III SA / Gl 913/18 - Judgment of the Provincial Administrative Court in Gliwice

Date of judgment	2019-02-27 *the judgment is not final*
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Court	Provincial Administrative Court in Gliwice
referees	Krzysztof Kandut / chairman rapporteur /
Symbol with description	6110 Tax on goods and services 6560
Thematic entries	Tax on goods and services
The complained body	Director of the National Treasury Information
Content of the result	The contested individual interpretation was repealed
Regulations cited	OJ 2017 item 1221 art. 28b *Act of 11 March 2004 on tax on goods and services - consolidated text*

SENTENCE

Provincial Administrative Court in Gliwice in the following composition: Chairman Judge of the Provincial Administrative Court Krzysztof Kandut (spr.), Judges Judge of the Provincial Administrative Court Adam Nita, Judge of the Provincial Administrative Court Iwona Wiesner, Protocollant of St. sekr. court. Agnieszka Wita-Łyskawa, after hearing at the hearing on February 13, 2019, the cases from A Gmbh's complaint against the individual interpretation of the Director of National Tax Information of [...] No. [...] regarding tax on goods and services 1) repeals the individual interpretation under appeal; 2) awards the Director of the National Tax Information to the applicant for PLN 457 (in words: four hundred and fifty-seven zlotys) as reimbursement of court costs.

SUBSTANTIATION

The contested individual interpretation of the Director of National Tax Information [...] after reviewing the application of A Gmbh based in H. in Germany (hereinafter referred to as: the applicant, the company, the applicant) for an interpretation of tax law regarding tax on goods and services in identifying a permanent place of business to determine the place of taxation, found the company's position incorrect.

The decision was made in the following factual and legal state:

The application from [...] the company applied for an individual interpretation pursuant to art. 14b of the Act of August 29, 1997 Tax Code (Journal of Laws of 2017, item 201, as amended - hereinafter abbreviated: Op). In the justification, she indicated that she was a business entity under German law for which the place of business and registered office is Germany. Currently, the company is in the process of registration for the purposes of value added tax in Poland, as it will move its own goods from the territory of other EU Member States to Poland, which is in Poland intra-Community acquisition of goods (WNT) subject to tax - pursuant to art. 11 paragraph 1 of the Act of 11 March 2004 on tax on goods and services (Journal of Laws of 2017, item 1221, as amended - hereinafter referred to as: Act on PTU).

The company's main business is the production and distribution of footwear (PKD 47.72.Z - retail sale of footwear and leather goods in specialized stores). The company distributes footwear manufactured in non-EU countries and EU countries other than Poland.

The taxpayer presented three possible future events:

1. It may happen that a company purchases goods (footwear) from outside the EU. Clearance of goods may take place in Poland and then the company will show the import of goods in Poland and tax it in accordance with the provisions of the Polish Act on PTU.

2. It may happen that the company moves its own goods from another EU country (previously imported or produced in that other EU country) to the territory of Poland - then the company will show WNT in Poland and tax in accordance with the Polish Act on PTU.

3. It may happen that the company purchases goods (shoes) from another EU member state (previously imported or produced in another EU country) on the territory of Poland - then the company will recognize WNT in Poland and tax it in accordance with the Polish Act on PTU .

The company considers, in all three situations, that the transport of goods from a non-EU country or from an EU country to Poland should take place in the warehouse of a business partner (hereinafter referred to as: partner) unrelated to it, having its registered office in Poland. In the partner's warehouse, the goods belonging to the company will be packed, packaged and stored on the basis of a concluded contract. In other words, the partner will provide the company in Poland with storage, packaging and packaging services on the material entrusted to him, and this entrusted material will remain the property of the company. All services rendered in Poland to the company will be provided by the partner's employees. The contract will not provide for the provision of all or a specific part of the warehouse to the company, but for providing services related to storage, packaging and packaging, what should be distinguished from the lease of warehouse space. The storage period of the goods will not be specified either. The implementation of the contract will provide comprehensive logistical support for sales made by the company through storage, packaging and packaging of goods.

