



VAT alert Belgium

No fixed establishment for VAT when a foreign based company rents out immovable property without own staff

On 3 June 2021, the Court of Justice of the European Union (CJEU) issued its ruling in the *Titanium Ltd* case (C-931/19), regarding the question whether renting out real estate can qualify as a fixed establishment for VAT. In a bold and clear judgment, the Court confirms that there is no fixed establishment if no own personnel is in place.

Facts

Titanium is a company whose registered office and management are located in Jersey, dealing with property and asset management as well as management of housing and accommodation. In that context it owned Austrian real estate and rented this out with VAT to Austrian companies.

For property management, Titanium contracted with an Austrian real estate manager who acted as an intermediary between service providers, invoiced rental fees and operating costs, prepared VAT declarations, etc. The property manager had its own office to supply these services.

Titanium retained the decision-making power to conclude and terminate leases, to determine the economic and legal conditions of the tenancy agreements, to make investments and repairs and to organize their financing, to choose third parties intended to provide other upstream services and, finally, to select, appoint and oversee the real estate management company itself.

In these circumstances, the Austrian VAT authorities took the view that Titanium had a fixed establishment in Austria, a view challenged by Titanium. The latter argued that in the absence of staff, the property which it rented out could not be regarded as a fixed establishment. Eventually, the Austrian Federal Finance Court, decided to refer the case to the CJEU asking whether it is always necessary that the service provider's own staff must be present, or it may be possible that, in specific case of renting out immovable property, there can be a fixed establishment without human resources attached to it.

The court's decision

In a very brief judgement, the court ruled that there can be no fixed establishment for VAT purposes.

Referring to the VAT regulation and its previous case-law, notably *ARO-Lease*, it argued that having staff in place is crucial to have a fixed establishment. As this was not the case and all-important decisions were taken by the Jersey company, the Austrian tax authorities could not conclude that Titanium is established in Austria.

What does this mean for businesses?

Firstly, the court emphasizes that even for a business that is not labor-intensive, such as renting out immovable property, having personnel on the ground is a necessity to have a fixed establishment. All businesses need to have technical and human resources, merely having goods, machines, buildings etc. in another country cannot lead to a fixed establishment.

Secondly, it took into account that all decisions were ultimately taken in Jersey whereas the Austrian real estate manager had no decision power but merely executed tasks that it had been assigned to contractually.

The judgment has the advantage that it is clear, bold and very straightforward, which was not always the case in previous judgements that dealt with fixed establishments for VAT purposes. A very welcoming message for all companies that face difficulties when assessing their fixed establishment risk.

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