This contribution on recent case law in India from a Swiss Perspective was drafted on the impulsion of the forthcoming free trade Agreement between India and the EFTA [1]. The similarities between India and Switzerland are striking (Federal State, with decentralized competence) as well as the differences: Switzerland is a civil law country while India is a common law jurisdiction. The differences and similarities are also reflected in the interpretation of the Double Tax Treaties entered into by both countries.

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RECENT INDIAN TAX CASE LAW

A Swiss Perspective

1. INTRODUCTION

In 2009, two important judicial decisions were rendered for inbound investors (*JDIT* v. *Krupp Uhde GmbH* – permanent establishment, and *DCIT* v. *DaimlerChrysler India Private Limited* – Non-Discrimination clause) by the Income Tax Appellate Tribunal. Those two decisions will be commented in this paper (infra points 3 et 4), under a Swiss perspective, after a short introduction to the Indian treaty network (infra point 2). We will also briefly review the consequences of the transfer of a controlling interest (indirect ownership) in an Indian company (infra point 5).

2. THE INDIAN TAX TREATY NETWORK

India has entered into *double tax treaties (DTT)* with more than seventy countries, among which its major commercial partners such as the United-States, most European countries, Switzerland, Saudi-Arabia, Singapore and Russia. India is not a member of the OECD, but an enhanced engagement country. Furthermore, India widely used the UN Model Convention as an inspiration in drafting its DTT. As a consequence, depending on the applicable DTT, the UN Model Convention is of persuasive value [2].

The UN Model grants more taxation rights to the State of source (invested country) than the OECD Model. The differences between both Models are limited in number but very significant [3]. The UN Model induces more situations where business is deemed to be carried through a permanent establishment; consequences of having a permanent establishment are also different in both Models, because of the limited force of attraction provided by the UN Model [4]:

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«3. The term ‹permanent establishment› also encompasses:
(a) A building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than six months;» [5]

Under the Indian domestic tax legislation, royalties, fees for technical services, interest, capital gains on disposal of shares of a company with seat in India are in principle subject to tax (Income tax Act of 1961). Such tax liability is limited by double tax treaties. However, the interplay between the DTT, the Income tax Act and the Finance Act are complex, but as a principle, the DTT is binding on the parties to it and that it keeps the status of an international agreement irrespective of what are the provisions of the Income tax and Finance Acts and amendments inserted subsequently to the entry in force of the DTT [6].

3. PERMANENT ESTABLISHMENT

As previously mentioned, business carried out in India is more likely to be considered to constitute a permanent establishment because most of India's tax treaties provide a lower threshold for such qualification compared to DTT based on the OECD Model.

As an example, art. 5 par. 2 lit. k of the DTT between India and US provides that:
«The term permanent establishment includes especially:
(k) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities (together with other such sites, projects or activities, if any) continue for a period of more than 120 days in any twelve-month period;»

This Article differs significantly from the U.S. and OECD Model provisions, principally by requiring a lesser nexus before a permanent establishment is determined to exist in another State. This Article is more similar in many respects to art. 5 of the UN Model, and to the permanent establishment definition in US treaties with some countries. Under the OECD Model, assembly projects and supervisory activities shall not constitute a permanent establishment, even after the period of time provided in the applicable DTT [7].

Furthermore, the provision in the DTT with the US specifies (together with other such sites, projects or activities, if any), the plain reading meaning that for assessing the existence of permanent establishment, one should not only look at the site or project in question, but also other sites or projects, which, per se, might not trigger a permanent establishment. The «other» sites and projects also have an influence on the computation of the period necessary to create a permanent establishment [8]. This is consistent with the US technical explanations

«Subparagraph (k) provides rules to determine when a building site or a construction, assembly or installation project constitutes a permanent establishment. Only if the site, project, etc. lasts for more than 120 days in a twelve-month period does it constitute a permanent establishment. The time spent on supervisory activities connected with the project or activity is included in determining whether the 120-day test has been met. A series of construction sites or projects are to be combined for purposes of applying the time threshold test. The 120-day period begins when work physically begins in a Contracting State.» [9]

The definition of a permanent establishment according to art. 5 par. 2 lit. i of the DTT entered into between India and Germany is much narrower:

«The term permanent establishment includes especially,
(i) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities continue for a period exceeding six months.»

