BS spa, da cui emergeva che 'BS spa era tenuta ad osservare le precise direttive del gruppo Boston indicate nelle linee guida', ciò che non si poteva conciliare con l'autonomia operativa di un soggetto indipendente; dalle dichiarazioni rese dal gruppo BSI nella lettera di patronage inviata a Mediafactoring spa secondo cui BS spa è 'una società il cui management cade sotto il nostro diretto controllo e responsabilità'; dalla pacifica circostanza che BSI BV fosse l'unica committente della società italiana, ciò che (a mente del paragrafo 38.6 del Commentario OCSE) costituisce ragione di minore probabilità dello status indipendente dell'agente/commissionario. *g* *h* *i*

Di fronte a tale complessivo quadro probatorio, la CTR Lombardia aveva omesso di considerare alcune fonti di prova ed aveva fatto

immotivata sottovalutazione di altre, sicchè il giudizio circa l'indipendenza della BS spa espresso dal giudicante del merito non poteva che apparire frutto di una disamina del tutto parziale e carente degli elementi di prova acquisiti al processo.

Il motivo di impugnazione, così sintetizzato, è inammissibile.

Benvero, occorre anzitutto evidenziare che nessuno degli elementi di fatto che la parte ricorrente ha enumerato e che sono stati trascritti dianzi appare essere stato 'omesso' nella considerazione del giudice dell'appello, così come la ricorrente assume nella prima parte del proprio motivo di impugnazione.

Non quello relativo alla posizione di controllo azionario, diffusamente trattato nel paragrafo relativo ai 'rapporti societari'; non quello relativo alle dichiarazioni di V.U. e T. M., che sono state analizzate dal giudicante nel capitolo relativo ai 'rapporti aziendali'; non quello relativo alla lettera di 'patronage', che è stata esaminata dal giudicante nel capitolo relativo ai rapporti aziendali; non quello relativo alla circostanza che BSI BV sia stata nel tempo l'unico cliente (committente) della società italiana, circostanza esaminata ed approfondita nella sua valenza dal giudice del merito nel capitolo relativo ai rapporti negoziali, oltre che condita da un pizzico di ironia.

Di fronte a queste obiettive circostanze, altro non resta che considerare se sia astrattamente congruente con l'archetipo del vizio valorizzato dalla parte ricorrente il solo residuo assunto secondo cui il giudice del merito ha fatto 'immotivata sottovalutazione' di alcune tra le circostanze che sono state dianzi enumerate, ai fini del raggiungimento del proprio convincimento.

Nei termini in cui detto assunto è stato articolato nel motivo di impugnazione, quest'ultimo ne risulta senz'altro viziato da inammissibilità.

Quali siano le specifiche circostanze di cui il giudicante avrebbe fatto immotivata sottovalutazione, tra quelle enumerate ai fini di dare sostegno al motivo di impugnazione, la parte ricorrente non lo precisa in alcun modo, e così contravviene al principio di necessaria specificità del motivo di impugnazione.

Ed inoltre la parte ricorrente neppure chiarisce in quali passi della motivazione il giudice del merito avrebbe attribuito insufficiente rilievo alle circostanze qui in argomento e quindi perchè possa eventualmente ritenersi fondata la taccia di 'insufficiente motivazione' che la medesima parte ricorrente gli rivolge.

In tal modo la parte ricorrente si limita – di fatto – a genericamente censurare di insufficiente esame l'intera disamina compiuta dal giudicante, coinvolgendo in detta censura fonti di prova non specificamente e dettagliatamente indicate ma genericamente richiamate e coinvolgendo in essa valutazioni non specificamente identificate e dettagliatamente

enucleate ma sommariamente individuate nel complessivo rimando al 'giudizio' espresso dall'organo giudiziario.

Così articolando le proprie doglianze, la parte ricorrente concretamente rinnega la tipologia del vizio valorizzato in epigrafe il quale (secondo l'insegnamento di questa Corte) 'sussiste solo se nel ragionamento del giudice del merito, quale risulta dalla sentenza, sia riscontrabile il mancato o deficiente esame di punti decisivi e non può invece consistere in un apprezzamento dei fatti e delle prove in senso difforme da quello preteso dalla parte, avendo la Corte di Cassazione non il potere di riesaminare e valutare il merito della causa, ma solo quello di controllare, sotto il profilo logico-formale e della correttezza giuridica, l'esame e la valutazione del giudice del merito, al quale soltanto spetta individuare le fonti del proprio convincimento e, all'uopo, valutare le prove, controllarne l'attendibilità e la concludenza e scegliere tra le risultanze probatorie quelle ritenute idonee a dimostrare i fatti in discussione' (Errore. Riferimento a collegamento ipertestuale non valido; Cass. Sez. 3, Sentenza n. 828 del 16/01/2007).

Con la deduzione di un siffatto vizio, la parte conferisce infatti al giudice di legittimità non già il potere di riesaminare il merito dell'intera vicenda processuale bensì la pura e semplice facoltà di controllo, sotto il profilo della correttezza giuridica e della coerenza logico – formale, delle specifiche argomentazioni svolte dal giudice del merito.

L'omessa specificazione analitica dei difetti di concludenza logica e di approfondito esame che il giudicante avrebbe commesso finisce, in sostanza, per alterare la caratteristica del vizio denunciato e lo apparenta ad un mero 'difforme apprezzamento' (in ordine ai fatti ed alle prove) rispetto a quello operato dal giudice di merito.

Ed è perciò che la violazione di un siffatto modus di articolazione del mezzo di impugnazione implica di necessità che il motivo qui in esame sia dichiarato inammissibile.

6. Il secondo motivo d'impugnazione principale

Con il secondo mezzo (intestato come:'Violazione dell'art.5 della Convenzione tra Italia e Paesi Bassi contro le doppie imposizioni sui redditi e sul patrimonio, ratificata con L. 26 luglio 1993, n. 305') la parte ricorrente premesso che la BS spa doveva essere considerata stabile organizzazione della società olandese ove fosse risultato provato che la stessa esercitava abitualmente poteri che le consentivano di concludere contratti 'a nome' della medesima società olandese- si duole del fatto che il giudicante abbia negato l'esistenza di tale requisito, a causa di una 'scorretta lettura della relativa nozione normativa', e cioè per avere supposto che ciò implicasse la disponibilità di poteri di rappresentanza, mentre il requisito in parola non avrebbe dovuto essere valutato secondo un rigoroso criterio civilistico, bensì secondo un 'criterio sostanziale'.

a Si tratta infatti di acclarare se l'agente operante in Italia abbia concluso contratti che vincolano l'impresa estera, indipendentemente dal fatto che quei contratti siano stati effettivamente conclusi 'a nome dell'impresa'. Ed infatti nella specie di causa è risultato che l'agente promuoveva e riceveva ordini che sono stati inviati direttamente ad un deposito dal quale i beni
b sono stati consegnati e dove la società estera regolarmente approvava le operazioni (se ne traggono gli elementi da quanto si dice a pag. 10 del PVC), sicchè poteva concludersi che non vi era alcun 'attivo coinvolgimento' della società committente nella conclusione dei contratti proposti dalla commissionaria.

c La sentenza impugnata ne aveva dato atto ma aveva poi evidenziato che – atteso che il cliente in caso di difformità della mercè non avrebbe dovuto rivolgersi a BSI BV bensì invece a BS spa – quest'ultima nei rapporti con i clienti appariva non come mera commissionaria ma come effettiva
d controparte. La Commissione era rimasta ancorata al dato giuridico formale, ma aveva trascurato la corretta esegesi della norma convenzionale, che avrebbe implicato la valorizzazione del dato 'sostanziale'.

