Permanent Establishments as Treated by Swedish Tax Law

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Compatibility with EC-law

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Abstract

This thesis aims to give an overall presentation of the present Swedish legal situation of the permanent establishment, from the perspective of international tax law. The different definitions and regulations regarding treatment of permanent establishments will be examined to find if there is a need for amendments of Swedish national provisions. Fundamentals of Swedish tax law, EC-law and of the OECD Model Tax Convention will be presented, in order to make comparisons between the legal systems. Similarities and differences will be identified and form the basis for discussions on conflicts in between the legal systems. The authors find that regarding definitions of, and attribution of profits to permanent establishments, Sweden is far in line with the OECD and EC-law. The general domestic principles are, however unclear in some situations and an amendment of the domestic principles is most likely needed.

Abbreviations

DTC	Double Tax Convention
EC	European Community
EC-law	European Community Law
ECJ	European Court of Justice
ECT	European Community Treaty
EEA	European Economic Area
EU	European Union
FTCA	Foreign Tax Credit Act (*Swe. lag om avräkning av utländsk skatt*)
ITA	Income Tax Act (*Swe. Inkomstskattelagen*)
MTC	Model Tax Convention
OECD	Organisation for Economic Co-operation and Development
PE	Permanent Establishment

Introduction

Background

In a world of increasing globalization, the amount of companies active in several countries steadily increases. With this increase comes the desire of countries to tax business activities in its territory. To meet this desire, there is a great need for effective measures of distribution of profits for companies with profits from several countries. For this purpose, the permanent establishment (PE) is one of the more important devices in tax law.

The PE is a tax instrument that enables countries to establish tax jurisdiction over foreign business activities that are not incorporated in the domestic country. Even though the functions and definitions of the PE are defined differently throughout the European Union, most countries utilize the instrument of the PE to some extent to levy tax on business activities within its country borders.

The question is how well the use of the PE in different countries combine with each other; if the definitions and regulations allow PEs to function in a similar way throughout the European Union, or if legislative conflicts complicate the use and imply higher risks and administrative costs.

The Eucotax Wintercourse

As a preparation for this thesis, the authors wrote a paper in line with the Eucotax Wintercourse. The Eucotax Wintercourse is a project in which students from different universities throughout Europe and the US, write a paper on a specific subject during the winter. The subject is treated from a perspective of the students' own countries.[1]

The main subject of this year's wintercourse was "Taxation on Global Actors" and the subtopic in which the authors of this thesis presented their paper was "Territoriality/ World wide income". During an intensive week in Tilburg, the Netherlands, the students of each subtopic formed workgroups in which they presented, analyzed and discussed the papers

[1] For more information, see www.wintercourse.com

written and the differences and similarities of the tax systems.[2] From these discussions a final paper was constructed and presented at the end of the week.

Purpose

In this thesis, the Swedish legal framework regarding permanent establishments will be examined. This will be done from the perspective of international tax law, to give an overall view of the legal situation of the PE at present. More specifically, the regulations regarding the PE will be studied from three perspectives, namely, the OECD Model Tax Convention (MTC), the EC-law and the Swedish tax law.

From these perspectives it will be possible to investigate the compatibility of Swedish tax law with respect to EC tax law. The purpose is to find possible discrepancies in definitions regarding the PE, as well as differences in the treatment. Such differences or discrepancies might be implying conflicts between national law and EC-law. A further aim is to examine the possible need for amendments of national provisions, in order to fulfil the overall goals set up by the EC. These goals include harmonization of tax law for the purpose of preventing international double taxation as well as tax avoidance.

Outline

To start of the comparison, this thesis will contain a theoretical framework regarding the PE. This discussion covers the motives for the use of the PE, a general definition of the PE and some notes on the attribution of profits to PEs.

From this starting point, the thesis will describe in more detail the management of the PE in the OECD MTC. In this section, the thesis will try to explain the definition of the PE used in the MTC. The most relevant part of the MTC regarding the treatment of PEs will be studied as well.

[2] In the subtopic workgroup in which the writers of this thesis took part, there were students representing Sweden, United Kingdom, Italy, France, Germany, Austria, Hungary, Netherlands, United States.

The reader will then be given an introduction to EC law; its components and influence on EU member states will be described. The PE definition under EC law will also be discussed, as well as the attribution of profits to PEs.

After the EC law section, Swedish tax law will be introduced in general. Once the general description of the Swedish tax law is made, additional description will be made of Swedish Double Tax Conventions (DTCs) and the definition of a PE. Under the section of Swedish tax law there will also be a study of four different scenarios regarding the treatment of asset transfers related to PEs. Following this will be a discussion regarding the PE treatment in Sweden concerning royalties, leasing payments and interests.

From the Swedish tax law, the thesis moves on to an analysis. The analysis covers the definitions of the PE in different tax law settings, the attribution of business profits as well as the compliance of Swedish law with the four freedoms of the EC Treaty.

To end the thesis, there will be some conclusions regarding the analysis and also a short discussion concerning the future of the PE and its treatment.

Method

This thesis follows a traditional legal approach. The thesis will study relevant acts of the Swedish tax law, as well as directives of the EC-Law and the OECD MTC. Further on, relevant case law will be studied both from court rulings in Sweden to interpret the Swedish tax law, as well as case law from the European Court of Justice (ECJ) to interpret EC-law.

Literature regarding the subject will also be studied, to form a base for discussion. This consists of articles and commentaries as well as the preparatory works leading to the Swedish tax law.

Limitations

To narrow the scope of this thesis we have made some limitations. This thesis does not cover the treatment of individuals. The focus is completely on companies. The special treatment of banks and insurance companies as PEs will not be covered in this thesis. Recent works of OECD regarding the PE have taken place during the spring of 2007 and will not be considered in this thesis. The writing of this thesis has been a lengthy process, and the development of these works by the OECD has run parallel to the work behind this thesis. A discussion regarding the choice of structuring foreign business through a subsidiary or a PE could be extended to a thesis of its own. Instead we have chosen to limit this only to an introduction to the issue, to continue to the matters regarding the PE.