The company does not have any own facilities in Poland necessary for conducting business (human, office, technical). It will also not employ its own staff in Poland. I do not plan to purchase services or goods other than those provided by the partner. It will not have an office or other permanent establishment. The company's employees will not have access to the partner's rooms and warehouses. There can only be situations when employees of the company come to the partner's warehouse to verify the partner's compliance with the terms of the contract, but these will be only sporadic situations. Contacts with contractors, trade negotiations, conclusion of contracts will be conducted and implemented from Germany.

After the service is performed by the partner, the goods will be sold to end users who are entrepreneurs, according to four possible options:

1. the company makes a sale on Polish territory - then it will recognize the delivery as domestic and tax in Poland in accordance with the provisions of the Act on PTU;

2. the company will make a delivery to an EU country other than Poland - then it will recognize WDT and tax in Poland in accordance with the provisions of the Act on PTU;

3. the company will move its own goods from Poland to Germany (to its headquarters) - then it will recognize WDT taxed in Poland in accordance with the provisions of the Act on PTU;

4. the company will make deliveries outside the EU - then it will recognize the transaction as export taxed in Poland in accordance with the provisions of the Act on PTU.

In connection with the above, the company asked the question:

Is it due to the lack of a permanent place of business in Poland within the meaning of Art. 11 of Council Regulation No. 282/2011 of 15 March 2011 establishing implementing measures to Directive 2006/112 / EC on a common system of value added tax, the storage, packaging and packaging services purchased by the applicant in Poland will be taxed in Germany (in the country of the applicant's seat) in accordance with art. 28b of the Act on PTU?

Presenting its own position, the company indicated that it would not have a permanent place of business in Poland within the meaning of Art. 11 of the above-mentioned Council Regulation and Art. 28b paragraph 1 of

the Act on PTU, therefore it will pay tax on services purchased in Poland in Germany, where it has its registered office.

The company further argued citing the provisions of art. 28b paragraph 1-3 of the PTU Act, that the essence of the dispute boils down to the correct interpretation of the provisions of para. 2 of this article in the context of the definition of a permanent place of business, which is located other than the seat of the taxpayer. The company emphasized that neither the PTU Act nor Directive 2006/112 / EC define this concept, which means that the case law of the CJEU and Council Regulation No. 282/2011 should be used, which in Art. 11 defines a permanent place of business for the purposes of applying Art. 44 of the above directive. This regulation provides that a permanent place of business means any place - other than the place of business of the taxpayer, referred to in art. 10 of the Regulation, which is characterized by sufficient stability and an appropriate structure in terms of personnel and technical facilities to enable it to receive and use the services provided for its own needs in this permanent place of business. Referring to the content of art. 11 paragraph 2 and paragraph 3 of the Council Regulation, as well as the case law of the CJEU and views of the doctrine, the applicant argued that if a company does not have its own staff or a stable organizational structure in a Member State sufficiently to enable it to draw up contracts and make management decisions, it cannot be assumed that it has permanent place of business in that country. In other words, an entity has a permanent place of business in a given country if it meets the criteria:

- stability and independence of operations,

- permanent presence of human resources (has personnel resources),

- the constant presence of technical resources (has technical facilities) for the business (e.g. buildings, warehouses, equipment).

In order for a permanent establishment of an entity's activity in the territory of a given country to be established, a certain minimum scale of activity is necessary, which is an external sign that the activity in this place is conducted permanently and independently of the main activity carried out by the entity. Obtaining a tax identification number is not sufficient to conclude that the taxpayer has a permanent place of business, as this does not entail the permanent transfer of technical facilities or personnel, and the personal and material structure at a permanent place of business should be permanent.

The company emphasized that the services provided by the partner are ancillary and are not the subject of its main activity. The company will not:

- kept separate books or other documents related to operations in Poland,

- had its own real estate and movable property (except for goods),

- owned intangible goods (industrial or proprietary property),

- held debts, rights from securities and cash,

- has rented or leased real estate, nor will it have any rights to use it under any other title

- which precludes fulfillment of the conditions for recognition of having a permanent place of business in Poland. This will not result in purchasing services in Poland or registration for VAT purposes, which is only connected with selling goods in Poland. The company has no intention to conduct business in a continuous, continuous, uninterrupted, regular or cyclical manner.