Il motivo di impugnazione è inammissibilmente formulato.

e L'assunto di parte ricorrente secondo cui il giudicante avrebbe supposto necessaria la dimostrazione dell'esercizio di poteri di rappresentanza (ai fini di acclarare il presupposto della 'stabile organizzazione') non è stato dettagliatamente declinato, con riferimento agli specifici argomenti della sentenza di secondo grado da cui emergerebbe siffatta determinante
f affermazione.

Anzi, per quanto non competa a questa Corte sopperire alle manchevolezze della parte ricorrente, giova evidenziare che non risulta affatto dalla decisione qui impugnata che il giudicante abbia ritenuto che
g 'stipulare contratti a nome della casa madre' implicasse di necessità 'la disponibilità di poteri di rappresentanza'. Al contrario, nel capitolo relativo ai 'rapporti negoziali' il giudice dell'appello si è soffermato ad espressamente considerare che la BS spa risulta avere agito nei confronti del pubblico 'spendendo il proprio nome e non quello della casa madre', e
h da qui ha ricavato che essa agiva 'in proprio', oltre che 'nel proprio interesse'.

Nessuna induzione dunque a proposito del difetto di poteri di rappresentanza e della valenza di un siffatto accertato difetto rispetto alla soluzione della questione di causa.

i Ma – soprattutto – nessun collegamento è operato nel motivo di impugnazione tra tale asserita induzione e la (erronea) soluzione della questione di causa, con riguardo alla violazione e falsa applicazione dell'art.5 della richiamata Convenzione. Per quale mai ragione la supposizione in ordine alla necessità della sussistenza dei poteri di

rappresentanza contrasti con la interpretazione di genere sostanziale della anzidetta norma la parte ricorrente non lo declina in alcun modo, lasciando sospesa l'affermazione alla stregua della pura e semplice affermazione apodittica ed indimostrata e limitandosi alla pura e semplice riscrittura degli argomenti contenuti nella decisione qui impugnata, quasi che essi stessi siano obiettivamente significativi della propria stessa erroneità.

Ma siffatto modo di proporre la censura non corrisponde alle ripetute indicazioni fornite da questa Corte in ordine al fisiologico contenuto della tipologia di vizio qui in considerazione, il quale 'deve essere dedotto, a pena di inammissibilità, non solo mediante la puntuale indicazione delle norme asseritamente violate, ma anche mediante specifiche e intelligibili argomentazioni intese a motivatamente dimostrare in qual modo determinate affermazioni in diritto contenute nella sentenza gravata debbano ritenersi in contrasto con le indicate norme regolatrici della fattispecie' (in termini, per tutte Cass. n. 11501 del 2006).

Ritiene insomma la Corte che nel motivo di impugnazione ora in esame non sia stata debitamente precisata, nei suoi contenuti, la violazione di legge nella quale sarebbe incorsa la pronuncia di merito, non essendo al riguardo sufficiente la sola indicazione delle singole norme che si assumono violate, non seguita da alcuna dimostrazione per mezzo di una circostanziata critica delle soluzioni adottate dal giudice del merito, operata nell'ambito di una valutazione comparativa con le diverse soluzioni prospettate nel motivo e non attraverso la mera contrapposizione di queste ultime a quelle desumibili dalla motivazione della sentenza impugnata.

Non assolvendo la formulazione del motivo di ricorso al suo precipuo scopo, e cioè quello di porre la Corte di legittimità in condizioni di adempiere al suo istituzionale compito (di verificare il fondamento della lamentata violazione), non resta che concludere che anche il secondo motivo è inammissibile.

7. Il terzo motivo d'impugnazione principale

Con il terzo mezzo (intestato come: 'Motivazione insufficiente su fatto decisivo e controverso – in relazione all'art. 360 c.p.c., comma 1, n. 5') la parte ricorrente si duole del fatto che il giudicante abbia omesso di riconoscere la sussistenza dei caratteri della stabile organizzazione in ragione degli acclarati 'atti eccedenti la ordinaria attività di commissionaria alla vendita' effettuati da parte di BS spa.

Ed invero, la BS spa avrebbe dovuto limitarsi alla conclusione di contratti di vendita per conto della committente BSI BV, ma contrariamente a ciò erano stati rinvenuti dei 'contratti di deposito e dei contratti di comodato stipulati dalla BS spa con delle strutture ospedaliere'

a a mezzo dei quali la BS spa aveva disposto dei prodotti della BSI BV senza specifico mandato in proposito.

D'altronde, anche il Dott. T. aveva dichiarato che in alcuni casi i macchinari non erano concessi in comodato ma bensì 'affittati ai clienti', e ciò senza che fosse chiaro in virtù di quali poteri il commissionario alla
b vendita potesse disporre anche la locazione di beni altrui.

Lo stesso T. aveva dichiarato che -per ciò che concerne la firma dei contratti di deposito e di comodato- si era nel tempo stabilizzata la prassi che egli firmasse per conto di BSI BV 'per ottenere uno snellimento della definizione dei contratti'.

c Ed ancora, dalle dichiarazioni rilasciate dal Dott. S. (all. n.l3 al PVC) risultava che la BS spa aveva compiuto operazioni di factoring aventi ad oggetto la cessione di crediti della BSI BV, sostenendone per intero gli oneri e senza successivamente ribaltarli in capo alla committente; ed ancora
d (come risultava a pag. 19 del PVC) la BS spa aveva partecipato alle spese del Gruppo Boston in materia di marketing strategico ovvero di assicurazioni per contratti di responsabilità civile per promotori nei vari paesi Europei, senza ricevere in cambio alcun corrispettivo.

Tutti questi elementi (ed in particolare la sopportazione di costi per
e contratti stipulati dalla controllante a suo esclusivo beneficio) costituivano sintomo di una partecipazione della commissionaria di vendita ad attività estranee al proprio ruolo, circostanze che invece -paradossalmente- la Commissione di appello aveva ritenuto sintomatiche dell'autonomia della società italiana.

f Anche questo ulteriore mezzo di censura è inammissibile.