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Theoretical framework of the Permanent Establishment

The Worldwide and the Territoriality Principle

Sweden is in its internal tax law mainly using the *worldwide principle* for taxation. The worldwide principle means that a legal entity or individual that is resident in a country will be taxed in this country for both its foreign income and for its domestic income.[3] A Swedish unlimited tax liable legal entity is taxed in Sweden for its worldwide income. The worldwide principle is the most commonly used principle for taxation used by European countries. By using the worldwide principle as a guideline for tax legislation, *capital export neutrality* is ensured. This means that a Swedish investor is indifferent to where to invest, since the tax rate will be the same, regardless of where the investment is made.[4]

Opposed to the worldwide principle is the territoriality principle, by which the country levies tax only on the business activities within its legal territory. This principle ensures *capital import neutrality*, which implies that it does not matter from where the investments come, since the taxation is equal at the place of activity.[5] The territoriality principle is rarely used compared to the use of the worldwide taxation system.[6]

The Residence of Companies

Under the principle of worldwide taxation, the determination of residence of a company is a matter of utmost importance. Since the use of the worldwide principle is very common among the EU member states, this matter becomes an important issue. There are several criteria or tests used to determine a company's residence. However, determining the place of residence for a company is not sufficiently relevant in a world of increasing cross border transactions and global actors. A lot of the business activities may be carried on abroad, making the worldwide taxation of the company seem irrelevant and misjudging, since the profits of the company only partly are earned in the resident country.

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[3] Lodin et al, p. 523.
[4] Mattson [2], p. 10.
[5] Ibid.
[6] Of the participating countries at the Eucotax Wintercourse 2006/2007, France was the only country employing the territoriality principle.

Organisation of cross border activities

When organising cross border activities, the management of the business has a choice of how to structure the organisation. The most common way of setting up cross border organisation is probably through the registration of a subsidiary in the country where the enterprise wishes to perform business activities.[7] The organisation through a subsidiary limits the parent company's financial risks regarding the foreign business activity. However, the registration of a subsidiary involves additional administration, registration fees and other costs, which might make operation of business through a subsidiary a less attractive alternative. Another possibility is to operate the business activities through a branch, rather than registering a subsidiary. This business activity does, in that case, not constitute a separate legal entity, and thus the initial costs are eliminated, making it a preferable alternative, especially for short-term activities in foreign countries.[8]

Attribution of Profits

If a company operates in many different states it can be extremely difficult to determine what parts of the company's income is derived from the different states in which it operates. To deal with this problem of profit attribution, and to enable countries to levy a tax on business activities, that are not operated through a subsidiary, the concept of the PE has been constructed. The issue of attribution of profits to PEs is not a recently developed concept. The principles that the PE are based on were developed already in the 1920s by the League of Nations.[9]

The existence of a PE in a state does not mean that the operating company, or any part of it, becomes residence in that state. The PE is strictly a part of the head office's enterprise. The meaning of the PE is merely that it is possible for the state, in which the business activities of the PE take place, to levy a tax on the business income generated by the PE. As mentioned above, the PE is not a legal entity and is therefore not tax liable in itself; the taxable entity is the foreign head office to which the PE regards. Most countries use the concept of the PE, in some way or another, to approximate the profit derived from each state.

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[7] Bäckström, p. 567.
[8] The pros and cons of operating foreign business activities through subsidiaries can be further investigated. This is, however, beyond the scope of this essay.
[9] Cahier de droit fiscal international 91b, p.28.

The Use of PEs

It is very common among the EU member states to internally use a definition closely connected to that of the OECD MTC. Some countries do not have notions in their legislation of the PE, but both treaty law and case law definitions are clearly derived from the OECD MTC definitions when it comes to PE related issues.[10]

From a Swedish perspective, the importance of harmonized PE legislation is clearly related to the use of a worldwide taxation system. Since a Swedish legal entity is taxed in Sweden for all its income in Sweden and abroad, the PE is a necessary mechanism to allocate the taxation between states where a Swedish company operates. The existence of a European, and preferably also a globally harmonized system for PE definition and regulations would significantly reduce risks and administrative costs for global actors residing in Sweden.

[10] The similarities to the OECD MTC was obvious for the majority of the participating countries' legislations at the Eucotax Wintercourse 2006/2007.

OECD

The OECD and the Model Tax Convention

The Organisation for Economic Co-operation and Development (OECD) has its seat in Paris and has 30 member countries.[11] Apart from the member countries, the OECD has active relationships with many other countries and through this it is an organisation with global reach. The OECD produces many publications, not least in form of internationally agreed instruments, decisions and recommendations.[12]

One of these is the Model Tax convention (MTC) which was published in its first version in 1963.[13] It has been followed by several updates and new versions[14]; the most recent version being the MTC published in 2005.[15] The OECD MTC is a model used by countries in negotiation of bilateral tax agreements. It contains articles as well as commentaries on these articles, which together make up guidelines on how to design Double Tax Conventions[16].

The MTC has however come to play an important role in the construction of countries' tax law in itself. The MTC contains suggestions on how to define and treat the PE.[17] Restrictions and definitions very similar to those of the MTC can be found in the interpretation and design of tax legislation of many countries.[18]

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[11] The member countries are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxemburg, Mexico, New Zeeland, Netherlands, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States.

[12] Information from www.oecd.org.

[13] Draft Double Taxation Convention on Income and Capital, OECD, Paris 1963.

[14] Dahlberg, 2003, p. 140.

[15] Model Tax Convention on Income and Capital, Paris, 2005.

[16] Double Tax Conventions will be treated in more detail later in this thesis.

[17] OECD MTC article 5.

[18] Cahier de droitt fiscal 91b.

Definition of a Permanent Establishment

As stated in the MTC, a PE is defined as:

> *"a fixed place of business through which the business of an enterprise is wholly or partly carried on."*

Furthermore, according to article 5 of the MTC, the term PE especially includes:

a) a place of management;
b) a branch;
c) an office;
d) a factory;
e) a workshop, and
f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

Article 5 also states that a building site or construction or installation project is deemed a PE only if it lasts for more than twelve months.[19]

There is also a list of business activities that should not be included in the definition of a PE. This list contains five categories which in general handle preparatory or auxiliary activities.[20] More specifically, the categories are:

a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely

[19] OECD MTC article 5, paragraph 3.
[20] Commentaries to the OECD MTC, article 5, paragraph 4, commentary 21.

for the purpose of processing by another enterprise;

d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other kind of activity of a preparatory or auxiliary character;

f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character. [21]

Paragraph 5 of article 5 of the MTC states that if an enterprise has an agent acting in another state, and that agent has, and habitually exercises the authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a PE in that state with respect to the activities carried out. The list of excluded activities mentioned above are not included in this setting.