The provision in the DTT between India and Switzerland is identical (the use of the plural for the term «activity» does not have any particular meaning in this respect):

«The term permanent establishment shall include especially:
(j) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or supervisory activity continues for a period of more than six months;»

The case of JDIT v. Krupp GmbH (a company resident in Germany) illustrates clearly the differences between the Indo-US treaty, on one hand, and the Indo-German and Indo-Swiss treaties, on the other hand.

3.1 The facts. Krupp Uhde GmbH, a company with seat in Germany, was engaged during assessment years 1998–1999 and 1999–2000 in the business of providing services covered by art. 5 par. 2 lit. i of the Indo-Germany DTT in the form of assistance and supervision of various projects and basic engineering services and technical know-how. During this period, and based on a service agreement, the income received by Krupp Uhde GmbH was subject to tax. Under the Income tax Act [10], royalty and technical services are subject to tax in India, the said tax being limited to 10% by art 12 DTT (Royalties). Under Indian domestic law, the same services performed through a permanent establishment were subject to direct taxes at a rate of 30% according to section 115A, without any limitation by virtue of the DTT.

The Revenue was of the opinion that Krupp Uhde GmbH had a permanent establishment in India under par. 2 lit. i of the Indo-Germany DTT.

3.2 The Judgment. The *Income Tax Appellate Tribunal (ITAT)* had to rule whether:

1. Various contracts entered into by the assessee with Indian counterparts have to be taken into consideration to determine the existence of a permanent establishment when those contracts have no effective interconnection with each other;
2. The period of six months has to be counted from the date of commencement of the project itself globally only where there is one single indivisible contract for various activities undertaken by the assessee;
3. The supervisory activity construed in accordance to art. 5 par. 2 lit. 1 DTT and conducted under an independent contract begins with respect to the six months period when the supervisory activity itself has commenced and not since the whole project commenced;
4. An interruption caused by various factors can be excluded while computing the minimum period of six months;
5. The minimum period of six months is to be counted from the date when the activity starts until the date when the work covered by the supervisory agreement is completed, irrespective of the calendar year to which the period relates.

With respect to question (1), the ITAT held that since the plain reading could not answer the question, commentaries and parallel treaties had to be taken into consideration. The ITAT conclusion was that when the contracting States intended that different sites, projects or activities should be taken into consideration to determine the existence of a permanent establishment, they provided so expressly in the DTT, as it is the case in the DTT entered into with the US [11]. In the absence of a wording similar to one in the Indo-US DTT, each site, project or installation (and supervisory activity in connection with such sites, project or installation) should be considered individually. This is the case even though a foreign company has unconnected contractual agreements with the same Indian counterparty. The UN Model Commentary seems to comfort that opinion [12], although a contextual and holistic interpretation would enlighten the presence of the words «for the same or connected project» in art. 5 sub par (b) (in relation with the furnishing of services) and their absence in art. 5 par (a) UN Model.

As a consequence, the ITAT also held that (2) independent agreements to provide services to different counterparties cannot be considered together for computing the six months period. Alternatively, the activity covered by a single indivisible agreement to provide services covered by art. 5 par. 2 lit. i must be counted from the date of commencement of the project [13]. This opinion is in line with a prior decision of the Supreme Court [14].

According to the Revenue, the activity of supervisory nature, even if provided in an independent contract, is deemed to begin, for the computation of the six months period, when the whole project starts. Krupp Uhde however was of the opinion that the permanent establishment shall be deemed

to exist only when the supervisory activity commences. The ITAT (3) held that a plain reading of art. 5 par. 2 lit. i confirms that each activity should be considered separately [15]. A different solution would lead to cause an assessee to be taxed because the activity was performed by an independent third party on the same project.

The ITAT then ruled that (4) the six months period cannot be suspended on account of various factors once commenced. Krupp Uhde GmbH contended that the period of time when technicians were not working in India should not be included in the computation of the six months period. The UN Model Commentary also confirms that

«A site exists from the date on which the contractor begins his work, including any preparatory work, in the country where the construction is to be established, e. g., if he installs a planning office for the construction. In general, it continues to exist until the work is completed or permanently abandoned. A site should not be regarded as ceasing to exist when work is temporarily discontinued. Seasonal or other temporary interruptions should be included in determining the life of a site» [16].

