



VAT alert

Belgium

VAT on service supply: subsidiary not a fixed establishment of foreign based parent by default

In a recent case, the Court of Justice of the European Union confirmed that a subsidiary does not automatically qualify as a fixed establishment of a foreign based parent. A service provider should determine the recipient of its service based on commercial and economic reality, without being obliged to investigate whether the relationship between the parent and its subsidiary may qualify as a fixed establishment ([Dutch](#) | [French](#)).

Background

Dong Yang Electronics (Poland) supplied manufacturing services to LG Display Co. Ltd. (Korea) for the assembly of printed circuit boards, which were physically provided to Dong Yang by a Polish subsidiary of LG Display Co. Ltd. (Korea).

Under the general B2B rule for services, no VAT was charged on those services. The Polish authorities argued that the Polish subsidiary of LG Display Co. Ltd. qualifies as a 'fixed establishment' for the Korean company, and that Dong Yang Electronics should have charged Polish VAT on said services.

The Polish Court asked the CJEU whether the mere presence of a local subsidiary is enough for the supplier to conclude that the customer has a local fixed establishment receiving the service, and in the negative, whether the supplier should

examine this in more detail (based on the contractual relationship between the parent company and its subsidiary).

CJEU Decision

The CJEU starts with the general principle that in order to localise B2B services, the most appropriate and thus primary point of reference for determining the location of services supply, for tax purposes, is the location at which the taxable person established their business. It is only if that place of business does not lead to a rational result, or creates a conflict with another Member State, that another establishment may come into consideration.

The CJEU confirms that a subsidiary could qualify as a fixed establishment of its parent if the subsidiary is characterised by a sufficient degree of permanence, as well as by a suitable structure in terms of human and technical resources, to enable the foreign entity to receive and use the services supplied to it for its own needs. This should be determined based on the commercial and economic reality.

From a service provider perspective however, the tests as set-out in article 22 of Regulation 282/2011 should be applied. The service provider needs to consider the nature and use of the service; then the contract, order forms, and VAT numbers used; if the answer remains unclear, then it is the business establishment by default.

The service provider is thus not required to investigate the contractual relationship between the customer and its subsidiaries to determine where the customer is established from a VAT perspective.

As a result, the CJEU does not completely rule out the existence of a fixed establishment for LG Display Co Ltd. in Poland, but confirms that such an establishment cannot be inferred from the mere existence of a Polish subsidiary. Furthermore, Dong Yang cannot, as service provider, be expected to enquire on the contractual relationship between different LG entities to determine whether one is an establishment of the other.

Impact

The case is particularly important for jurisdictions where local tax authorities argue that subsidiaries constitute a fixed establishment of a foreign related company, in order to change the service location from a VAT perspective and assess local VAT (instead of a reverse charge). The case brings relief for service providers in such discussions if they correctly apply the abovementioned tests to determine the VAT treatment of their services. However, the case does not bring much clarity on the more fundamental question of when a foreign parent company can be considered as locally established through a local, legally independent, subsidiary.

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