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Input VAT newsletter

"Titanium": a building is not a fixed establishment for VAT purposes

8 June 2021

On 3 June 2021, the Court of Justice of the European Union (the "Court") confirmed in the "Titanium" case (C-931/19) that a foreign company has no fixed establishment in the Member State where it owns and exploits a property if it does not have human resources in that Member State to exploit it. This is a positive decision for all concerned persons, of which there are many in Luxembourg—and here we examine why.

Background and question referred to the Court

A Jersey company owns and rents a building in Austria but has no employees or other resources there, such as an office or technical resources. As typically the case in these situations, a local property manager takes care of the property's day-to-day management while the owner, the Jersey company, has decision-making powers over the most important matters. These include whether to conclude or denounce the rent agreements, determine their legal and economic conditions, make investments and how to finance them, etc.

In addition, this local manager has its own premises, so it does not perform its activities in the property owned by the Jersey company.

From a VAT viewpoint, real estate transactions (such as buy and sale transactions, lease, etc.) and property-related services are, in principle, subject to VAT in the Member State where the property is located. This implies that when a foreign taxable person not established in that Member State performs these transactions, this person should, in principle, register for VAT and file VAT returns in that Member State.

However, article 194 of the EU VAT Directive ("article 194") allows Member States to foresee that, in these situations, the VAT payment obligation can be shifted to the service's beneficiary ("reverse charge"). Please note that Luxembourg does not allow this option.

Based on the Court's jurisprudence[1], a fixed establishment is characterized as having a sufficient minimum level of human and technical resources necessary to provide or receive the service, and a sufficient degree of stability in the sense of human and technical resources being permanently present.

The Austrian VAT authorities consider that Member States can determine the conditions of the application of article 194 and refused it in the case at hand. The dispute was brought to the Austrian tribunals, which referred the question to the Court under the following terms:

[1] *Berkholz*, 168/84, 20 February 1997; *DFDS*, C-260/95, 17 July 1997; *ARO Lease*, C-190/95, 28 June 2007; *Planzer Luxembourg*, C-73/06, 28 June 2006, *Welmory*, C-605/12, 16 October 2014.

"Is the term 'fixed establishment' to be interpreted as meaning that the existence of human and technical resources is always necessary and therefore that the service provider's own staff must be present at the establishment, or can—in the specific case of the letting, subject to tax, of a property situated in national territory, which constitutes only a passive tolerance of an act or situation—that property, even without human resources, be regarded as a 'fixed establishment'?"

The Court's decision and comments

To little surprise, the Court has decided that a building owned and exploited under the abovementioned conditions—i.e., the owner not having staff in the Member State where the building is located— is not a fixed establishment for VAT. The Court emphasizes that a structure without its own employees could not constitute a fixed establishment by reference to its previous jurisprudence[2] and to article 11 of the Council Regulation 282/2011[3] that requires human and technical resources able to provide or receive taxable transactions.

This confirmation is a positive decision if we consider the possible impact of the opposite decision (i.e., that the property is a fixed establishment).

The first consequence would be regarding Member States that allow the possibility of article 194 to implement reverse charge rules. They would have had to review whether these rules are still valid if the foreign taxpayer is considered established in their territory and, possibly, adapt these rules. This may have led to foreign companies having to register for VAT in the Member States that apply article 194 where they own and exploit properties in the abovementioned conditions.

The second consequence would have been the VAT treatment that applies to the purchase of some services.

Under the EU VAT Directive rules, it is necessary to distinguish whether the services acquired by the taxable person qualify as "real estate" or property-related services, which are taxable in the country where the property is located, or if they qualify as "general" services, which are taxable in the place where the recipient is established.

In this respect, despite the EU VAT Directive providing some clarifications to the concepts of "property-related" and "general" services, we note this distinction is not always easy to apply in practice and that it still may lead to double or no taxation. And even before considering double or no taxation, this generally leads to unnecessary discussions or even disputes with the VAT authorities.

And for taxpayers, beyond pure VAT compliance, this distinction can have an actual financial impact due to the differences in VAT rates or in the application of the VAT deduction rules between the country of the property and the country of establishment.

[2] ARO Lease, point 19.

[3] Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value-added tax.