Activities performed through a broker, a general commission agent or any other agent of an independent status do not constitute a PE, if the activities are in the ordinary course of business of the agent.[22]

Finally, article 5 of the MTC states in its seventh paragraph that the fact that a company in one state controls or is controlled by a company active in another state, is not in itself a sufficient prerequisite for either company to constitute a PE of the other.

[21] OECD MTC article 5, paragraph 4.
[22] OECD MTC article 5, paragraph 6.

Permanent Establishment and Business Profit

Article 7 of the MTC deals with business profit, and since the PE is a very important concept for the attribution of business profits, the article contains several important regulations regarding the PE.

First out, article 7 states that an enterprise should be taxed in its resident country for all of its income, according to the worldwide principle, except for income earned in a foreign country by a PE belonging to the enterprise.[23] The income earned by the PE should be calculated in such a way that it equals the profit the PE would have earned if it was a separate and independent enterprise.[24] This is often referred to as the arm's length principle, indicating the distance kept between the PE and the company to which it is related.[25] In article 7, this is stated as:

> *"[...] the profits which it [the permanent establishment] might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment."* [26]

The profits of the PE are to be calculated with allowance for deductions for the expenses incurred for the purpose of the activities of the PE.[27]

[23] OECD MTC article 7, paragraph 1.
[24] OECD MTC article 7, paragraph 2.
[25] Commentaries to the OECD MTC, article 7, paragraph 2, commentary 11.
[26] OECD MTC article 7, paragraph 2.
[27] OECD MTC article 7, paragraph 3.

EC-law

The European Community Law (EC-law) is cogent for all member states and their inhabitants.[28] According to an early ruling in the European Court of Justice (ECJ) a membership in the European Union (EU) will have substantial effect on the states' national legislation.[29] Because the ECJ is a part of the EC-law, rulings made by the ECJ will always be cogent for all member states.

When a state enters the EU it is obliged to sign the European Community Treaty (ECT).[30] Regarding taxation, by signing the ECT, the member state agrees to extensive restrictions in the national sovereignty of taxation. Consequently, the EC-law became a part of the Swedish internal law, when Sweden became a member of the EU. The EC-law is an own law order which is developed in another way than the Swedish law. When there is a conflict between Swedish law and EC-law, the EC-law has preference.[31] The main purpose of the EC-law is to ensure *free movement of goods, services, persons* and *capital* and also to prevent biases of competition.

The EC-law is divided into primary and secondary legislation. The primary legislation consists of the ECT and the secondary legislation consists of *directives, regulations* and *recommendations* that are continuously developed by different institutions active within the EC.[32] Which part of the secondary legislation to use in a certain question depends on the current issue. Normally there are guidelines in the ECT of where, e.g. in a certain directive, to look for solutions in a certain area.

Primary legislation

European Community Treaty

The ECT is supposed to be a framework with general goals and principles for the EC-cooperation.[33] These principles are supposed to get a more concrete substance within the

[28] Ståhl & Persson-Österman, p. 21.
[29] See Case C-26/62, *van Gend & Loos*, and Case C-6/64, *Costa v. ENEL.*
[30] Ståhl & Persson-Österman, p. 21.
[31] Ståhl & Persson-Österman, p. 22.
[32] Ibid.
[33] Ståhl & Persson-Österman, p. 25.

area of the secondary legislation. The treaty assumes a future development of the EC-cooperation and states that the institutions working with the secondary legislation will have a great influence of this development. In the treaty, there are directions on how the power is to be balanced between the institutions and also directions of how the decisions process is to be carried out. It is of great importance that the secondary legislation is stated in a way that does not come in conflict with the ECT.

The Four Freedoms

In the ECT there are articles concerning the hindrance of movement within the EU. The articles advocate free movement of goods, services, persons and capital and aim to eliminate all discrimination in these areas within the union. These articles are also known as the four freedoms.

The ECJ consider the four freedom articles to have direct effect on the member states' direct taxation, even though there is no directive covering this area. According to the *avoir fiscal*-case[34] from 1986, internal laws that are in conflict with the freedom of establishment within Europe may be set aside by virtue of the ECT. Hinders that may be in conflict with the free movement are all types of discrimination where domestic and foreign tax payers are treated unequally. Within the section treating the free movement of persons, the *freedom of establishment* is included.

Freedom of Establishment

In Article 43 of the ECT, the freedom of establishment is presented. It is in this article stated that:

> "*restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any*

[34] See Case C-270/83 *avoir fiscal.*

> *Member State established in the territory of any Member State.*"

The term "branches" used in the article can easily be interpreted as PEs. Hence, any kind of hindrance that will stand in the way for setting-up a PE in another member state is by this article of the ECT not accepted by EC-law.

In Article 48 of the ECT, it is expressed that the freedom of establishment stated in Article 43 includes companies and firms formed in accordance with internal law in the member state that it has its registered office, central administration or principle place of business. The pre-condition is that the company or firm is within the EC.

Secondary Legislation

The secondary legislation consists of directives, regulations and recommendations.[35] These are made up by different institutions. An easy way to describe the decision making process is that the Commission has the right to make an initiative of a directive to be made, the Economic and Social Committee fills the role as an advisor and finally the Council has the right to make the final decision regarding the institution of a new directive.[36] Regarding PEs, The most interesting parts of the secondary legislation to study is the directives, but here a brief presentation of all the above mentioned parts of the secondary legislation will follow.

Directives

The directives are used for the purpose of harmonization within the EC member states.[37] The design of the directives gives the member states the right to maintain their own way to legislate, but affects in what direction the legislations are made. The most important parts of the EC-law are covered within directives. What concerns the tax directives most of them are relatively detailed with precise and specific statements.

[35] Ståhl & Persson-Österman, p. 22.
[36] Ståhl & Persson-Österman, p. 23.
[37] Ståhl & Persson-Österman, p. 26 f.

Commonly the directives are directed to one or many member states, but it can never be directed towards single citizens.[38] In the directive there are goals and results stated that the member states are to achieve within a certain time period. Then the member states are to implement changes in their internal law so that these goals and results stated in the directive is achieved. In what way they are implemented or how the changes in internal tax acts are stated, the directive does not cover. Hereby the directives are to be classified as indirect legislation. The directive itself is a part of the EC-law, but the changes are however only affecting internal legislation of the member states. According to article 249 of the ECT, a directive is however only cogent with respect to the result that it is supposed to achieve.