The company cited examples of individual interpretations issued to other taxpayers to confirm the correctness of its position. In the summary, she stated that the place of providing storage, packaging and confectioning

services, to which art. 28b paragraph 1 of the Act on PTU, purchased for the needs of the company from a partner in Poland - will be the state of the company's seat, i.e. Germany.

By the impugned interpretation, the authority found the company's position incorrect.

In the matter of the concept of "permanent place of business", referred to in the cited above art. 28b paragraph 2 of the PTU Act, the authority explained that in order to harmonize the rules applied in this respect in EU Member States, reference should be made to 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 and case law of the CJEU and Polish administrative courts in this regard. Considering the above, "permanent" - it is permanently connected with a given place, non-portable, unchangeable.

This means that a permanent place of business must have a certain degree of commitment that allows it to be recognized that the business is carried out in this place not in a transient or temporary manner. This involvement should assume a specific personal and material dimension, allowing the provision of services in an independent manner. In other words, in order to recognize that a given place of business is permanent, it is necessary to have technical infrastructure and human staff at that place who can perform specific activities themselves. Such a personal and business structure in a permanent place of business should occur in a permanent way, i.e. repeatable and lasting.

Referring further to art. 15 paragraph 2 of the Act on the Polish Insurance Association, the authority argued that for recognition as a permanent place of business it is necessary that this place not only used goods and services, but also could itself carry out taxable activities in accordance with art. 5 paragraph 1 of the Act. Therefore, it should be assumed that technical infrastructure and personal involvement must be closely related to the performance of taxable activities, without having your own personnel and technical facilities. However, the taxpayer must have - based on the requirement of sufficient stability of the place of business - comparable control over the personnel and technical facilities.

Referring to the description of the future event covered by the application, the authority stated that the company, in connection with its operations in Poland, will have a permanent place of business in the country's territory, which results from having a minimum size of activity characterized by a certain level of stability, in which there is continuous the presence of human resources necessary to conduct business, as well as the presence of necessary technical resources. There is also a close relationship between technical infrastructure and personnel and the performance of taxable activities. For a permanent establishment in a given country it is not necessary for the taxpayer to have the personnel he employs and the technical facilities which he owns. Just that the entity uses the personnel and technical facilities of other entities in such a way that it enables it to receive and use the services provided for its own needs in this permanent place of business. Only the organizational structure necessary to conduct a given type of activity is necessary, while the human resources necessary to perform it can be obtained from external resources. Similarly, technical resources. Hiring or providing them in another way is sufficient. while human resources necessary for its implementation can be obtained from external resources. Similarly, technical resources. Hiring or providing them in another way is sufficient. while human resources necessary for its implementation can be obtained from external resources. Similarly, technical resources. Hiring or providing them in another way is sufficient.

As explained by the authority, the company's operations in Poland will include the performance of activities (taxable within the territory of the country) consisting in the purchase (under WNT and import) and the sale (under WDT, export and domestic supply) of goods in a continuous manner for commercial purposes, with using the partner's warehouse and services purchased from it. Therefore, the criterion of possessing technical and personnel resources necessary to conduct part of economic activity on the territory of the country will be met, as the company will have actual power over technical and personnel resources. Storage, confectioning and packaging of goods purchased from a partner will be "consumed" in Poland for the purposes of the activities related to the distribution and sale of goods. The technical infrastructure and personal involvement of

the Partner used by the company will be closely related to its taxable activities. It is irrelevant that the warehouse in Poland to which the goods acquired by the company will be delivered and in which they will be stored, packed and packed, will belong to the partner who will simultaneously provide services to the company. It is sufficient to properly use the infrastructure to conclude that the company on the territory of the country has human resources and necessary technical infrastructure sufficient to permanently conduct business activity in the field of selling goods, characterized by a certain level of stability, in which there is a constant presence of human resources necessary to carry out this activity. It is also not important that contacts with contractors, trade negotiations, concluding contracts with recipients of goods will be carried out by the company directly from its headquarters in Germany. The stability of a place of business cannot be identified with management decisions. In other words, it does not matter that the company is not the owner of the warehouses or that the contracts will be concluded in Germany, as this does not determine a permanent place of business. Hence, in the case art. 28b paragraph 2 of the PTU Act and the company will pay VAT on purchased services in Poland. The authority also ruled out that the acquired services were related to the property, as they do not constitute the lease of warehouse space. He stressed