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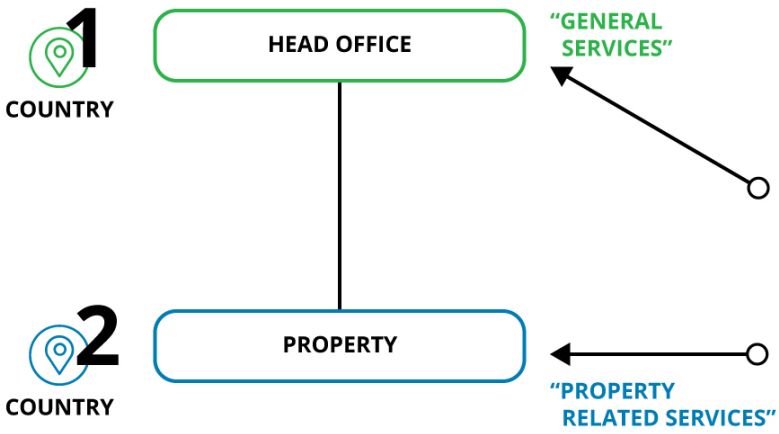
THE PROPERTY IS NOT A FIXED ESTABLISHMENT FOR VAT PURPOSES

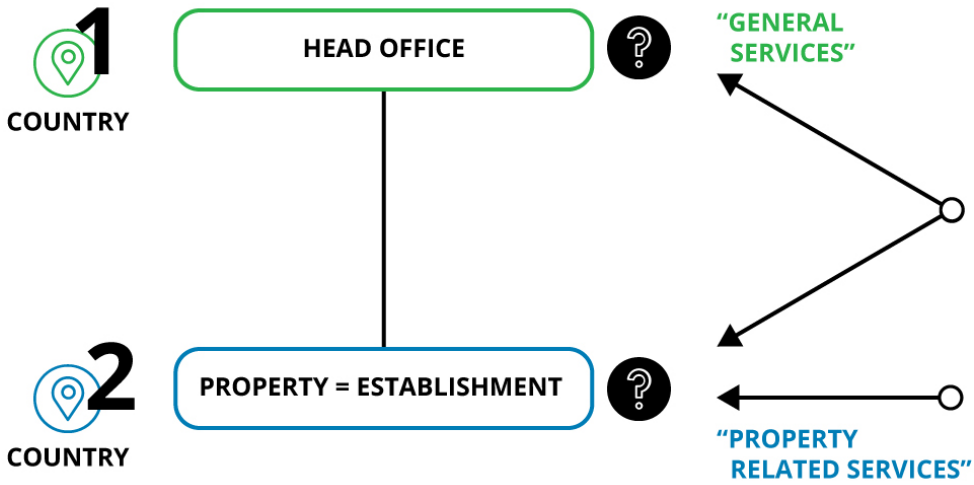


If the Court had decided that the property is a fixed establishment, it would not have made this situation less complex—on the contrary in fact, notably for taxpayers holding and exploiting buildings in different jurisdictions via one single entity.

Indeed, after taxpayers would have determined whether services received qualify as "general" or "property-related", for "general services", they would have needed to determine if these services shall be located at the place of the company's main establishment ("head office"), as is currently the case, or at the place of the fixed establishment, i.e., the country where the property is located.

This would have created an additional layer of complexity, despite some useful clarifications provided by the Court in its "Dong-Yang" (C-547/18) case. (See our newsletter of June 2020 "*Dong Yang—The Court of Justice of the European Union provides useful guidelines for service providers to help them determine who the beneficiary of their services is*".)

THE PROPERTY WOULD HAVE BEEN CONSIDERED AS A FIXED ESTABLISHMENT FOR VAT PURPOSES



Beyond real estate companies, we should mention that, if the Court had taken the opposite decision in this case, it may also have affected taxable persons with installations such as warehouses or servers in Member States where they are not established and do not have their own employees. Indeed, Member States could have considered that these installations qualify as fixed establishments, implying VAT registration obligations.

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Therefore, the Court's decision is good news for concerned taxable persons. This decision also provides an opportunity to remind organizations of the importance of carefully examining the VAT positions of companies with activities abroad in terms of VAT compliance obligations, for example. In particular, if a company has property abroad, organizations should place special attention on the localization of services, the application of the place of supply rules, and the computation of the input VAT deduction right.

If you would like to discuss the potential impacts of this topic on your organization, please contact the Deloitte Luxembourg indirect tax team.

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