Regulations

According to article 249 in the ECT, a regulation shall have general application and shall be binding in its entirety and directly applicable in all member states. A regulation is used for total harmonization and leaves no room for the member states to shape their internal legislation.[39] Therefore, a regulation only states immediate rights and obligations for the individual citizens. The ECJ has even settled that the member states are not allowed to introduce the regulation in their internal law in a way that will hide the regulations origin.[40]

Recommendations

Unlike directives and regulations, recommendations are not cogent for the member states.[41] Generally a recommendation is made up on the institutions' own initiative. Their purpose is to, without having any legal cogency, recommend a way to act in certain situations for member states and citizens of member states. Even though it is impossible to enforce the recommendations, lately the Commission has increased the usage of recommendations within the area of tax law as an alternative way to harmonize the member states.

[38] Ståhl & Persson-Österman, p. 27.
[39] Ibid.
[40] See Case C-34/73 *Variola.*
[41] Ståhl & Persson-Österman, p. 28.

Definition of a PE under EC-law

It is hard to find a uniform definition of a PE under EC-law. Anyhow, the PE is treated by and plays a key roll in the three major EC company directives, the Parent-Subsidiary Directive, the Interest and Royalties Directive and the Merger Directive.[42] There is a definition of a PE within two of these directives, the Parent-Subsidiary Directive and the Interest and Royalties Directive, but the definition is not uniform.

In 2003 the European Council adopted an amendment of the Parent-Subsidiary Directive which stated that PEs were to be included in the directive. Also a definition of the PE was included, but only for the purpose of the directive. Article 2(2) of the Parent-Subsidiary Directive provides this definition:

> *"[f]or the purposes of this Directive the term 'permanent establishment' means a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on in so far as the profits of that place of business are subject to tax in the Member State in which it is situated by virtue of the relevant bilateral tax treaty or, in the absence of such a treaty, by virtue of national law."*

Here we see a rather clear definition of the PE, but it must not be forgotten that this definition is only for the purpose of this directive. Thus, this definition cannot be seen as a general definition. Neither the definition of a PE in the Interest and Royalties Directive can be seen as a general definition. In Article 3(c) of the Interest and Royalties Directive we find the definition:

> *"[t]he term 'permanent establishment' means a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on."*

[42] The Parent-Subsidiary Directive (2003/123/EC), the Interest and Royalties Directive (2003/49/EC) and the Merger Directive (90/434/EEC).

In this definition there is no part with conditions that the PE's profits must be subject to tax, but there are provisions (in Article 1(5)(b) of the directive) pointing out that the PE is to be treated as a *"beneficial owner"*[43] only *"if the interest and royalty payments represent income in respect of which that permanent establishment is subject in the Member State in which it is situated to one of the taxes mentioned in Article 3(a)(iii)".*

There are similarities between the two definitions, but it is obvious that they are made up to fulfil only the purposes for the respective directives. Also, there are interpretations of these definitions that they were intended to subordinate the directive's PE definition to definitions in national law and DTCs of the EU member states.[44] However, since definitions of a PE are included in these two important directives it is believed that this is enough for the term "PE" to become a term of EC-law, and thereby also subject to interpretation of the ECJ.[45]

PE – as treated by EC-law

In EC case law we see that it has been stipulated that if a host state of a PE levies tax on the PE for its income, the taxation cannot be less favourable than the tax that would have been levied on a similar resident company. In the famous and revolutionary *avoir fiscal*-case[46] from 1986 the ECJ stated that any national law of a member state that is in conflict with freedom of establishment may be overruled by the ECT. In this case the ruling was that a French PE of a Spanish insurance company was entitled to the *avoir fiscal*[47] on dividends from French equities that held it. The reason for the ruling was that the PE was to be treated exactly as a French resident insurance company. Furthermore, the ECJ concluded in the case *Royal Bank of Scotland*[48] that the Greek tax law was not in line with the freedom of establishment. A Greek branch (PE) of Royal Bank of Scotland was subject to a 40 per cent tax rate whilst Greek banks only were subject to tax at a 35 per cent rate. These rulings, stressing the equal treatment on a national basis, are closely related to the "distinct and

[43] Being a beneficial owner in the Interest and Royalties directive makes the entity entitled to relief under the directive. We will however not enter into a further discussion on this topic since it is irrelevant for our thesis.
[44] Cahiers de droit fiscal international 91b, s. 74.
[45] Ibid.
[46] See Case C-270/83 *avoir fiscal.*
[47] The term "avoir fiscal" is French and a translation would be "tax credit".
[48] See Case C-311/97, *Royal Bank of Scotland v. EllinikoDimosio.*

separate enterprise" approach described in the OECD MTC. For the purpose of profits attributed to a PE, profits should be calculated as if the PE was a distinct and separate enterprise, and not a part of the same enterprise as the head office.

It is clear that all types of benefits that are made available for resident companies within a state must be available also for PEs carrying out similar business within the jurisdiction. In one EC case, the *Futura*-case,[49] the ECJ also deemed that national legislation of a member state was in conflict with the ECT, without discriminating foreign entities. In the *Futura*-case the legislation of Luxembourg did not demand any particular bookkeeping referring to business activity within the state for non-resident entities. Anyhow, if a foreign entity wanted to get loss relief and a possibility to carry forward and/or backward losses from activities in Luxembourg, there was a need for certain bookkeeping. These rules were applicable to all entities in Luxembourg, even to resident entities, but the ECJ stated that due to forcing foreign entities into a certain type of bookkeeping that would not have been necessary if the entity would not have carried on business in Luxembourg, a hindrance of the freedom of establishment was at hand.

It has lately become more obvious that the EC-law is recognizing the OECD's approach on the treatment of PEs. In AG Léger's[50] comments to the two ECJ-cases *CLT-UFA SA*[51] and *FCE Bank*[52] it is stated that the profits and losses of a PE must be calculated on the basis that the PE is viewed as a separate and distinct enterprise dealing with its head office. Also the dealing is considered to be carried out according to the arm's length principle.[53] These statements are very similar to the definitions in the OECD MTC article 7(2).