Finally, (5) the Tribunal ruled that the six months period had to be computed irrespective of the calendar year involved [17]. The Protocol to the Indo-US DTT provides a similar solution:

«It is understood that where an enterprise of a Contracting State has a permanent establishment in the other Contracting State in accordance with the provisions of paragraphs 2(j), 2(k) or 2(l) of Article 5 (Permanent Establishment), and the time period referred to in that paragraph extends over two taxable years, a permanent establishment shall not be deemed to exist in a year, if any, in which the use, site, project or activity, as the case may be, continues for a period or periods aggregating less than 30 days in that taxable year. A permanent establishment will exist in the other taxable year, and the enterprise will be subject to tax in that other Contracting State in accordance with provisions of Article 7 (Business Profits), but only on income arising during that other taxable year.»

4. CAPITAL GAINS ON DISPOSAL OF SHARES IN COMPANIES WITH THEIR SEAT IN INDIA [18]

Case law in India about the interpretation of non-discrimination clauses, as well as the acknowledgement of the overriding effect of Tax treaties, has «swung like a pendulum» for years. The above-mentioned case provides guidance on the scope and interpretation of non-discrimination clauses in DTTs entered into by India.

Art. 24 UN Model reproduces art. 24 of the OECD Model Convention. The OECD Commentary of art. 24 is therefore fully relevant to the interpretation of art. 24 UN Model. Art. 24 DTT between Switzerland and India is fairly similar to art. 24 DTT between Germany and India, but it has an additional paragraph which states «In this Article, the term taxation means taxes which are the subject of this Agreement», which is not relevant in the present case.

4.1 Facts. *DaimlerChrysler India Private Limited (DCI)* is a company incorporated and resident of India. At the beginning of the assessment year 1999–2000 (financial year 1998–1999), on May 7th, 1998, the merger between *Daimler-Benz AG (DBAG)* (Germany) and *Chrysler Corporation (USA)* in a new company *DaimlerChrysler AG (DCAG)* (Germany) was announced and took effect on November 12, 1998. DBAG held 81.33% of DCI prior to the merger. After the merger, DCAG held the same shareholding in its Indian subsidiary, the balance (18.67%) was held by the *TATA group*. In short, the shares held by DBAG were transferred to DCAG.

From an Indian domestic tax perspective, more that 51% of the share capital of DCI was transferred to a new shareholder triggering prima facie the application of Section 79 of the Income Tax Act (about the carrying forward and set off of losses in the cases of certain companies). The Revenue was of the opinion that losses of DCI cannot be carried forward after the completion of the merger.

Section 79 of the Income Tax Act, as it then stood provided that:

«Notwithstanding anything contained in this Chapter, where there is any change in shareholding has taken place in the case of a company, not being a company in which public are substantially interested, no loss incurred in any year prior to the previous year shall be carried forward and set off against income of previous year unless –

(a) on the last date of the previous year, the shares of the company carrying no less than 51% of the voting power were substantially held by the persons who beneficially held the shares of the company carrying no less than 51% of the voting power on the last day of the

year or years in which the loss was incurred: Provided that nothing contained in this section shall apply to a case where a change in voting power takes place in previous years consequent upon death of a shareholder or on account of a transfer by way of a gift to any relative of the shareholder making such a gift.
(...)»

The expression «company in which public are substantially interested» in Section 79 is defined under the Income Tax Act. Chapter 1, Section 2 (18) as follows:
«(18) A company is said to be a company in which the public is substantially interested:
(...)
(b) If it is a company which is not a 39 private company as defined in the Companies Act, 1956 (1 of 1956), and the conditions specified either in item (A) or in item (B) are fulfilled, namely:
(A) Shares in the company (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) were, as on the last day of the relevant previous year, listed in a recognized stock exchange in India in accordance with the Securities Contracts (Regulation) Act, 1956 (42 of 1956), and any rules made there under;
(B) Shares in the company (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) carrying no less than fifty per cent of the voting power have been allotted unconditionally to, or acquired unconditionally by, and were throughout the relevant previous year beneficially held by:
(a) The Government, or
(b) A corporation established by a Central, State or Provincial Act, or
(c) Any company to which this clause applies or any subsidiary company of such company if the whole of the share capital of such subsidiary company has been held by the parent company or by its nominees throughout the previous year.»

Furthermore, DCI was not «a company in which public are substantially interested». Neither DCI nor DCAG were listed on a recognized stock exchange in India. Hence, according to the Revenue, DCI ought not to be allowed to carry forward and set off accumulated losses. DCI, on the other hand, contended that such an interpretation of Section 79 is in violation of the non-discrimination clause (art. 24[4]) of the DTT.