La parte ricorrente infatti assembla una serie di elementi di fatto (dedotti peraltro in maniera difforme dal canone dell'autosufficienza, che ne imporrebbe la specifica declinazione sia con riferimento ai luoghi della
g loro produzione documentale che con riferimento alla specifico contenuto del documento stesso) per assumere che essi – siccome sintomo della effettuazione da parte di BS spa di atti eccedenti la ordinaria attività di commissionaria alla vendita – sarebbero stati trascurati nella loro decisiva rilevanza dal giudice del merito.

h Senonchè, la parte ricorrente non spiega e chiarisce in alcun modo la ragione per la quale atti denominati come: contratto di deposito; contratto di comodato; contratto di locazione; contratto di factoring, sarebbero estranei ed ultronei ed addirittura in contraddizione con i compiti tipici del commissionario alla vendita, tanto che detti atti finiscono per rientrare
i nell'ambito di ciò che il Commentario OCSE (al par.38.7) definisce come 'attività che economicamente attengono alla sfera della suddetta impresa piuttosto che a quella delle proprie operazioni commerciali'.

Non è quindi chi non veda che tali modalità apodittiche di prospettazione della censura realizzano una mera contrapposizione con le

argomentate considerazioni con le quali la Commissione di appello ha esaminato gli elementi indiziari qui riproposti dalla parte ricorrente e ne ha disatteso la rilevanza, valorizzandoli al contrario come sintomi della indipendenza della posizione della società italiana rispetto al quella di diritto olandese (nel capitolo riservato ai 'rapporti commerciali'), sicchè dette modalità non possono che dare luogo ad un giudizio di inammissibilità.

Il difetto di una chiara illustrazione delle ragioni per le quali la ridotta rilevanza attribuita dal giudice del merito ad una o all'altra delle circostanze di fatto acquisite alla causa come materiale istnittorio dovrebbe acquisire carattere decisivo ai fini della diversa soluzione della questione controversa costituisce senz'altro motivo di inammissibilità della censura, atteso il ripetuto insegnamento di questa Corte: 'Il controllo di logicità del giudizio di fatto, consentito dall'art. 360 c.p.c., n. 5, non equivale alla revisione del 'ragionamento decisorio', ossia dell'opzione che ha condotto il giudice del merito ad una determinata soluzione della questione esaminata, posto che una simile revisione, in realtà, non sarebbe altro che un giudizio di fatto e si risolverebbe sostanzialmente in una sua nuova formulazione, contrariamente alla funzione assegnata dall'ordinamento al giudice di legittimità; ne consegue che risulta del tutto estranea all'ambito del vizio di motivazione ogni possibilità per la Corte di Cassazione di procedere ad un nuovo giudizio di merito attraverso l'autonoma, propria valutazione delle risultanze degli atti di causa. Nè, ugualmente, la stessa Corte realizzerebbe il controllo sulla motivazione che le è demandato, ma inevitabilmente compirebbe un (non consentito) giudizio di merito, se – confrontando la sentenza con le risultanze istruttorie – prendesse di ufficio in considerazione un fatto probatorio diverso o ulteriore rispetto a quelli assunti dal giudice del merito a fondamento della sua decisione, accogliendo il ricorso 'sub specie' di omesso esame di un punto decisivo' (Cass. Sez. L, Sentenza n. 3161 del 05/03/2002).

In conclusione, nessuno dei motivi di impugnazione formulati dalla parte ricorrente appare ammissibilmente formulato. Il rigetto dei motivi di impugnazione principale preclude l'esame di quelli del ricorso incidentale, che sono stati espressamente condizionati all'eventuale accoglimento dei primi.

La regolazione delle spese di lite è informata al principio della soccombenza, per ciò che attiene a questo grado di giudizio.

P.Q.M.

la Corte rigetta il ricorso. Condanna la parte ricorrente a rifondere le spese di lite, liquidate in Euro 50.000,00 oltre accessori di legge ed oltre Euro 100,00 per esborsi.

ITALIAN SUPREME COURT OF CASSATION
UNOFFICIAL TRANSLATION

THE TRIAL

1. The Pleadings of the Judgment of Legitimacy

On March 29, 2010, Boston Scientific International BV (BSI BV) was notified the appeal by the Italian Revenue Agency for the cassation of the judgment described below (filed on December 2, 2009), which had rejected an appeal by the Revenue Agency against the judgment of the Milan Provincial Tax Court No 450/35/2007 through which the taxpayer's appeal against the notice of assessment for corporate income tax (the 'old' IRPEG) and ILOR for year 1997 had fully been upheld.

The company defended itself with a counter-appeal and a conditional cross-appeal.

The controversy was discussed at the public hearing dated February 29, 2012 in which the state attorney proposed for the dismissal of the appeal.

2. The Facts of the Case

Through the above-mentioned notice of assessment—adopted after the issuance of an audit report (PVC) by the Italian Tax Police of Liguria on December 6, 2005—the Revenue Agency assessed profits produced by the Dutch company BSI BV attributed to an Italian permanent establishment and thus considered as taxable income. The latter was identified in Boston Scientific Spa (BS SpA), an Italian company with headquarters in Milan, owned 99% by BSI BV and the remaining 1% by Boston Scientific Corporation. The latter is identifiable as the parent company that carries out an activity aimed at 'designing, manufacturing and marketing of minimally invasive medical devices', whose distribution in Europe is provided by Group companies based in various European countries.

Within such a framework BSI BV acts as the buyer for the sale of group products and enters into commissionaire agreements with various European subsidiaries in charge of marketing and distributing products (therefore acting in their own names but on behalf of BSI BV), thus earning commissions contractually agreed upon.

By arguing that BS SpA was neither legally nor economically independent from its parent company and that the Dutch company also appeared to be the only customer of the Italian company, the Revenue Agency concluded that the former carried on its business as a permanent establishment of the latter. Thus, the Dutch company was deemed liable to taxation in Italy and, as such, should have had to book separately the revenues from sale of products in Italy, as per art 14(4) Presidential Decree No 600 of 1973, by filing income tax returns in our country.

The Dutch company had appealed to the Provincial Tax Court of Milan

against the tax assessment notice. The latter fully accepted the taxpayer's reasons (by dismissing the claim that BS SpA was a permanent establishment in Italy). Next, the Revenue Agency appealed against this first judgment but the Regional Tax Court totally rejected it.

3. The Grounds of the Appeal

The judgment under appeal is justified meaning that for the purposes of determining whether or not there is a permanent establishment all of the facts valued by the public party must be taken into consideration, for only the combination of these elements allows (under art 5 of the Italy/Netherlands Treaty against double taxation with respect to income taxes) to find a solution to the core issue, which is whether the Italian company 'had the power to execute agreements on behalf of the foreign company'. For the above, indeed, the existence of a brokerage/agency agreement or the existence of shareholding control, whatever stringent, is not determinative.