In the complaint, the company alleged that the body:

1. incorrect interpretation of substantive law:

- art. 28b paragraph 1 and 2 of the Act on PTU in connection with from art. 11 paragraph 1 and 2 of Council Implementing Regulation (EU) No 282/2011 by recognizing that the company has a permanent place of business in Poland, therefore the place of taxation of services provided to it will be Poland;

- art. 1 clause 2 of Council Directive 2006/112 / EC and the principle of neutrality expressed therein by bringing about a situation of double VAT taxation in Poland and Germany;

2. breach of the rules of procedure:

- art. 2a Op by resolving doubts as to the content of legal provisions in favor of the taxpayer,

- art. 14c § 1 and 2 Op by preparing an incorrect legal justification for the interpretation and assessment of the party's position, which does not allow to identify the reasons why the authority decided that the company has a permanent place of business in Poland,

- art. 121, art. 120 and art. 14h Op by using arguments that are not supported by legal provisions, which is a violation of the principle of trust in tax authorities.

As a consequence of the allegations, the company requested that the contested interpretation be set aside in its entirety and that the costs be reimbursed.

In response to the complaint, the authority requested that it be dismissed, maintaining its previous position in the case.

The Provincial Administrative Court in Gliwice considered the following:

The complaint turned out to be well founded.

In accordance with art. 57a of the Act of 30 August 2002 Law on proceedings before administrative courts (Journal of Laws of 2018, item 1302, as amended - hereinafter referred to as: ppsa), a complaint about a written interpretation of tax law issued in an individual case, (... .) can only be based on an allegation of violation of the procedural rules, an error of interpretation or an incorrect assessment as to the application of the substantive law. The administrative court is bound by the charges of the complaint and the legal basis invoked. Thus, the court examines the correctness of the individual interpretation complained of only from the

point of view of the complaint and the legal basis indicated therein. In particular, the court may not take any action to determine other than the violations indicated in the complaint.

The subject of the dispute in the present case is the matter of deciding whether, in the light of the future event described in the request, the company has a permanent place of business in Poland within the meaning of Art. 28b paragraph 2 of the Act on PTU and art. 11 of EU Council Regulation No. 282/2011 (implementing regulation) and art. 44 of Directive 2006/112 / EC, and thus whether the services purchased from a partner (packaging, storage and packaging of goods) are taxable in Poland.

In the company's opinion, the interpretative body incorrectly found that it had a permanent place of business in Poland, which committed an infringement of Art. 28b paragraph 1 and 2 of the Act on PTU in connection with from art. 11 of Regulation No. 282/2011, because its activity does not meet the criterion of stability of its operations, it has no human resources or technical facilities in Poland; will use the services of another entity, i.e. a partner. It will not meet the requirements of independence. The authority took the opposite position.

At the outset, it should be noted that in a similar case the applicant, the Court ruled in a judgment of 7 January 2019, reference number III SA / Gl 912/18. The court ruling in the present case fully shares the position expressed there.

In accordance with art. 15 of the Act on PTU, taxpayers are legal persons, organizational units without legal personality and natural persons who independently carry out business activities referred to in para. 2, regardless of the purpose or result of such activity. Taxpayers are also legal persons, organizational units without legal personality and natural persons purchasing goods, if the person making their delivery within the territory of the country is a taxpayer without a registered office or permanent establishment in the territory of the country (Article 17 (1) (5) of this Act) .

Pursuant to art. 17 clause 2 of the Act on PTU, in the cases listed in para. 1 points 4, 5.7 and 8, the service provider or the supplier of goods does not settle the tax due. According to art. 17 clause 5 point 1 of the Act, the provision of para. 1 point 5 shall apply if the purchaser is a taxpayer referred to in art. 15, having a registered office or a permanent place of business in the territory of the country, or a legal person who is not a taxable person referred to in art. 15, having its registered office on the territory of the country, subject to paragraph 6.

