I SA / Gl 737/19 - Judgment of the Provincial Administrative Court in Gliwice

Date of judgment	2019-11-20 *the judgment is not final*
Date of receipt	2019-06-05
Court	Provincial Administrative Court in Gliwice
referees	Anna Tyszkiewicz-Ziętek / chairman rapporteur /
Symbol with description	6110 Tax on goods and services 6560
Thematic entries	Tax Interpretations
The complained body	Director of the National Treasury Information
Content of the result	The reimbursement of the costs of the proceedings was awarded. The contested individual interpretation was repealed
Regulations cited	OJ 2018 item 2174 art. 28 b *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 Agata Ćwik-Bury, Judge of the Provincial Administrative Court Monika Krywow, Judge of the Provincial Administrative Court Anna Tyszkiewicz-Ziętek (trial), Protocol clerk, court secretary Marta Lewicka, after hearing at the hearing on October 30 2019 cases from complaint A in L. regarding the interpretation of the Director of National Tax Information of [...] No. [...] regarding tax on goods and services 1) annulls the contested interpretation, 2) awards the Director of National Tax Information for the applicant, PLN 697 (six hundred and ninety-seven) for the costs of the proceedings.

SUBSTANTIATION

By the contested interpretation of [...] No. [...], the Director of the National Tax Information Office stated on the basis of art. 13 § 2a, art. 14b § 1 of the Act of August 29, 1997 Tax Code (Journal of Laws of 2018, item 800, as amended), that position A in L. (hereinafter: Applicant, Company, party, applicant) presented in the application of 11 December 2018, supplemented on 19 March 2019 at the request of the authority for an interpretation of the provisions of the tax law regarding the tax on goods and services regarding the determination of a permanent place of business, place of taxation of services and the right to deduct tax is incorrect.

The following facts were presented in the application initiating the interpretative proceedings in the present case.

The applicant is a company created and existing under Luxembourg law with its registered office in L., registered in Poland as an active VAT taxpayer. The applicant mainly deals with the purchase and resale of goods on European-language websites A. The applicant does not have infrastructure or employ employees on the territory of the country. In order to deliver the ordered goods to customers, the Applicant has signed a number of contracts for the provision of services related to the implementation of orders (hereinafter: "Contract Performance Agreement") with logistics companies of Group A and independent third parties. In Poland, such an agreement was signed with the company B Sp. z o. o. (hereinafter: "B"), which currently operates 5 logistics centers in Poland. In Europe there are over 40 service centers run by entities belonging to group A,

Pursuant to the Contract for Contract Performance, B undertook to provide the Applicant with, among others the following services:

- storage, storage and supervision of the applicant's stocks of goods;

- inventory management;

- packaging, assembling and renewing goods;

- packing, labeling and shipment of goods, including insertion of waybills and, on request, decorative packaging of gift packages;

- maintaining a sufficient inventory of packaging articles, such as boxes, wrapping materials, gift wrapping materials, tapes, and other resources;

- handling returns; and

- any other services mutually agreed by the parties.

As part of the services provided, orders placed by customers from across the European Union are processed, with the goods being shipped from any A logistics center or third-party logistics center located within the EU, as indicated above. Therefore, the order placed, e.g. by a German customer, can be served by a logistics center in Poland, as well as any of the logistics centers located in other EU countries. Similarly, the shipment of an order placed, e.g. by a Polish customer, can be carried out by any logistics center not necessarily located in Poland. For logistical reasons, an order consisting of several products can also be divided into several shipments carried out by different (or one) logistics centers.

The order processing process by B is the same for goods belonging to the Applicant, as well as for goods of external sellers who use the service [...] ([...]) and whose goods are also the subject of orders from centers logistics (these goods belong to external sellers, not to the Company, and are stored in the same locations).

B is based on logistics solutions (supply chain), which specify in which logistics center goods belonging to the Applicant should be stored in order to reduce the overall delivery costs incurred by the Company (and also to facilitate their quick delivery).

The Company does not control personnel B, which operates independently, and the Company has no technical resources / infrastructure in the country.

Transfers of goods between logistics centers located in different countries are reported by the Applicant as intra-Community acquisitions and deliveries of goods. Historically, the Company has registered for the purposes of VAT in Poland due to taxation of mail order sales to natural persons whose place of residence is in Poland (without connection with logistics centers).

In response to the authority's request of [...] the individual questions, the applicant replied as follows:

a) what exactly is it, what benefits specifically applies (what benefits it covers, including which goods) the Applicant's activity in the country of establishment, i.e. in L.