That said, and after examining the specific company relationships; the agreements; the business relationships; and the trade relationships between BSI BV and BS SpA, the Regional Tax Court decided that BS SpA—having endured the sale of products in a totally autonomous manner by bearing the business risk pertaining to; having supported its own sales organization with the proceeds earned from the carrying out of its business—could not be considered a mere permanent establishment of BSI BV, but rather an independent business entity. It must be added that the income produced by BSI BV under the relationship with BS SpA was still subject to taxation in The Netherlands, country of the European Union characterized by similar tax burden to the one existing in Italy. Therefore, the risk of taxing BSI BV Italian profits twice is not at all unsubstantiated. Compared to this risk, the danger that the implementation of a textual interpretation of the provisions regulating transactions between the two countries may end up facilitating tax avoidance becomes merely apparent, provided that the entrepreneurial activities involve homologous countries.

4. The Appeal to the Supreme Court

The appeal to the Supreme Court by the Revenue Agency has been argued on the basis of three different grounds and ends—after the indication of the value of the lawsuit in the range of €50m—with the request of quashing the judgment under appeal, with the consequential decision even with reference to litigation expenses.

The conditional counter-appeal to the Supreme Court by BSI BV is supported with two grounds of appeal and ends—after the statement the conditional appeal does not involve changes in the value of the dispute—with the request for dismissal of the main appeal or of

acceptance of the reasons of counter-appeal, with aside the nullification of judgment under appeal and consequent nullification of the notices of assessment.

GROUNDS OF THE DECISION

5. The First Ground of the Principal Appeal

With the first reason of the main appeal (categorized as: 'with reference to art 360(5) of the Italian Code of Civil Procedure: insufficient statement on a decisive and controversial fact'), the Revenue Agency complains that the Court of Appeals has held that the BS SpA should be considered as an 'independent' agent, although the Tax Police had collected clear evidence about BS SpA's legal dependence upon BSI BV or, more generally, the Boston Group through its audit.

Those elements can be found in the Dutch company's shareholding control position on the Italian company; in the statements issued to the tax inspectors by Dr VU, sales director of the endoscopy and urology divisions of BS SpA, which showed the 'direct interference of the Boston Group on the performance of BS SpA's activity'; in the statements issued to the inspectors by TM, general director of BS SpA, which revealed that 'BS SpA was required to comply to the Boston Group's strict rules as prescribed in the guidelines', circumstances that cannot be considered as the ordinary way of doing business by independent persons; in the statements made by the Boston Scientific Group in the patronage letter sent to Mediafactoring SpA according to which BS SpA was stated as being 'a company whose management falls under our direct control and responsibility'; in the uncontroversial fact that BSI BV was the only seller of products to the Italian company, which means that, pursuant to para 38(6) of the OECD Commentary to art 5, the agent/commissionaire is less likely to present an independent status.

In facing this overall evidentiary framework, the Regional Tax Court of Lombardy had failed to consider some sources of evidence and had made unfounded underestimation of others, so that the expressed judgment on BS SpA's independence could only appear as the result of a partial and inadequate examination of the evidence obtained during the trial.

The ground of appeal as summarized above is unsubstantiated.

Indeed, it should first be noted that none of the evidence listed by the Revenue Agency appears to have been omitted by the Court of Appeals, as the applicant infers in the first part of his plea.

Not the ground related to the shareholding control relationship, widely covered in the section on 'Company Reports'; not the statements relating to VU and TM, which were analyzed by the judges in the section on 'business relationships'; not the ground concerning the letter of 'patronage', which was examined by the judges in the section on business

relationships; not one related to the fact that BSI BV over time was the only customer (buyer) of Italian society, a fact considered thoroughly by the judge in the chapter on contractual relationships, even seasoned with a pinch of irony.

In the light of these objective circumstances, nothing else remains to be considered other than the fact argued by the applicant concerning the judges' alleged 'unjustified underestimation' of some of the circumstances that have been enumerated, for the attainment of their decision.

Provided that this assumption has been articulated in the grounds of appeal, the latter results to be undoubtedly tainted by inadmissibility.

The plaintiff does not specify in any way which among those listed for the purpose of giving support to the plea would be the specific circumstances underestimated by the judges, undermining in this way the compulsory specificity principle required in order to support an appeal.

Furthermore, the claimant does not clarify the point in the reasoning where the judges would have overlooked the circumstances here at end. Therefore, the thesis on the insufficient motivations cannot be backed up.

Thus, the plaintiff's complaint is in fact restricted to the censorship of the insufficient evaluation of the overall examination performed by the judges, including sources of evidence not specifically described in detail but generally recalled as well as evaluations only briefly identified in the wide-ranging reference to the 'judgment' expressed by the court.

In this way, the plaintiff specifically denies the kind of evaluation that can be performed by the Court of Legitimacy, which (according to the teaching of this court)—

> 'exists only if the judges reasoning fails to examine decisive points and may not instead consist of an appreciation of the facts and evidence that differs from that demanded by the party. The Supreme Court has no power to review and evaluate the so called "merits" of the case, but only to assess, on logical-formal and legally sound basis, the examination and evaluation of the judge, who alone is competent to identify the sources of his conviction and purpose, evaluate evidence, checking on the latter's reliability and conclusiveness and choosing between the collected evidence, in order to prove the facts under discussion'.

(Supreme Court, Section 3, judgment no 828 dated January 16, 2007.)

Thus, the court is not empowered to review the whole issue but has the sheer authority to control, in terms of legal fairness and logical-formal consistency, the judge's reasoning.

The omitted analytical description of the judge's reasoning essentially alters the characteristic of the complaints turning it into an 'uneven

appreciation' (regarding the facts and evidence) compared to that implemented by the judge of merits.

The plaintiff misrepresented the grounds of appeal. Accordingly, the court is compelled to declare such ground inadmissible.

6. The Second Ground of Principal Appeal

With the second ground of appeal (identified as: 'Violation of art 5 of the Convention between Italy and the Netherlands against double taxation on income and on capital, ratified by Law No 305 dated July 26, 1993'), the applicant points out that BS SpA should be considered a permanent establishment of the Dutch company provided that it had been proved that the company normally had the powers to execute agreements 'on behalf' of same-Dutch company. The plaintiff complains that the judge has denied the existence of such requirement, due to an 'incorrect interpretation of the relevant legal definition' that implied the powers of attorney. According to the plaintiff, such requirement should not have had to be evaluated according to a strict contract law statutory criterion, but on the basis of a 'substance over form' approach.

Allegedly, what needs to be clarified is whether the agent operating in Italy has executed contracts with the foreign company, regardless of whether those contracts were actually executed 'in the name of the company'. In fact, the agent provided and received orders that were sent directly to a warehouse from which the goods were delivered and where the foreign companies regularly approved the transactions (please refer to p 10 of the audit report). Thus, it should have been concluded that BSI BV was not 'actively involved' in the execution of contracts proposed by BS SpA (commissionaire).

The judgment had taken the latter into consideration but had then pointed out that—since, in case of product differences, the customer should not have addressed its claims to BSI BV but to BS SpA instead—the latter in dealing with customers did not appear as a mere commissionaire but as an effective party. The court enhanced the formal interpretation of the treaty disregarding its 'substantial' value.

The plaintiff formulated an inadmissible ground of appeal.