4.2 The Judgment. DCI filed an appeal before the ITAT and said jurisdiction had to rule whether:
1. A tax treaty is applicable when there is no double taxation of income;
2. DCI, being a tax resident of India, is not eligible for treaty protection in India from the provisions of the Income Tax Act;
3. DCI was discriminated, pursuant to the non-discrimination clause of the Indo-German tax treaty.

With respect to question (1), the ITAT held that the treaty override covers all provisions of tax treaties including provisions relating to non-discrimination, which can be construed as a relief provision [19].

The ITAT also held that (2) under art. 24 (4), DCI is entitled to treaty protection. Paraphrasing art. 24 (4), such article applies when the conditions hereunder are satisfied:
→ An enterprise resident of India, which has capital; → The capital of such Indian enterprise is owned or controlled, directly or indirectly, by one or more residents of the other Contracting State (Germany in the case at hand); → The Indian enterprise is subject in India to a taxation or requirement connected therewith; → Such taxation or requirement connected therewith is different (other) or more burdensome than the taxation and connected requirements to which enterprises of the first-mentioned State are or may be subject; → Such other enterprises are similar to the Indian enterprise.

In view of the above, it is not necessary that DCI be a resident of Germany. Additionally, the disentitlement of the loss carried forward affected first DCI from a fiscal standpoint and subsequently and economically, its parent company DCAG.

The Revenue also contended that to ascertain that a discrimination against DCI existed, what has to be examined is the differentiation in tax treatment of DCI vis-à-vis another Indian company which was owned or controlled, directly or indirectly, by one or more residents of a Third country (ie not Germany). The reach of the non-discrimination provision was consequently not broad enough to give any right to DCI.

The Revenue's opinion was supported by a famous decision of The House of Lords in the UK *(Boake Allen Limted and others v. HRMC)* [20].

The ITAT held that this opinion is at variance and inconsistent with a series of judgements in Europe and in the USA [21] and the comparison has to be made between a subsidiary of a domestic parent company and a subsidiary of a foreign controlled company. As a consequence, the existence of discrimination has been acknowledged (3). The ITAT concluded that the differentiation in treatment based on the stock exchange in which shares of the parent company are listed is unreasonable. By doing so, the ITAT referred explicitly to the doctrine of reasonableness [22].

4.3 Doctrine of reasonableness. The ITAT left open the question as to whether India's non-discrimination clauses were to be interpreted as not prohibiting different treatments in different circumstances, when such a different treatment is reasonable [23], notably in relation with the Indo-US DTT [24].

The differentiated treatment is institutionalized in the US Technical Explanations which state that the US non-discrimination provision (art. 24 [5]), which is almost identical to the OECD non-discrimination clause [25]: «does not prohibit differing treatment of entities that are in differing circumstances». This justifies the levy of withholding tax on foreign partners' share of effectively connected income under § 1446 of the US Revenue Code [26].

A similar doctrine exists in the Swiss jurisprudence. The Administrative court of Zurich [27] denied a violation of the non-discrimination clause between Switzerland and Japan because of taxation at source of foreign employees [28]. The

reasoning of the Administrative Court of Zurich was that the right provided by art. 24 (1) OECD is similar to the guarantee provided by the Swiss Constitution, especially the guarantee of an equal treatment. Under the Swiss Constitution, a different treatment is not prohibited if not arbitrary (or if there is a reasonable cause for such differentiation of treatment) [29]. According to the said judgement, the same reasoning should apply to art. 24 (5) OECD Model and differentiation of treatment based on reasonable grounds (ie. not arbitrary or irrelevant).

The non-discrimination clause (especially 24 [1] discrimination on the grounds of nationality and 24 [4] foreign control discrimination) of the DTT between Switzerland and India should be read keeping in mind the above.

5. CAPITAL GAINS ON DISPOSAL OF SHARES IN COMPANIES WITH THEIR SEAT OUTSIDE INDIA

An alternative to a change in direct ownership (such as in the *DaimlerChrysler* case) is a sale of the controlling interest in an off-shore SPV. Prima facie, this type of transaction may allow more flexibility from a tax standpoint since a direct transfer of the shares in an Indian company is avoided.