[49] See Case C-250/95 *Futura*.
[50] Advocate-General Philippe Léger of the ECJ.
[51] See Case C-253/03 *CLT-UFA SA v. Finanzamt Koln-West.*
[52] See Case C-210/04 *Ministero delle Economia e delle Finanze, Agenzia delle Entrate v. FCE Bank Plc.*
[53] See paragraph 85 of AG Léger's opinion in *CLT-UFA SA* and paragraph 62 in *FCE Bank* case.

General Information of Swedish Internal Tax Law

The Swedish tax system distinguishes between tax payers with limited and unlimited tax liability. The main rule is that *Swedish legal entities* are unlimited tax liable, while *foreign legal entities* are limited tax liable. Generally an entity that is registered is Sweden is a Swedish legal entity.[54] Legal entities that are unlimited tax liable are tax liable for all their income from Sweden and abroad.[55] This is consistent with the fact that Sweden uses a worldwide income principle.

However, a foreign legal entity is only limited tax liable in Sweden.[56] A foreign legal entity is a foreign association that is taxed in the state where it belongs in a way that is similar to the Swedish taxation. A limited tax liable legal entity, such as a foreign legal entity, will be taxed in Sweden for income from a PE and real estate in Sweden.[57]

Under Swedish tax legislation a PE of a foreign entity will be taxed similarly to a Swedish limited liability company. The accounting of the PE, as well as of all other entities within Sweden, has to be made up in accordance with Swedish General Accepted Accounting Principles (GAAP).[58] An entity resident in Sweden will always be taxed for all its income, including capital income, as business income. Expenses arising when acquiring or maintaining income from business activities may be deducted.[59]

Swedish Double Tax Convention

Swedish legal entities registered in Sweden are, as mentioned above, unlimited tax liable for all their income from both Swedish and foreign sources. Regarding income from foreign sources there is a possibility that the income also will be levied a tax in the foreign state due to that states' internal tax law. In that case the income will be levied a much higher total tax than a domestic company in either state. This phenomenon is called international double taxation.

[54] Chapter 6, § 3, ITA.
[55] Chapter 6, § 4, ITA.
[56] Chapter 6, § 7, ITA.
[57] Chapter 6, § 11, ITA.
[58] Cahiers de droit fiscal international 91b, p. 618.
[59] Chapter 12, § 1, ITA.

The main purposes of the Swedish double tax conventions[60] (DTCs) are to eliminate international double taxation and to prevent international tax evasion.[61] “The golden rule of tax treaty law”[62] is that DTCs can never give Sweden the right to tax a person if that income is not taxable according to national law.[63] Most of the Swedish DTCs are bilateral, which means that they are only valid between Sweden and one other state.

Historically, Swedish DTCs have mainly contained two methods to avoid international double taxation, the exempt method and the credit method. From the middle of the sixties the credit method has normally been used in all new Swedish DTCs. The credit method in the DTCs gives a company that is resident in Sweden the right to credit the foreign tax on its foreign income against the Swedish tax on that same income. This is what is called an *ordinary credit*. In the DTCs where the exempt method is still used the exemption gives only one country the right to tax a certain income.[64]

The content of the DTCs overrules the internal jurisdiction in the states involved and has a cogent effect to tax payers, public authorities and courts.[65] Most of the Swedish DTCs also contain a section which deals with exchange of information between the DTC parties’ tax authorities.[66]

Exempt Method

A few of the Swedish DTCs apply for the use of the exempt method for relief of international double taxation. The exempt method gives only one of the participating states in the DTC the right to tax a certain income.[67] Depending on the design of the DTC the exempted income may, or may not, affect the tax rate on other income in the state from where the tax is exempted. Using the exempt method the income will never be taxed in more than one state. Hence, international double taxation is avoided.

[60] The term “double tax convention” is also known by the shorter term “tax treaty”.
[61] Lodin et al. p. 557.
[62] Lindencrona. p. 24.
[63] Cahiers de droit fiscal international 90a, p. 639.
[64] Sweden has over 90 different DTCs with other countries and the exempt method is only used in ten of these.
[65] Lodin et al. p. 558.
[66] Lodin et al. p. 560.
[67] Mattsson p. 194.

Credit Method

Rules regarding the credit method are rather complicated and have their own act in the Swedish tax law, the Foreign Tax Credit Act (FTCA).[68] When applying a Swedish DTC, providing for the credit method, it should be design as it is outlined in FTCA.[69] There are a number of criteria listed that has to be fulfilled for the credit method to be applicable.[70] The credit of foreign tax against Swedish tax on foreign income is however limited. A credit can not exceed the Swedish tax on the foreign income. Unused credit may be carried forward up to three years.[71]

By following this method the international double taxation is eliminated in the sense that the total tax paid in the end always will equal the amount of tax that the tax payer would have had to pay in the state with the highest tax rate.[72] Since the Swedish tax rate is relatively high, in most cases the result will be that the tax payer pays an amount of tax that is equal to the tax he would have paid if all his income were Swedish instead of foreign, everything in accordance with the principle of Worldwide Income and capital export neutrality. This might imply that Sweden misses out on tax income.

[68] Lag (1986:468) om avräkning av utländsk skatt.
[69] Cahiers de droit fiscal international 90a, p. 628.
[70] § 1, FTCA.
[71] § 11, FTCA.
[72] Lodin et al. p. 535.

Definition of a PE

The definition of a PE under Swedish tax law is stated as follows:[73]

- The term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

- The term "permanent establishment" includes especially:
    - a place of management;
    - a branch;
    - an office;
    - a factory;
    - a workshop;
    - a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.
    - a building site, construction or installation project , and
    - real estate treated as a current asset in business income.

- If someone is acting on behalf of an enterprise in Sweden and has, and habitually exercises, an authority to conclude contracts in the name of the enterprise, a permanent establishment is considered to exist.

- A permanent establishment is however not considered to exist in Sweden merely because someone carries on business here through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

[73] Chapter 2, § 29, ITA.