The plaintiff held that the judge of merit had considered as necessary the demonstration of the exercise of powers of attorney (in order to ascertain the existence of 'permanent establishment') but did not describe it accurately, with reference to the specific points of the judgment that show such a decisive statement.

Provided that this court is not competent for making up the applicant's inaccuracy, it should be pointed out, anyhow, that from the appealed decision it does not emerge that 'entering into contracts on behalf of the parent company' would necessarily imply the need for the 'power of

attorney'. Contrariwise, in the chapter on 'contractual relationships' the court focused specifically on the consideration that BS SpA 'spent its own name and not that of the parent company', and from this, inferred that it was acting 'on its own', as well as 'in its own interest'.

Thus, no assumption on the lack of powers of attorney with respect to the settlement of the case can be inferred.

But, most importantly, with regard to the violation and misapplication of art 5 of the aforementioned Convention, in the grounds of the appeal no connection is operated between such assumption and the (erroneous) conclusion of the issue. The plaintiff did not demonstrate in any way the reasons according to which the assumption on the existence of such powers of attorney clashes with the general interpretation of the aforesaid provision. Accordingly, the claim is unsubstantiated and left unproven by virtue of mere and apodictic assertions. Indeed, the plaintiff simply rewrites the arguments contained in the decision here under appeal, as if they alone can act as a demonstration of their own inaccuracy.

It must be noted that the plaintiff's approach is not consistent with the guidelines repeatedly made available by this court in relation to the claim's content, that—

> 'under penalty of inadmissibility, must include not only the strict indication of the rules allegedly infringed, but also the specific and intelligible theses designed to demonstrate how certain statements contained in the appealed judgment should contrast with the rules governing the case at hands'

(in these terms, Supreme Court Judgment No 11501 of 2006).

In short, the court considers that the grounds of appeal now under consideration have not properly clarified the content of the breach of law. Indeed, the sheer indication of the standards that have been breached is not sufficient if it is not followed by a detailed evaluation of the solutions adopted by the judge. Furthermore, such evidence must be provided through a comparison between the proposed solutions and not through the mere juxtaposition of the latter to those inferred from the grounds of judgment.

The plaintiff's claim cannot be considered compliant to its chief purpose, namely, to allow the Supreme Court of legitimacy to fulfil its institutional role (appraise the content of the alleged violation). Hence, it can only be concluded that even this second ground is inadmissible.

7. The Third Ground of Principal Appeal

With the third ground of appeal (identified as: 'Insufficient reasoning on a decisive and controversial fact—in relation to art 360(1)(5) of the Italian code of civil procedure'), the applicant complains that the judge failed to

recognize the existence of a permanent establishment by reason of ascertained 'activities carried out beyond the ordinary course of business of the sales commissionaire' carried out by BS SpA.

Indeed, BS SpA should have restricted its activity to the execution of sales contracts on behalf of BSI BV while instead 'deposit and loan contracts executed by BS SpA with hospital facilities' have been found. Through such agreements, BS SpA had used BSI BV's products without a specific power of attorney.

Moreover, even Mr T had stated that in some cases the machinery was not granted on loan but 'leased to customers', and it was not clear under what powers the commissionaire would also have the authority to lease others' property.

T also stated that, in reference to the execution of the deposit and loan agreements, he often would sign on behalf of BSI BV in order 'to obtain a simplification of the execution' itself. And yet, the statements made by Dr S (Appendix No 13 of the tax audit report) showed that BS SpA had carried out factoring transactions involving the transfer of BSI BV's receivables, supporting the charges fully and without recharging them on the principal; furthermore, (as resulting in p 19 of the tax audit report) BS SpA had participated in the Boston Group's expenditure on marketing strategy on insurance contracts or civil liability for promoters in various European countries, without receiving any consideration.

All these elements (and in particular the endurance of cost for agreements entered into by the parent company to its own benefit) showed the participation of the commissionaire in activities outside its business purpose. In a paradoxical way, the Court of Appeals had considered these elements as an expression of the Italian company's independence.

Even these additional grounds are unacceptable.

The applicant in fact assembles a set of facts without respecting the self-sufficiency criterion, which would require a thorough description both with reference to the places in which the documents have been produced and with reference to the specific content of the document itself. Provided that these facts represent a symptom of the carrying out by BS SpA of activities that go beyond the ordinary course of business, the plaintiff bases its reasoning on this set of facts by inferring that the latter was not taken into consideration by the judge of merits.

Accordingly, the plaintiff does not explain nor clarifies in any way the reason why legally pre-determined acts such as the deposit contract; bailment contract, leasing contract, factoring agreement, are alien and even contrary to the typical duties of the commissionaire, by causing these acts be eventually included in what the OECD Commentary (under para 38(7)) defines as 'activities which, economically, belong to the sphere

of the enterprise rather than to that of their own business operations' (ie, the activity of the principal).

Therefore, the plaintiff challenged the grounds provided by the judge of merits without any reasoning whatsoever. Instead of proving the Italian company's dependence to the Dutch parent company, the above-mentioned grounds enhance the company's independent position (in the section called 'business relationship'), so that the appellant's challenge can only result in a judgment of inadmissibility.

The lack of a clear explanation of the reasons for which the judge of merits overlooked one or the other of the factual elements acquired in trial certainly represents a suitable justification for the declaration of inadmissibility, provided that, according to the repeated teaching of this court:

> 'The logical evaluation on the factual judgment as per art 360(5) of the Italian Code of Civil Procedure, is not equivalent to the review of the so-called decisional reasoning, ie, the reasoning that has led the trial judge to adopt a particular solution for the issue under consideration, given that such a review, in fact, implies a factual judgment, and would result substantially in a new decision itself, colliding with the function assigned to the Supreme Court of legitimacy. It follows that any possible flaw in the Supreme Court's reasoning that leads to the performance of a new trial on the merits of the trial is entirely outside the scope'.

Nor, similarly, the Supreme Court could take into consideration a new fact, different or additional to those used by the judge of merits to support its decision (Supreme Court, Section L, Judgment No 3161 dated March 5, 2002). Even in the latter situation, the court of legitimacy would perform a so-called judgment of merit.

In conclusion, none of the grounds of appeal raised by the appellant appears to be acceptably formulated. The rejection of the main grounds of appeal precludes the consideration of those enhanced in the defendant's appeal, expressly influenced by the possible acceptance of the first.

With regards to this instance, settlement on legal costs must respond to the principle according to which the expenses are charged on the party whose petition is rejected.

FOR THESE REASONS

The court rejects the appeal by asking for the appellant to pay the costs of litigation, settled in €50 thousands together with the legal accessories and more than €100 for disbursements.

This has been decided in Rome, during the Council held on February 29, 2012. Filed with the Court Chancellery on March 9, 2012.

a 10 June 2009. The following judgment was delivered.