Based on Article. 28b paragraph 1 - 3 of the Act on PTU, the place of providing services in the case of services rendered to the taxpayer is the place where the taxable person being the recipient of the service has its registered office, subject to paragraph 2-4 and art. 28e, art. 28f paragraph 1 and 1a, art. 28g paragraph 1, art. 28i, art. 28j paragraph 1 and 2 and art. 28n.

Where the services are provided for a permanent place of business of a taxable person which is located elsewhere than his place of business, the place of supply of these services is the permanent place of business.

In the event that the taxable person being the recipient of the service does not have a business establishment or permanent establishment, as referred to in paragraph 2, the place of providing services is the place where he has his permanent residence or his usual place of stay.

From the provision of art. 11 paragraph 1 of the Implementing Regulation shows that a permanent place of business means any place that is characterized by sufficient stability and an appropriate structure in terms of personnel and technical resources to enable it to receive and use services provided for its own needs of this permanent place of business.

As pointed out by the company, the issue of determining the conditions for recognizing what should be understood as a permanent place of business has been the subject of many judgments of national and EU courts, which have evolved in subsequent judgments, taking into account the conditions and mechanisms of

commercial trading. However, there are still many doubts in this respect, as evidenced by the preliminary question of the Provincial Administrative Court in Wrocław of June 6, 2018, reference number file I SA / Wr 286/18. It applies to the fact that a company with its registered office outside the EU, a subsidiary in Poland and the possibility of deriving from this fact that it has a permanent place of business in Poland. However, it cannot be omitted that the above-mentioned legal question concerns the interpretation of Art. 28b paragraph 2 of the PTU Act, hence its content is also relevant for the interpretation of the law in this case.

It should also be noted that the Provincial Administrative Court in Olsztyn in the judgment of September 30, 2009 reference number act I SA / Ol 563/09 expressed the view that an entity has a permanent place of business in the territory of the country, if, using infrastructure and personnel in the territory of the country in an organized and continuous manner, it carries out activities under which it carries out activities subject to value added tax . Technical infrastructure and personal involvement must be closely related to the performance of activities subject to value added tax. In turn, in the judgment of 16 October 2014 in the **Welmory** caseC-605/12, EU: C: 2014: 2298 CJEU stated that the first taxpayer established in one Member State who uses the services of a second taxpayer established in another Member State should be considered as having that another Member State 'permanent establishment' within the meaning of 44 of Directive 2006/12 / EC, in order to determine the place of taxation of these services, if this permanent place is characterized by sufficient stability and an appropriate structure in terms of personnel and technical facilities to enable it to receive services and use them for the purposes of its business activities, which will be examined belongs to the referring court. The ruling was about a Cypriot company that organizes auctions on an online sales platform. I sell "BID" packages (rates), or rights to submit bids for auctioned goods by offering a higher price than the one last proposed. This company concluded a cooperation agreement with a Polish company consisting in making it available exclusively to the auction website under the appropriate domain along with associated services (advertising, service, information provision and data processing services). The Polish company generated revenues from sales at online auctions on the Cypriot company's website and part of the profit of the Cypriot company from the sale of BIDs, which are used by clients in Poland to submit an auction on this page. The Court emphasized that the question concerns the interpretation of Art. 44 of Directive 2006/112 from the point of view of the recipient of the service, and the previous case-law has taken into account the point of view of the service provider, which means that when interpreting it is necessary to take into account the wording of the provision, its context and the objectives of the regulation, of which part of this provision constitutes (avoidance of double taxation or non-taxation of revenues). As the Court pointed out, the most useful connecting factor to determine the place of supply of services from a tax point of view, and therefore the main connecting factor, is the place where the taxpayer is established. The inclusion of a different place only comes into play if the recognition of the abovementioned seat does not lead to a rational solution or creates a conflict in relation to another Member State. The Tribunal also indicated that in art. 44 of the directive, the seat of business comes first, and only the second place of permanent establishment, which is a departure from the general rule. Hence the indication of own personal and technical facilities, or the availability of other facilities comparable to the availability of own facilities (personal, technical), exercising control over this facilities, the possibility of receiving and using the purchased services for own needs - conducting the contractor's business. A distinction should be made between services rendered by a Polish company to Cyprus and services provided by the latter to consumers in Poland.