There is yet another definition of a PE stated in the Swedish ITA. A PE exists if a foreign entity receives a royalty or leasing payments from a Swedish company or a PE located in Sweden.[74] However, this only applies for entities that are not covered by the EU Interest and Royalties Directive.[75]

Attribution of profits to PEs

In the Swedish internal tax law there are no specific provisions regarding the attribution of profits between a head office and a PE. Generally, the head office and the PE are to be viewed as part of the same legal entity. However, for the purpose of determining the profits attributable to the PE, the head office and the PE are to be viewed separately. In a case from 1971, the Swedish Supreme Administrative Court stated that a Swedish entity that sold jewellery through a branch (a PE) in Spain were to calculate the profits attributing to the PE as if it was a distinct and separate entity.[76] The general principle is therefore that dealings made between a head office and a PE is to be made by attributing profits as if the PE was a separate legal entity.

As mentioned above, accounting according to the Swedish GAAP is the starting point for determining the taxable profit of the PE, and then adjustments are made for non-taxable and non-deductible items under Swedish tax provisions. Expenses incurred when pertaining taxable income will always be deductible, regardless of whether the expense is incurred by the head office or the PE.[77] The Swedish tax agency is obliged to follow the PE's financial statements when determining the taxable profit, but it is possible for the agency to question some parts of the financial statements and demand profit adjustments.[78] In cases where the agency considers the profit attribution to the PE to be incorrect, the Swedish tax law provide for two sets of rules for the adjustments demanded. Either the arm's length principle or the exit taxation is used.

[74] Chapter 6, § 11, ITA.
[75] Interest and Royalties Directive (2003/49/EC).
[76] See RÅ 1971 ref. 50.
[77] Chapter 16, § 1, ITA.
[78] Cahiers de droit fiscal 91b, p. 619.

The arm's length principle means that profit adjustments are to be made if a Swedish enterprise receives a different profit, due to contractual terms with a related enterprise, than it would have if the contractual enterprise was unrelated.[79] According to preparatory work,[80] this provision should not be applicable on dealings between a foreign head office and a Swedish PE. The arm's length principle presuppose that there are two contractual parts, and since the head office and the PE is two parts of the same enterprise they cannot enter into agreements with themselves. However, in practice, the arm's length principle applies.[81]

The second set of rules is the exit taxation.[82] The term "exit taxation" will be used as a term to express that assets have been transferred to or from the entity at a dealing price that differs from the fair market value. The main rule is that whenever an asset is transferred at a price below fair market value exit taxation is imposed. There is however some exceptions to exit taxation. Provided that certain conditions are met, assets may be transferred at a price lower than fair market value without exit taxation. It is worth noticing that even if the price of the transfer is below the tax residual value, the asset will still be considered being transferred at the tax residual value.[83]

Swedish PE-Legislation in Practice

If an asset is being transferred between a head office and a foreign PE, a cross border transaction is taking place. This transfer will in most cases lead to taxation in both participating states, international double taxation, unless there are active DTCs dealing with this issue. The consequences of taxation will be different depending on if the applicable DTC is enforcing the use of the credit method or use of the exempt method for relief of international double taxation.

[79] Chapter 14, § 19, ITA.
[80] Government Bill 1955:87, p 64.
[81] Cahiers de droit fiscal international 91b, s. 619, also see RÅ 1971 ref. 50.
[82] Chapter 22, ITA.
[83] Chapter 23, ITA.

Here follows an illustration of four different scenarios where assets are transferred between a head office and a PE. The different scenarios are:

(i) transfer of an asset from a Swedish head office to a foreign PE;
(ii) transfer of an asset from a Swedish PE to a foreign head office;
(iii) transfer of an asset to a Swedish head office from a foreign PE;
(iv) transfer of an asset to a Swedish PE from a foreign head office.

In all four scenarios, both types of DTCs will be described. In absence of an applicable DTC, Swedish internal law provides for the use of the credit method. Therefore, the domestic situation (no applicable DTC) and the credit DTC situation will have the same result. The starting point will always be from the Swedish legislation. Hence, the term "Swedish PE" used below is a PE resident in Sweden that is a part of a foreign enterprise.

Transfer of an asset from a Swedish head office to a foreign PE

Domestic and credit DTC situation

If an asset is transferred from a Swedish head office to a foreign PE it will be considered being a dealing between two parts of the same enterprise and is therefore not to be recognized for tax purposes. The value of the asset transfer will be at acquisition cost for inventory items, whilst for capital equipment and intangible assets the value will be the tax residual value. Later, if the asset is sold by the PE it will generate a gain (or a loss) for the enterprise, calculated as the difference between the selling price and the acquisition price (or the tax residual value). A gain for the enterprise is a taxable income in Sweden.

Exempt DTC situation

Under the exempt DTC situation the asset is considered leaving Swedish tax jurisdiction and therefore the Swedish head office is imposed with exit taxation.[84] The value of the asset transfer will for tax purposes be considered to be done at fair market value. The PE's taxable profit is then determined as the difference between the fair market value and the acquisition cost of inventory assets. The taxable income arising from capital equipment and intangible assets being transferred is calculated as the difference between fair market value

[84] Chapter 22, § 5, ITA.

and tax residual value. A future sale of an asset will not be taxed in Sweden since the asset is no longer considered to belong to the Swedish tax jurisdiction.

Transfer of an asset from a Swedish PE to a foreign head office

Domestic and credit DTC situation

This dealing of an asset being transferred from a Swedish PE to a foreign head office is recognized for taxation in Sweden. The asset is considered leaving Swedish tax jurisdiction and therefore exit taxation is imposed on the fair market value. Regarding inventory items, the difference between the fair market value and the acquisition cost determines the PE's taxable profit. For capital equipment and intangible assets the PE's taxable profit consists of the difference between the fair market value and the tax residual value. If the head office later on sells the asset, an eventual gain will not be taxed in Sweden.

Exempt DTC situation

The asset transfer from a Swedish PE to a foreign head office in a state, under Swedish exempt DTC, will be treated in the same way as if the DTC is a credit DTC or if there is no DTC at all.

Transfer of an asset to a Swedish head office from a foreign PE

Domestic and credit DTC situation

An asset that is transferred to a Swedish head office from a foreign PE is considered being a dealing between two parts of the same enterprise. Therefore this transfer is not to be recognized for tax purposes. The value of the asset transfer will be at acquisition cost for inventory items, whilst for capital equipment and intangible assets the value will be the tax residual value. When the asset is sold by the Swedish head office it will generate a gain (or a loss), calculated as the difference between the selling price and the acquisition price (or the tax residual value). The gain is taxable income in Sweden.