REGIONAL TAX COURT OF LOMBARDIA
UNOFFICIAL TRANSLATION

b FACTS

On the 7 December 2005, the Tax Police of Liguria concluded a tax audit against Boston BV referred to the fiscal year 2000, issuing a Processo Verbale di Constatazione (tax report).

c Therefore, the Tax Office of Milan notified a deed of assessment through which it assessed, with reference to the fiscal year 2000, a higher taxable income and related interest and penalties for the purposes of IRES (corporate income tax) and IRAP (regional income tax).

Boston BV held the deed of assessment through a long and grounded d appeal supported by an appropriate documentation. The company asked for the integral avoidance of the deed of assessment as it was ungrounded and for the refund of any amount paid in the course of the proceedings.

Subordinately, the company asked to declare that, even if the company had a permanent establishment in Italy, no income would have been e attributable to it. By way of further subordinate ground the company asked for the income redetermination in a single amount taking into account every fiscal year and every tax subject to assessment.

The company claimed that the criminal proceeding arisen from the tax policy inspection was filed by the public prosecutor's office as the notitia f criminis was judged to be ungrounded. Hence, the appellant pointed out the following arguments each with an accurate, appropriate and ample motivation:

1. Complete deed of assessment unlawfulness and insufficient g ground as tax audit was manifestly contradictory and it breaches the principle of the avoidance of double taxation (art 67 of Presidential Decree no 600 of 29 September 1973 and no 167 of Presidential Decree no 917 of 22 December 1986);

2. Complete unlawfulness and insufficient grounds of the h argument regarding the existence of a agency permanent establishment (art 162 of Presidential Decree no 917 of 22 December 1986 and art 5 of the treaty between Italy and The Netherlands);

3. Complete notice of assessment unlawfulness and insufficient ground for the tax assessment violation of regulations with regard to i the determination of income attributable to activities performed by the alleged permanent establishment (art 39 of Presidential Decree no 600 of 29 September 1973 and art 7 of the treaty between Italy and the Netherlands);

4. Unlawfulness of the penalties provided by the tax office.

With reference to the first ground, the appellant underlined the unlawfulness of the tax office's conduct and the evident violation of the Italian tax system basic principle on the avoidance of double taxation.

To prove the violation of the aforesaid principle, the appellant stated factual and legal consideration on Boston Group and on the functions carried out within the group by the company and by Boston SpA.

Furthermore the appellant pointed out that the Boston Group organized the sales and distribution of its own goods in Europe through the appellant's company 'who buys goods from manufacturing company of the group and after sells in the European market through its associated company'.

According to the company's theory, Boston SpA distributed the group's products under its name but on behalf of the foreign company under a mandate with no power of representation.

As far as the second ground, the appellant pointed out that the tax audit had led to an unlawful double taxation of the same taxable basis.

With regard to other grounds, the company stated that the method to determine the income to be attributed to the alleged permanent establishment used by the tax office had not taken into account the peculiar regime applicable to the sales relation between agent and principal or final customers.

Thereby the tax office determined the income to be attributed to the permanent establishment violating both the rules on tax assessment and the rules on the attribution of the profit to the permanent establishment.

Finally, the appellant pointed out the complete unlawfulness and incorrect determination of penalties actually due.

The tax office disputed, in fact and in law, the theory of the appellant requiring the entire appeal rejection as manifestly ungrounded and requested the company to pay the litigation costs.

The Provincial Tax Court accepted the appeal and declared litigation costs to be equally shared between the parties.

In particular, the Provincial Tax Court stated that, in this specific case, the existence of a permanent establishment as deemed by the tax office could not be ascertained.

According to art 5 of the treaty between Italy and The Netherlands, the Provincial Tax Court decision stated that 'in order to ascertain the existence of a permanent establishment in a state, the national company must habitually carry on its business in the name and on behalf of foreign company'. These circumstances were not achieved. In fact, the Italian company sold the products in its own name and on its own behalf.

Therefore the agency contract stated that the Boston SpA had autonomously organized the sales, earning commissions for the sale of products. Moreover, the entrepreneurial risk would be assumed by Boston.

In this specific case, the control exercised by Boston SA and not by the appellant concerned only the activities of an auxiliary and preparatory character.

Furthermore, the objections raised by the tax office was considered not to be relevant. The decision had been appealed by tax office through a long and reasoned appeal supported by several tax case law. The appellant pointed out that the court, in this specific case, would have incurred on:

1. the violation and misapplication of the provision under art 5 of the treaty between Italy and The Netherlands as ratified by Law No 305 of 26 July 1993;
2. the violation and misapplication of the provision encompassed by art 5 of the OECD Model Tax Convention;
3. the failure, insufficient and contradictory grounds;
4. the breach of the non ultra petita rule pursuant to art 102 of the Italian Civil Procedure Code.

The tax office pointed out that the appealed judgment led to the unlikely and unacceptable result of denying the existence of an agency permanent establishment in Italy belonging to Boston BV, even if 'all the elements demonstrating the existence of such a permanent establishment have been collected and stressed'.

The affirmative and negative requirements in order to form an agency permanent establishment were described and recalled in the appeal act. The appellant pointed out that in such a case the first one, certainly not the negative one, subsisted.

Consequently, according to the above mentioned argument, from the evidence collected through the scrupulous investigation performed by the tax police and from the line of reasoning offered by the OECD Commentary at § 32(1), supported by doctrine and case law, it seems undisputed that the principal falls within the affirmative definition pursuant to art 5(5) of the OECD Model Tax Convention and the treaty between The Netherlands and Italy.

After detecting that the Provincial Tax Court had limited itself to collect the taxpayer's generic complaints, without examining with the due clearness all the theses supported by the office, therefore coming to an unfounded judgment, the appellant asked the Provincial Tax Court to 'overrule the judgment n. 114/10/08, confirming the validity of the pertaining notice of assessment notification' and the contextual company condemnation to the payment of the legal costs for the trial before the Court of First Instance and the Court of Second Instance.

The company appeared before the court challenging the office's theses and asking, therefore, the confirmation of the appealed ruling. He pointed out de jure that the appeal looked unfounded, since the Court of First Instance grounded the decision on the uniform case law as well as the law

in force. In particular, § 5 of art 5 of the treaty referred by the appellant excluded the possibility to define as a permanent establishment a commission agent who works independently and acts within his own ordinary business. De facto, the company drew the court's attention to the fact that, according to the militaries drafting the report which gave rise to the tax assessment, the existence of the following conditions emerged:

(a) a purchase order;
(b) the processing of such an order;
(c) the dispatch of the order to Boston BV;
(d) the management and carrying out of the order on the part of the company;
(e) eventually, the company's warehouse administration.

Thus, in the light of the facts described above, it seems obvious, according to the company, that the office 'confuses the management of the orders collection, approval and carrying out, by means of information system, with the absence of a decision making and operational role of Boston BV'.

The company asked, therefore, the admission of the drawn conclusions.