In the opinion of the Court, the abovementioned judgment of the CJEU, although it does not correspond to the facts of the present case, contains important interpretative guidelines regarding the definition of the concept of a permanent place of business.

According to the Court, a certain minimum scale of activity is necessary to determine the place of permanent establishment, which is an external sign that the activity in this place is carried out constantly (see Case C-231/94), i.e. in a constant, repeatable and timely manner (see case C-168/84), requires minimal sustainability, by accumulating the permanent human and technical resources necessary to provide certain services independently (see cases C-73/06, C-260/95).

In the case, it is not disputed that the company's registered office is in Germany and that its principal place of business and payment of VAT-EU is located there. It is also not disputed that the company is involved in the production of footwear outside of Poland and the distribution of footwear produced outside of Poland, both in EU and non-EU countries. Goods are sold in specialized stores. In Poland, the goods purchased or produced by the applicant are stored, packed and ready for sale as part of the services purchased from a Polish partner - a company that has the appropriate warehouses and staff to carry them out. The partner's activities for the applicant in the above-mentioned scope are carried out by him without the possibility of supervision by the applicant over the performance of services (except for sporadic verification of the partner's compliance with the terms of the contract). Commercial negotiations, signing contracts, orders for implementation, contacts with contractors - will be conducted only from Germany or Germany. The company itself in Poland has no personnel or any technical facilities for its production and distribution activities.

Taking into account the indicated premises for establishing a permanent place of business and the future event presented by the company, it should be stated that the services it purchases from a partner will be taxed in Germany. In the Court's opinion, in the actual state / future event described in the application, there are no reasons justifying a departure from the general principle of taxation of the company according to the place of business of the service purchaser. The company does not produce footwear in Poland, but only imports ready-made goods for storage and storage for further resale. In Poland, it buys ancillary services for its main activity outside Poland. In other words, without footwear manufactured or purchased in a country other than Poland, there will be no need to purchase services from a partner - a Polish company.

According to the Court, the interpretative body wrongly accepted that the applicant had sufficient technical and personnel facilities in the country to consider her permanent establishment here. By purchasing the indicated services of storage, packaging and confectioning of goods, the applicant did not create a place of business in Poland. The employees are employed by the service provider and do not act on behalf of the applicant, under her management or directly on her behalf. The company has no freedom of action or right of decision in relation to the partner's staff and infrastructure. In the warehouse, the company does not have a designated, separate area only for its own disposal and storage of only its goods; may not affect storage location and conditions; there is no authority over the way of packaging and storage services or exclusive use. She was not the only contractor of the service provider. Also, the fact that a tax representative has been appointed in a given country or registered as a VAT-EU taxable person does not automatically result in the entity being established or having a permanent establishment in that country (see Case C-323/12).

In the Court's opinion, it was faulty for the authority to assume that the company was operating in Poland in a stable manner that fulfills the features of a permanent establishment. In the event presented in the application, unlike the case described in the judgment of 23 November 2017 I FSK 160/16, the applicant does not conduct its activities using the personnel and technical resources of the partner's company. As it is clear from the content of the application, the content of which in the case is binding, it has no back office in Poland, no permanent structure that would allow it to be assumed that it has a permanent place of business in the country, independent of its headquarters in Germany. Thus, the General Court did not share the position of the body expressed in the contested interpretation.

Finding the complaint alleged to be well founded, the court overruled the contested interpretation based on art. 146 § 1 ppsa

In reviewing the applicant's request, the authority must take into account the above considerations of the Court and the legal assessment provided in the statement of reasons for the judgment.

The reimbursement of the costs of the procedure was decided on the basis of art. 200 and art. 205 § 2 and 4 ppsa The awarded amount of PLN 457 consisted of the equivalent of a court fee (PLN 200) and tax consultant's remuneration (PLN 240) determined in accordance with § 3 para. 1 point 2 of the Regulation of the Minister of Justice of 31 January 2011 on remuneration for acts of a tax adviser in proceedings before

administrative courts and detailed rules for bearing the costs of legal aid granted ex officio by a tax adviser (Journal of Laws of 2011 No. 31, item 153) and the fee from the power of attorney paid