Exempt DTC situation

Before the transfer the asset was not recognized for tax purposes by the Swedish head office. When the transfer is being made, the head office will get a tax acquisition value on the asset that is the lowest of the fair market value at the time for the acquisition and the acquisition cost that the foreign PE initially paid.[85] This is true for inventory assets.

Regarding capital equipment there are some differences. At a transfer, the acquisition value for the Swedish head office will be equal to the acquisition cost initially paid by the foreign PE, but with some changes. Any improvements that have been made by the PE may be added to the acquisition value, and also a deduction must be made for each year that the PE has held the capital equipment. There are given percentage figures for the yearly depreciation depending on what type of capital equipment that is being transferred, e.g. machinery, equipment or real estate.[86] However, the acquisition cost can never exceed the fair market value at the time of the transfer.

When transferring intangible assets to a Swedish head office, the acquisition value will be the acquisition cost initially paid by the PE, reduced with a yearly depreciation of 20 per cent and added expenses incurred when the PE made improvements to the intangible asset. Also in this case the acquisition cost can not exceed the fair market value at the time of the transfer.[87]

For all these cases regarding asset transfers to a Swedish head office from a foreign PE there is an exception from the rules stated above. In the case where this asset transfer was imposed with exit taxation on the fair market value in the state where the PE is located, the acquisition value for the Swedish head office will always be the fair market value. This however only applies if the PE is located in a state within the EEA or in a state with which Sweden has a DTC which includes an exchange of information clause.[88] Furthermore, a future sale of the asset will only attribute to the Swedish head office, and will therefore only be taxed in Sweden.

[85] Chapter 20a, § 3, ITA.
[86] Chapter 20a, § 4, ITA.
[87] Ibid.
[88] Chapter 20a, § 7, ITA.

Transfer of an asset to a Swedish PE from a foreign head office

Domestic and credit DTC situation

Since the asset is entering the Swedish tax legislation as the transfer is being made it can not have been recognized for tax purposes in Sweden before the transfer. Regarding inventory items the acquisition value of the transfer will be the lowest of the fair market value and the initial acquisition cost paid by the foreign head office.[89]

Transfers of capital equipment and intangible assets to a Swedish PE will also be considered entering the Swedish tax legislation. The acquisition value will be calculated as the initial acquisition cost paid by the foreign head office adjusted for improvement costs incurred and with a yearly depreciation.[90] There is a limitation though so that the acquisition cost can never exceed the fair market value at the time of the transfer.

If the asset transferred has been imposed with exit taxation on the fair market value in the state where the head office is resident, the acquisition value for the Swedish PE will always be the fair market value. This is true for all types of assets, but only applies if the head office is located in a state within the EEA or in a state whit whom Sweden has a DTC which includes an exchange of information clause.[91] A future sale of the asset will be attributed to the Swedish PE, and will therefore be taxed in Sweden.

Exempt DTC situation

Transfers of assets to a Swedish PE from a foreign head office under the exempt DTC situation will be treated in the same way as under the domestic and credit DTC situation. The same principles and provisions as stated above will apply.

[89] Chapter 20a, § 3, ITA.
[90] Chapter 20a, § 7, ITA.
[91] Ibid.

Royalty, Leasing Payments and Interests

Royalty and leasing payments

As mentioned above under the definition of the PE, royalty and leasing payments for the right to use capital equipment and intangible assets are to be considered as income from a PE in Sweden, if the payment arises from an entity or a PE resident in Sweden.[92] Hence, royalty and leasing payments will be taxable income for the receiver regardless of whether the receiver is carrying out business in Sweden or not. The receiver is by Swedish law considered being involved in the business of the giver, and it is therefore considered that this business constitutes an own PE for the receiver.[93] The foreign entity receiving the payments is taxed In Sweden on the net income of the PE. All expenses attributing to receiving the payments are deductible, not considering if they incur in Sweden or abroad.[94]

This however does not apply if the dealing entities are associated companies and the receiver is resident within the EU.[95] Associated companies exist when one company is holding at least 25 per cent of the capital in the other company, or when at least 25 per cent of the capital in both companies is held by another EU-resident company. The addition of these exceptions is a direct consequence of the implementation of the EU Interest and Royalties Directive.[96]

Worth noticing is that in many DTCs Sweden is limited to its taxation on royalty payments.[97] According to some DTCs Sweden does not have the right to tax the payment at all, and in some the taxation is limited to a certain per cent of the gross payment.

The Swedish Administrative Court of Appeal has in the case where a Swedish PE pays a royalty payment to its foreign head office concluded that the payments are not deductible.[98] The court settled that a foreign company receiving royalty payments from its Swedish PE was denied deduction for these payments. The foreign head office is the taxable person in

[92] Chapter 6, § 11, ITA.
[93] See Government Bill 2003/04:126. Notice that this is also expressed in Government Bill 1928:213 p. 261 f.
[94] Chapter 16, § 1, ITA.
[95] Chapter 6a, §§ 4-6, ITA.
[96] Interest and Royalties Directive (2003/49/EC).
[97] Cahiers de droit fiscal international 91b, p. 628.
[98] The Administrative Court of Appeal in Stockholm, case no. 4418-2000, 13 December 2000.

Sweden for the operations performed by the PE and in this case the royalty payments are to be considered as if the head office paid royalty to itself.

Interests

The treatment where the head office and PE are to be viewed as two separate part of the same enterprise also applies in the case of loans and interests. Generally interest expenses paid on a loan are deductible under Swedish law.[99] However, in an advance ruling it was stated that a head office and a PE could not enter into loan agreements since they were to be considered being two parts of the same enterprise.[100] The loan was denied as a transaction and therefore also all payments of interest were denied.

The tax agency however argues in favour of that rents for the right to use capital equipment arising from the PE should be deductible if the PE explicitly is using the capital equipment and has them at its full disposal. Also, the rents should be equivalent to former depreciations made by the foreign head office.[101]

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[99] Chapter 16, § 1, ITA.
[100] The Council of Advance Ruling, 11 June 1987.
[101] The Tax Agency, Memorandum registration no. 126-94/901

Analysis

Definitions of the PE

To start the comparison of the different legal systems' treatment of the PE, we will look at the definitions of the PE. At a first glance, the definitions might seem to be very similar; perhaps even close to identical. After investigating the legislations further, however, one might find some small differences that may prove to be significant in a setting of Swedish ECT compliance.