Since last year, the Revenue is scrutinizing the indirect transfer of controlling interest in Indian companies. The Revenue is of the view that M&A transactions involving the indirect ownership of a company with seat in India is liable to tax in India. Section 5 of the Income-tax Act 1961 provides that the right to tax in India is based on domicile/residence, on one hand, and on source of income, on the other hand. Pursuant to Section 9 (1) (i) of the said act, income is deemed to accrue in India through or from (a) business connection in India, (b) property in India, (c) any asset, (d) any source of income in India and (e) through the transfer of capital assets in India. Furthermore, and in this respect, the «Effects doctrine», which is followed by the Supreme Court of India [30], widens the scope of application of Section 9.

As a consequence, the Revenue is of the opinion that when the dominant purpose of entering into agreements between two foreign companies is to acquire controlling interest in an Indian company, the transaction shall be subjected to tax in India.

This interpretation of the Indian tax sovereignty by the Revenue was upheld before the High Court of Bombay in the *Vodafone* case where as a result of the sale of an indirect ownership of the Honk-Kong based company Hutchison to a company within Vodafone group in the Netherlands resulted in a capital gain of about USD 2 billion [31]. The Mumbai High Court rejected the petition on formal grounds, terming it was premature. However, some of the observations made by the Mumbai High Court have far reaching implications, notably that the Court held that since the very purpose of the transaction was the transfer of the controlling interest of an Indian company, the transaction would certainly be subject to capital gain tax in India.

This is a trend also represented by the new circular n° 698 published on December 10, 2009 by the Chinese Tax Administration on reporting obligations of indirect equity transfers of Chinese companies by Chinese non-residents. These new reporting obligations will allow the Chinese Revenue to investigate indirect transfers and, based on a substance over form doctrine, re-characterize the equity transfer as subject to Withholding tax in China.

6. CONCLUSION

The Krupp Uhde case illustrates that the level of activity which creates a permanent establishment varies significantly from one DTT to another, from an Indian perspective, mainly due to the fact that the UN and OECD models have substantially different definitions, particularly when cross-boarder services are concerned. Furthermore, the definition of permanent establishment in Indian domestic tax law is significantly wider than what is provided in the OECD and UN

Model and according to Swiss domestic tax law. Therefore, care should be taken when assessing the impact of choosing the jurisdiction from which supervisory activities are rendered in India.

The DaimlerChrysler case demonstrates that M&A crossboarder transactions in India should be structured with utmost care, since the risk of litigation is high in case of a transfer of indirect ownership (such as in the Vodafone case). The use of an on-shore SPV may allow to mitigate an important part of the said risk. Finally, it seems that the Indian and Swiss interpretation of the non-discrimination clause recognize a forbidden discrimination only when the differentiation of treatment is unreasonable. ■