LAW

Preliminarily, the court would like to clarify the matter from any doubt related to the form, the substance and the congruity of the motivation from the notice of assessment, the decision and the appeal side. The assessment was anticipated by a thorough verification performed by the tax police, the results of which was brought to the knowledge of the party; with reference to the results of the tax police activity, such assessment is sufficiently argued. The appealed decision seemed immediately well motivated on all crucial aspects to which it gives a proper answer. As far as the appeal by the Revenue Agency is concerned, it is of all evidence that any pertinent argument, point of controversy or relevant aspect has been neglected by the office or by the party.

This being said, the Boston BV incidental appeal, which claims that the assessment was performed before the expiration of the 60 days, should be rejected. This is a regulative term the non observance of which does not trigger any penalty. In any case, the rights of Boston BV do not appear to be trampled, the taxpayer had the time and the way to prepare an adequate defence; this also emerges from the fact that Boston BV immediately settled the case and met all deadlines.

We can then face, without any further preamble, the controversy central point.

The tax authorities argue that Boston SpA (the domestic company), beyond the fact that it is incorporated as a limited liability company, constitutes a permanent establishment of the parent company Boston BV (the foreign company). Boston BV (the party in the present procedure), by

selling its products in Italy through Boston SpA, who was selling products in the name and on behalf of Boston BV, produced income in Italy which has to be taxed therein following the domestic tax rules. In order to determine such income, the tax authorities, in the absence of ascertained costs, takes into consideration the revenues produced in Italy (by Boston SpA) and consider them as taxable income, calculating the taxes due; penalty charges and interests follow as a consequence in the amount—actually quite relevant—identified in the assessment notice.

Boston BV, on the contrary, argues that the subsidiary Boston SpA does not represent its permanent establishment but a separate entity instead, which produced its own revenues in Italy concurring with its own costs to determine its own taxable base on which taxes has been calculated and paid. The financial results of Boston SpA, contributed to the Boston BV positive income components and, as such, influenced the determination of the taxable income subject to tax in The Netherlands.

The essential point, therefore, is almost exclusively constituted by the qualification of Boston SpA as a Boston BV's permanent establishment or as an autonomous separate entity. Only in the affirmative, we should examine the criteria with which the treasury claims to determine the income produced in Italy by Boston BV through its permanent establishment Boston SpA; criterion that the court considers to be surprising. Following art 7 of the double tax treaty signed between Italy and The Netherlands, in fact, in case a permanent establishment exists, it has to be ascertained the actual income amount produced in the country by such permanent establishment; this should not be calculated with reference to the whole income produced by the parent, but it should not be based on the mere revenues perceived in Italy even.

It has to be immediately affirmed that there are many arguments grounding the two above mentioned thesis and hence it is necessary to analyse each one of them. Anyway, to evaluate whether there is or there is not a permanent establishment it is necessary to take into consideration all the elements as a whole, in their reciprocal interdependence (see Supreme Court decision no 3368/01). Only then it is possible to take a decision. Hence it should be introduced that based on the art 5 of the above-mentioned double tax treaty, there is such a situation when there is the power to conclude contracts in the name of the 'upper' company (unless a mere buy of goods is concerned, which is not our case, because Boston SpA clearly sells foreign products in Italy). The treaty clarifies which should not be considered as conclusive:

– a mere mediation/agency relationship;
– the plain control exercised by shares, as stringent it could be;

1. Shareholder relationships between Boston SpA and Boston BV

Boston BV controls almost entirely Boston SpA, having the absolute majority of its share capital. Preliminarily, one should observe that holding the majority of the share capital is not per se significant to establish the degree of dependence from the parent of the enterprise which is affirmed to be a permanent establishment (para 38(1) of the OECD Commentary). However, it could constitute an indication thereof (Supreme Court decision no 6799/2004). It is not significant that Boston SpA is part of a multinational group, which includes not only Boston BV but also France and USA. It is useful in this respect to recall that the French enterprise was constituted in 2001 and that the group, as it is natural, is characterized by a variable geometry; this not affecting anyhow the relationships between the Italian subsidiary and the Dutch parent, which are part to this litigation. The presence of both companies in the said multinational group entails, inevitably, that the nominations of the persons operating at the bottom come from the top. It is therefore absolutely reasonable (and per se insignificant) that the managers of the Italian company are the expression of, or at least have the approval, of the managers of the companies at the top. In other words, the fact that directors and internal auditors of the subsidiary are designated by the parent is an inevitable event, which generally happens, thus insignificant to establish whether in fact it exists or not a permanent establishment.

Therefore, the situation of the shareholder relationships between the two entities appears insignificant to support any of the two theses.

2. Transactions between Boston SpA and Boston BV

The group business consists in the production and distribution of medical/hospital equipment and supplies (for instance, what is needed for a 'by-pass'); business where the group is one of the world leaders and a major player on the local market.

The issue is about the characterization and nature of the relationship between the two enterprises. The Commission however considers that the designations given to the relationship are scarcely significant, since they are subject to abstract interpretation which is as such misleading, and they are subject to linguistic differences when moving from English to Italian. Thus, it seems not to be crucial establishing whether or not a commissionaire relationship is in place and whether or not art 1731 of the Italian Civil Code—under which the commissionaire buys and sells in the name and on behalf of its principal—is applicable. Rather, it counts what concretely are the relationships between the two enterprises and how they arise. It is considered that a permanent establishment would exist if Boston SpA, through its orders, were capable of binding Boston BV as if it were one of its employees, whose commercial choices and transactions

bind the employer in respect of third parties. In the case at stake, it actually results that Boston SpA does not supply the goods to the Italian client, but it transfers the order abroad through the IT system, which handles the order automatically; the order is then executed by the Dutch warehousemen and not by Italian personnel (Boston SpA does not dispose, in fact, of any warehouse). In substance, the goods are supplied directly by Boston BV. Nevertheless, it is established that the client, in cases of dissimilarity of the goods, manufacturing faults or other juridical ties (third party goods), should not address Boston BV as if it were an employer, but it should address Boston SpA. Boston SpA, therefore, in the relationships with clients, does not appear as a commissionaire, but it appears as the true counter-party, to which the clients should comply.

Hence, the situation of the transactions between the two enterprises suggests that Boston SpA is not a permanent establishment of Boston BV. Boston SpA in fact acts with third parties by spending its own name and not that of its parent; it acts therefore on its own. Furthermore, Boston SpA acts in their own interests, which is earning the fee linked to each order and represents its main source of proceeds. Of course, there is a parallel and coincident interest of the parent, but this is a normal situation, typical, which only suggests the obvious principle that 'everyone makes business to earn money'. Neither the fact that Boston BV is the only principal of Boston SpA leads to a different conclusion. It is in fact absolutely obvious that the agent, in this kind of relationship (widespread everywhere and all along), is bound to exclusivity. It would be meaningless that the Boston SpA commercial sales force would go around proposing to hospitals the competitors' items!

3. Business relationship between Boston BV and Boston SpA

The tax authorities point out the following circumstances:

(a) the endoscopy and urology sales director declared to the tax auditors that the sales policies were indicated by the vice president (who acted as a connection between the headquarters and the operative entities). This person, who was not related to Boston SpA, was also involved in the recruitment activity. Boston France decided the sponsorship policies for the whole group (when the expenses exceeded 5.000 Euros).