The OECD MTC has a very clear definition of the PE in its fifth article; typical examples of what constitutes a PE are enumerated, as well as activities that are not to be defined as PEs.

The definition of a PE within the EC-law is however not that clearly stated. The definition in the Parent-Subsidiary Directive and the Interest and Royalties Directive are definitions explicitly made for the purpose of the directives. Since they are a part of these directives the general opinion is that these definitions will function as a definition of the PE under EC-law. To a great extent, these definitions are in line with the OECD MTC definitions. However the statements in the directives are not uniform with each other, which leave room for further discussion.

The definition of a PE under Swedish tax legislation is closely related to the definition in the OECD MTC. They are almost identical, but for three exceptions. First, a building site, construction work or installation project in Sweden constitutes a PE regardless of the time involved, as domestic legislation does not include a minimum time period. Second, real estate treated as a current asset constitutes a PE under the domestic definition. Third, activities of a preparatory and auxiliary character listed under paragraph 4 of article 5 of the OECD MTC are not included it the definition of a PE under domestic legislation.

Overall, the Swedish legislation regarding PEs is very similar to the definitions in the OECD MTC. The Swedish legislation stated to have its starting point in the same principles as the definitions in the OECD MTC article 5.[102] The differences found are motivated in preparatory work made by the Swedish Government in 1986/87.[103] It is argued that the exclusion of some parts of the OECD MTC definitions of a PE are made because of the regularly exclusion of the same parts in Swedish DTCs. Therefore the OECD MTC definition would not imply a correlation between internal and international tax law. Worth noticing is that the Swedish legislator here has chosen to adopt more to internal law than to the OECD MTC, which in this setting may be regarded as an international harmonization standard.

In general, it seems that the definitions of the PE in the legislative systems are close to each other. It is outside the scope of this thesis to follow changes in the legislative systems over time. Therefore it is hard to decide if the definitions in the legislative systems are changing in a direction of more convergence or shifting away from each other. However, studying commentaries and reasoning related to the legislative systems, it seems reasonable to believe that the systems to some extent are constructed with convergence in mind.

Business Profits

There is no ruling concerning the issue of treatment of business profits either in the EC law or in ECJ cases. However, there are directions on how to distribute profits in commentaries made by AG Léger, advocate-general of the ECJ. These commentaries are by some argued to be strong evidence that the EC law is moving towards wholly adopting the OECD MTC approach.[104]

Regarding the treatment of PEs in relation to its head office, the profits of the PE are to be calculated in such a way that the PE is to be considered being a distinct and separate entity and not a part of the head office's enterprise, even though formally, the PE is a part of the enterprise of the head office. We have found that in the OECD MTC and in statements made by an Advocate-General of the ECJ, almost exactly the same wording is used regarding this issue.[105] In practice, the same course of action is taken in the Swedish tax

[102] Government Bill, 1999/2000:2, part 2, p. 47.
[103] Government Bill, 1986/87:30, p. 42f.
[104] Cahiers de Droit Fiscal International 91b, p. 72.
[105] See OECD MTC article 7, Case C-253/03, *CLT-UFA SA v. Finanzamt Koln-West* and Case C-210/04, *Ministero delle Economia e delle Finanze, Agenzia delle Entrate v. FCE Bank Plc.*

law, even though it is not stated specifically in the context of PEs. However, Swedish case law settles that the profits of a PE shall be calculated as if the PE was a distinct and separate entity.[106]

In contrary, it has been stated in two Swedish case laws that capital is not to be attributed from a Swedish head office to a foreign PE.[107] It has however been questioned whether these case laws has a general application.[108] Anyhow, tax agencies will most likely refer to these case laws in cases of attribution of capital to a foreign PE.

Even though Sweden according to case law utilizes a separate entity approach for a general calculation of profits attributed to the PE, it may be questioned if the use of the approach is consistent. In most situations, the separate entity approach applies, but when considering the transfer of an asset from a Swedish head office to a foreign PE, that dealing will be seen as a dealing between two parts of the same enterprise and therefore not recognized for tax purposes. This is, however, only valid under domestic law or under a DTC utilizing the credit method.

Compatibility with the Four Freedoms

Above, the profit allocation in practice as treated by Swedish tax law have been presented. What is of interest is to see if this treatment is in line with the overall EC-law concerning freedom of establishment. The main rule of the EC-law is that there can be neither discrimination nor hindrances of movement within the EU. EC case law especially states that discrimination within a member state of non-resident entities in favour of resident companies is not accepted.

It is noticed in the scenario study above that profit attribution from a Swedish point of view is made in accordance with the arm's length principle. Exit taxation and taxation from selling an asset is calculated with taxation on the difference of the Fair market value and the Acquisition value of the asset. The tax system is by this adjusting prices set that might be lower than they would have been if the contractual parties were unrelated. Such

[106] See Rå 1971 ref. 50.
[107] See The Administrative Court of Appeal in Stockholm, case no. 4418-2000, 13 December 2000 and The Council of Advance Ruling, 11 June 1987.
[108] Cahiers de Droit Fiscal International 91b, p. 634.

discriminations described in the EC-cases have not to be found in the Swedish legal system. There are differences in the definitions of a PE, and also differences in the profit attribution. That these differences would not be in line with the four freedoms is not assumed.

Conclusions

Regarding definitions of the PE, the Swedish tax legislation in most senses appears to be in line with the EC definitions and OECD definitions. Since the definition under EC-law still is not uniform, one further issue to discuss would be what impact a future ruling of ECJ on a definition on a PE would have, especially on Swedish tax legislation.

Also in the case of business profits and treatment of PE in relation to its foreign head office, a future ruling of the ECJ would be very interesting to follow. Most likely there will not be much of a change from AG Léger's commentaries to the ECJ-cases, since there is a desire to move towards a more harmonized Europe within the field of taxation. We have found that, regarding attribution of profits to PEs, Sweden is far in line with the OECD and EC-law. However, there are a numerous of situations where the treatment differs. The general domestic principles are unclear in some situations and an amendment of the domestic principles is most likely needed.

Finally, we do not find any evidence that, despite the differences in the legal systems, the Swedish tax law is in conflict with the EC-law. An amendment of the national provisions may be needed to clarify some situations, but not for the purpose of being compatible to EC-law.

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