Notes: 1) http://www.efta.int/content/free-trade/ongoing-negotiations-or-talks/india. **2)** Motorola Inc. v. DCIT (2005) 95 ITD 269 (Delhi). **3)** Important differences can be found in Art. 5 – Permanent establishment, Art. 7 – Business profits, Art. 9 – Associated enterprises, Art. 10 – Dividends, Art. 11 – Interest, Art. 12 – Royalties, Art. 13 – Capital gains and Art. 21 – Other income; Bart Kosters, The United Nations Model Tax Convention and Its Recent Developments, IBFD, Asia-Pacific Tax Bulletin 2004, p. 4. **4)** Bart Kosters, The United Nations Model Tax Convention and Its Recent Developments, IBFD, Asia-Pacific Tax Bulletin 2004, p. 5. **5)** Art. 5 par 3 UN Model. **6)** See Rajesh Kadakia, Nilesh Modi, The Law and Practice of Tax Treaties: An Indian Perspective, New Delhi, 2008, for a detailed analysis of the case law in relation with the interplay of DTT and Indian domestic tax legislation. **7)** Bart Kosters, The United Nations Model Tax Convention and Its Recent Developments, IBFD, Asia-Pacific Tax Bulletin 2004, p. 5. **8)** Krupp Uhde GmbH v. Joint Director of Income Tax, ITAT Mumbai Bench (L), of January 7, 2009. **9)** Treasury Department Technical Explanation (hereafter: TE) of the Convention and Protocol between the USA and the Republic of India for the avoidance of double taxation and the prevention of the fiscal evasion with respect to taxes on income, signed on September 12, 1989, ad article 5. **10)** Section 90 cum section 115 A. Section 90: (1) The Central Government may enter into an agreement with the Government of any country outside India (a) for the granting of relief in respect of (i) income on which have been paid both income-tax under this Act and income-tax in that country; or (ii) income-tax chargeable under this Act and under the corresponding law in force in that country to promote mutual economic relations, trade and investment, or (b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country, or (c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country, or investigation of cases of such evasion or avoidance, or (d) for recovery of income-tax under this Act and under the corresponding law in force in that country, and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement. (2) Where the Central Government has entered into an agreement with the Government of any country outside India under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee. (3) Any term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf. Explanation. For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company. **11)** Krupp Uhde GmbH v. JIDAT, par. 24. **12)** UN Commentary ad art. 5 page 77. **13)** Krupp Uhde GmbH v. JIDAT, par. 28. **14)** Sumitomo Corporation v. DCIT (2008) 110 TTJ 302 (DEL). **15)** Krupp Uhde GmbH v. JIDAT, par. 29, 30 and 31. **16)** Art. 5 UN Model Commentary. p. 77. **17)** Krupp Uhde GmbH v. JIDAT, par. 33. **18)** DaimlerChrysler India Private Limited v. DCIT, ITAT Pune Bench (B), of January 21, 2009. **19)** DaimlerChrysler India Private Limited v. DCIT, par. 31. **20)** Boake Allen Limted and others v. HRMC (2007) UKHL 25, see Arun Birla, Cahiers de droit fiscal international (USA), Vol 93a (2008), page 610. It should be mentioned here that a recent decision of the First Tier Tribunal Tax Tribunal held that UK rules on group relief (pre 2000) breach the non discrimination article in the US UK DTT, FCE Bank plc v. HRMC (2010) UK FTT 136 (March 24, 2010). **21)** For a summary, see DaimlerChrysler India Private Limited v. DCIT, par. 60 and seq. **22)** DaimlerChrysler India Private Limited v. DCIT, par. 92. **23)** Automated Securities v. ITO (ITAT Pune) 118 TTJ 619. **24)** DaimlerChrysler India Private Limited v. DCIT, par. 92. **25)** Arun Birla, Cahiers de droit fiscal international (USA), Vol 93a (2008), page 627. **26)** Arun Birla, Cahiers de droit fiscal international (USA), Vol 93a (2008), page 633. **27)** ZsTP 1992, page 135 and seq. **28)** Xavier Oberson, Précis de droit fiscal, 2ème édition, p. 205, Klaus Tappolet, Verstösst die Quellenbesteuerung ausländischer Arbeitnehmer gegen staatvertragliche Gleichbehandlungsklauseln? In Festschrift Zuppinger 1989, p. 631. **29)** Stefan Oesterhelt, Cahiers de droit fiscal international (Switzerland), Vol 93a (2008), page 591. **30)** Shyama Charan Agarwala & Sons v. Union of India (2202) 6 SCC 201. **31)** Vodafone International Holdings BV v. Union of India (2008) 175 Taxmann 399 (Mumbai), December 3, 2008.

RÉSUMÉ

La jurisprudence récente indienne en matière fiscale

L'Inde est un partenaire commercial important de la Suisse et l'Accord de libre-échange actuellement en négociation avec l'AELE accroîtra certainement cette coopération économique. Du point de vue du droit fiscal international, deux jugements importants ont été rendus en 2009 en faveur du contribuable par des juridictions d'appel au sujet d'investissements effectués en Inde par des sociétés allemandes. Le premier jugement (*JDIT* v. *Krupp Uhde GmbH*) concerne la notion d'établissement stable et le second (*DCIT* v. *DaimlerChrysler India Private Limited*) l'application des clauses de non-discrimination. Le premier jugement illustre les différences fondamentales entre les droits interne suisse et indien, notamment en raison des critères d'assujettissement économique beaucoup plus larges en Inde, alors que le second laisse entrevoir une approche commune de l'interdiction de la discrimination prévue dans les conventions de double-imposition conclues par les deux pays. Les deux jugements reposent sur des dispositions identiques à celles contenues dans la convention de double imposition qui lie la Suisse et l'Inde. Finalement, les conséquences fiscales en droit fiscal interne indien d'une vente indirecte d'une société indienne par le transfert des actions de sa société-mère *(SPV off-shore)* seront également brièvement abordées (*Vodafone International Holdings BV* v. *Union of India,* jugement incident sur une question de procédure). *JM*