



VAT alert Belgium

Subsidiaries only deemed VAT Fixed Establishment of foreign based entities if there are abusive practices - CJEU Advocate General

A preliminary question referred by the Polish courts to the Court of Justice of the European Union (CJEU) underlines an important issue on the concept of VAT fixed establishments for internationally active businesses (pending case 'Dong Yang', C-547/18). Advocate General Kokott delivered her Opinion in this case and took a clear stance against certain tax authorities' approach in considering a dependent but legally autonomous subsidiary as a fixed establishment of its foreign parent company. She invited the Court to provide a clear answer to this question.

Background & questions raised

Dong Yang Electronics (Poland) supplied manufacturing services to 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 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. Two questions were referred to the CJEU:

1. Is the sole fact that LG Display Co. Ltd. operates a subsidiary in Poland sufficient to conclude that LG Display Co. Ltd. has a fixed establishment in Poland?

2. If not, is it up to the supplier to analyse the contractual relation between the parent company and its subsidiary, then determine whether a fixed establishment exists or not?

Advocate General Kokott opinion: no fixed establishment

Advocate General Kokott took a clear stance on the concept of Fixed Establishment and the possibility for tax authorities to conclude that such a Fixed Establishment exists in the case at hand.

The AG starts by pointing out that the default position in the Principal Directive is to treat legal entities separately (except in VAT groups), and that the Implementing Regulations emphasise the need for certainty in defining where a customer belongs. Therefore, a dependent *but legally autonomous* subsidiary cannot be considered as a fixed establishment of its parent company.

This position follows directly from Article 44 of the VAT Directive and the concept of “a *single* taxable person” with a business based in one location and a fixed establishment in another. A parent company and its subsidiary are not one but rather **two single taxable persons**.

As for the question on whether *other criteria could lead to a subsidiary being regarded as a fixed establishment of its parent company*, AG Kokott voices “**fundamental reservations** that plead against equating the place where a subsidiary is established to a fixed establishment of a parent company”. Such approach could lead to conflicts with the provisions on the reverse charge principle (Article 196 of the VAT Directive), the concept of ‘VAT grouping’ (Article 11 of the VAT Directive) and jeopardise the principle of legal certainty for taxpayers.

Hence, the AG limits the cases where a subsidiary, that is a taxable person in its own right, could be attributed to another legal person to situations where **an abusive practice** is found to exist. In its earlier case law (DFDS), the CJEU ruled that a subsidiary that was a “mere auxiliary organ” could be a fixed establishment of its parent where there was a risk of tax loss arising from an abusive VAT structure. According to the AG, no such threat was apparent in this fully taxable supply chain. Therefore, Dong Yang should not have to charge Polish VAT to LG Display Co. Ltd. on its services.

Finally, regarding service providers’ obligations to carry out checks, AG Kokott reminds that unless there are indications to the contrary, a contracting partner can rely on written assurance from the other party that it does not have a fixed establishment in the country concerned.

Impact

The case is particularly important for jurisdictions where local tax authorities argue that subsidiaries, such as toll manufacturers, constitute a fixed establishment of a foreign related company in order to assess local VAT (instead of a reverse charge) on the tolling fee and any subsequent local

sales of end products. In Belgium, there are recent examples of such an approach by tax authorities, and it is therefore important for affected companies to re-consider their filing and audit positions pending the CJEU's final verdict.

Contacts

If you have any questions concerning the items in this alert, please contact your usual tax consultant at our Deloitte office in Belgium or:

- Charlotte Degadt, cdegadt@deloitte.com, +32 2 301 81 88
- Johan Van der Paal, jvanderpaal@deloitte.com, +32 2 600 66 39
- Charlotte De Jaegher (Laga), cdejaegher@laga.be, +32 2 800 70 75

For general inquiries, please contact:

bedeloittetax@deloitte.com, + 32 2 600 60 00

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