Another positive ruling of the ECJ concerning fixed establishment

On 7 April 2022, the European Court of Justice ('ECJ' or 'the Court') issued a verdict in the Romanian case Berlin Chemie (C-333/20). The judgment concerns one of the most problematic issues in value-added tax (VAT) – the fixed establishment and continues the recently launched positive line of case law for taxpayers. The most important conclusion of the ECJ judgment is that the same technical and personnel facilities cannot be use simultaneously within the same transaction both to provide and receive the same services.

Case before the ECJ

Law case judged by the Court concerned Berlin Chemie a company, with its registered office in Germany, which has supplied pharmaceutical products to wholesalers in Romania. Due to the need of permanent deliveries to counterparties in that country, Berlin Chemie entered into a storage contract with a company with business office in Romania (an unrelated entity).

At the same time, Berlin Chemie entered into an agreement with its subsidiary that had its seat in Romania and whose main business activity was public relations and communication. Based on this agreement the subsidiary was obliged to promote the German company's products in Romania, in particular through marketing activities in accordance with the strategies and budgets set and developed by the German company. Furthermore, the subsidiary's tasks included: taking the necessary regulatory action to ensure that the German company was authorized to distribute its products in Romania, providing assistance in clinical trials and other actions in terms of science and develop research, and also: providing an adequately supply of medical literature and promotional materials approved by the German company. Moreover, the Romanian company also undertook to take orders for pharmaceutical products from contractors in Romania and forward them to the German company. Company was also obligated to process invoices and send them to the German company's customers.

The subsidiary received remuneration from Berlin Chemie for its services and documented them with invoices issued without Romanian VAT, but under the reverse charge, assuming that the place of supply for VAT purposes was the customer's seat (Germany). The tax authorities have held a different view. They recognized that the place of supply of services by the Romanian's subsidiary was in fact Romania, because the German company has a fixed establishment in that country. According to the authorities, the fixed establishment was created because Berlin Chemie had an uninterrupted access to technical facilities (mainly computers, operating systems, motor vehicles) and personnel facilities belonging to the Romanian subsidiary. At the same time, in the opinion of the authorities, these facilities were sufficient to make taxable supplies of goods or services on a regular basis.
Doubts regarding the fixed establishment of the German's company in Romania had a court which has sent preliminary's questions to the ECJ.

Conclusions of the Court's judgment

During analyze of the case, the ECJ has articulated a number of interesting and positive views on fixed establishment.

Firstly, the Tribunal repeated, following the judgment in the Polish case Dong Yang Electronics (C-547/18), that the existence of fixed establishment in the territory of a EU member state cannot be concluded solely from the fact that a company has a subsidiary in that member state.

The ECJ also added, in continuation of its earlier line of case law, that it is not necessary for a taxpayer to have his own technical or personnel resources in order to create a fixed establishment. According to the Court, it is sufficient "for a taxable person to be able to dispose of those technical and personnel facilities as if they were his own, for example, by the agreement of service or lease contracts, which make those facilities at his disposal and which would not be terminated at short notice".

The ECJ ruling also suggests that the existence of a fixed establishment cannot be implied from the sole fact that a subsidiary transfers technical and personnel facilities to the parent company through the provision of services that may affect the amount of the sale, if at the same time that subsidiary does not participate directly in the parent company's taxable activities.

Finally, the Court referred to the issue of the so-called purchase fixed establishment and concluded that the same facilities could not be used simultaneously to render and purchase the same services. In the discussed case, the technical and personnel facilities of the subsidiary, which were supposed to be a fixed establishemt of Berlin Chemie, were at the same time used by the Romanian company to provide services to the parent company.

The last statement of the ECJ is very interesting and universal. Despite the fact that the Courts's thesis is narrowed down to the particular services described in the judgement, in our opinion, it may constitute an argument also in other cases, in which also the tax authorities tend to find the existence of a fixed establishment, e.g. in tool manufacturing structures.

Should you have any questions or doubts about the issues mentioned in this information, please do not hesitate to contact us.

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