(b) Boston SpA managing director declared that Paris was involved in the authorization of these expenses and decided the seat transfer. The above-mentioned vice president was the referent for the strategies, prices and commercial tactics.

(c) according to Boston SpA CFO the above mentioned circumstances lasted 'since ever'.

(d) in a patronage letter sent from Boston BV to Mediafactoring the former wants to be sure that all the management (and therefore also Boston SpA) falls under its direct control and responsibility.

Based on the above one can maintain that a permanent establishment is actually present.

However it should be pointed out that:

– the limit of 5.000 Euros relates only to the sponsorship expenses and not to the prices to be applied to the customers; therefore this limit constitutes a collateral aspect of the business relationship between the two entities;

– the parent company (the American one, not the Dutch or the French one) has a generic and physiological interest that Boston product has uniform characteristics all over the world and that the commercial policies (included the amount of the sponsorship expenses) are uniform as well;

– the CFO has been working for Boston SpA only from 1999 and that relates to 1999 onwards;

– the controlled entities management subordination is a generic circumstance, only asserted in one letter aimed at calming down a factor to which receivables can be sold, and this does not necessarily represent an effective reality.

The element indicated by the tax authorities are relevant since they show the close connection between the management of the single entities and the central one, even regardless to the patronage letter to Mediafactoring. However the court believes that the appellant has given too much relevance to the alleged uniformity of the monthly report through which Boston SpA executives informed the headquarters of the business, sales, and budget. It has to be pointed out that Boston USA is listed on NYSE and therefore it is understandable and physiological that information regarding budgetary control were needed in order to prepare its consolidated financial statements. To infer from those facts the existence of a permanent establishment it means to deny the multinational companies chances, in contrast with history, economics and law.

But it is not enough. According to franchising agreement an autonomous subject is in charge of the sale of goods and services of a specific trademark, and the products must be sold with uniform standards, so that the customer feels to be in connection with the known trademark itself. This does not mean that the franchisee is a longa manu of the franchisor but only that the sale has to follow certain common standards. Even the existence of specific guidelines on the gift and advertising policies does not necessarily mean that there is a close connection between the headquarters and the peripheral entities, as the tax authorities are alleging. The guidelines are necessary in order to avoid possible conflicts of interest

within the group (ie if for a customer is more convenient to buy products abroad than from the national sellers).

In conclusion from the circumstances pointed out by the tax authorities one could infer that there is a permanent establishment, however it is not incontrovertible.

4. Commercial relationship between Boston BV and Boston SpA

The tax authorities, during the audit, pointed out some piece of information. In particular there is a factoring contract that allows Boston SpA to transfer to Mediofactoring its customer receivables, thus demonstrating that the Italian entity acts not only as a commission agent, but as an extension of Boston BV, especially because Boston SpA does not receive any compensation by this transfer. The aforesaid contract is dated 2004, but according to the CFO, it would date back (and therefore it would be also applicable in the disputed fiscal years). The meaning of that element appears ambiguous. Indeed, the fact that the subsidiary could transfer autonomously its customer receivables even more demonstrates the business autonomy (as well as legal and corporate) of the Italian towards the European parent company (the Dutch first and the French later).

There is also an insurance contract, which covers the risks for any contract breach caused by the action of the promoters. Even in this case, the element proves the absence and not the presence of a permanent establishment. Boston SpA, as a matter of fact, taking a direct interest for the harmful consequences as a result of the mandate to the promoters, covers the risk, bearing the costs of the aforesaid contract (premiums); this would not occur if Boston SpA was merely a branch of Boston BV. On the contrary, the fact that Boston SpA, in addition to sell products with brand 'Boston', could (and therefore, it has the autonomy) enter in another sort of contractual agreement (ie factoring and insurance agreement), shows a status of autonomy referred to Boston SpA, incompatible with the nature of a permanent establishment.

In short, Boston SpA appears to have not only a concrete possibility (and autonomy) to transfer receivables and to enter in insurance agreements, but also (limited to certain products and/or to some kind of customer base) to rent out products or to enter in a bailment agreement (it is related to a couple of deposit agreements and a bailment agreement for the value of a few tens of thousands of Euros, compared to millionaire turnovers). Therefore all this may highlight and not deny a situation of manifest autonomy of Boston SpA towards the group to which it belongs, with the result that, in terms of business relationship, no permanent establishment between the two entities comes into picture.

It seems we reached the time to draw the conclusions.

Boston SpA autonomously manages the business risks related to the sale of the Boston branded product. It has a sales structure generating costs. It alone supports such expenses financed by the commissions earned from its activity. Thus the business risk is fully in its hands. Obviously, if it has a loss at the end of the year, the parent company (Boston BV) will cover it, as it happens in any company owned by shareholders that are willing to assume additional risks and costs. If a sufficient level of turnover, able to cover the fixed charges (personnel, equipment, overheads), is not achieved the profit will decrease, because the positive items of income, represented by the brokerage commissions, will not be sufficient.

In other words, Boston SpA, in this context, cannot not be considered as a Boston BV mere extension, but it has to be considered as an independent business entity, whose operating margin will vary depending on how 'the business is going'.

In so far, based on the foregoing, the Regional Tax Court declares that the Italian company is an autonomous entity and therefore the claims of the tax authorities to tax the income (determined in a baffling way on the sole basis of income, excluding any cost …) allegedly produced in Italy by the Dutch company, is certainly an attractive hypothesis, and partly (for the reasons mentioned at point 3 above) reasonable, but actually without any ground.

Some additional remarks to confirm this declaration.

The profits and eventually the participation profits originate a taxable income in the hands of Boston BV; now we do not know and it does not matter if the income is positive or negative. This income is partly due to the business activity carried on with Boston SpA (including its sales and any profit participation) and it has been already subject to tax by The Netherlands; being the latter a state, which belongs, as Italy does, to the European Union, and that it will certainly have a similar tax burden compared to the Italian one and with whom a treaty to avoid double taxation is in force.

Therefore, if the claims of the tax authorities are followed, Boston BV would be subject to tax twice and it should hope that domestic tax authorities will grant it a foreign tax credit. It's hard to think of it as a concrete perspective. The Regional Tax Court does not hide the risk that a literal interpretation of the system, with certain tax avoidance practices, allow someone to operate in Italy through a mere 'branch', disguised as an autonomous entity and achieving an unacceptable tax saving, gaining on the different tax systems. But it is more apparent than a real risk, since—as mentioned—we are dealing with business entities not located in tax havens, but in countries where there is a tax system similar to ours and comparable in terms of tax burden.

a The extremely controversial nature of this dispute justifies, also in the appeal, the expanses compensation.

FOR THESE REASONS

The Regional Tax Court of Lombardia confirms the judgment of first
b instance.

Milan, 10 June 2009

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