The Applicant's activity consists in purchasing goods directly from suppliers (third parties), remaining in their possession until the time of sale (or until the liquidation of goods in the event that the goods cannot be traded, e.g. expiry date, etc.) and the sale of such goods goods to final recipients.

The commercial activity of the Company is divided into four product lines based on the nature of the goods supplied.

b) how the Applicant's business is carried out / organized in the country of establishment, i.e. in L.

The company manages the European part of retail sales and is a seller of goods offered by A throughout Europe. The company carries out strategic and management tasks in order to conduct commercial activities in Europe, as well as bears business risks related to the above activities. The company's business activities are organized in accordance with the Company's main areas of activity, i.e. retail sales, equipment A (which is sold through retail sales channels A, where it is treated as separate economic activities under A) and operational

activities (related to both retail sales and equipment A), All three areas of the Company's operations are subject to centralized management with L. Below the Company provides a more detailed description of individual areas of activity.

Retail sales:

A L. sets the strategy, goals and guidelines for the retail area, including, for example: what goods will be offered and sold, a price strategy is set, internet promotions and advertising strategy are determined on individual European-language websites A. The company makes a physical purchase goods from suppliers (third parties), and sells them via the European-language websites A.

Equipment A:

The A equipment department is involved in all activities related to the sale of A devices (such as [...] readers [e-book reader], tablets, etc.), regardless of whether they were sold via A-language European websites or stationary. A L. manages the equipment department A. The areas of activity include, for example: setting strategies, objectives and guidelines for the European equipment market, including making decisions regarding the release of a given equipment in Europe, as well as issues related to the price and distribution strategy of this type of equipment .

Operational activities:

Operational Department A is involved in all activities related to the implementation of operational and logistics activities, including: negotiating European transport rates; location and development of logistics centers; making decisions about launching new logistics centers; management of property and assets; planning of storage capacities of logistics centers; supply chain improvement and automation; supply chain analytics and supplier supply chain integration

A. A L. manages the operational department and participates in all key strategic activities related to storage, supply chain and product logistics in Europe. The European warehouse network is the best example of the benefits of centralizing A's operations. Through the European warehouse network, A L. is able to offer, in a more efficient manner, a wide range of its goods throughout Europe. The European warehouse network A utilizes the pan-European presence centralized in L., operational assets and technological capabilities to provide European consumers with the greatest availability of goods, their best selection, timeliness of deliveries, competitive prices, as well as to enable suppliers to conduct business effectively across the continent. In addition, A L.

c) how the process of providing services to the client in the country of the Applicant's country of business is organized in a specific way, i.e. without providing detailed information, but precisely how the Applicant's complete performance of the service from the territory of the country of the seat to the client is carried out, including the process related to taking orders, making sales and providing services / goods

Supplier management:

The company attempts to attract suppliers regardless of their size or sophistication, as well as, to the extent possible, tries to automate or simplify the delivery process. The supplier's indication and the negotiation process begins with a comparative analysis of the conditions offered within a given category and product standard established by A L. in order to verify whether the conditions offered are or are not compatible with the level of effectiveness expected by management. After making market research and performing comparative analysis, L., assisted by the legal department in L., sets out standard contractual terms.

Supplies management:

Most goods are ordered automatically based on algorithms using various data, such as: historical sales volume, projected sales volume, goods inventory levels, as well as other indicators using various relevant data and demand forecast. The above requires support and feedback from department leaders as well as departments managing individual categories of goods (which may be located in A L. as well as in 5 other markets in Great Britain, Germany, Italy, Spain or France) in order to introduce the correct data to System A, for example, taking into account the impact of seasonality of sales, promotions, new products and discounts. Tool A assesses the amount of inventory and makes decisions related to a reduction in the price or sale of inventory in the event of a surplus. Most decisions are made automatically. Some types of products, however, due to the unpredictability of demand (e.g. in the case of the introduction of new products), however, require manual intervention, however, these goods are still monitored, as well as subject to established analyzes regarding specific guidelines, inventory levels, etc. determined by A L. as well as being the subject of established analyzes regarding specific guidelines, stock levels, etc. determined by A L. as well as being the subject of established analyzes regarding specific guidelines, stock levels, etc. determined by A L.

Valuation:

As for the valuation of products offered on European-language websites by A L., this action is also largely based on automation. The valuation of products sold by A through their websites is a highly automated process, based on various tools and algorithms with a built-in decision making process based on the pricing strategy previously set by A.

Customer service:

The customer service process on Website A is fully automated. If the user makes a purchase, the software of the website redirects the retail order to the servers in L. in order to authorize the payment and make the settlement. After authorizing payment by payment card, relevant information is forwarded to the appropriate logistics center to start completing the order. As soon as the order is ready for shipment, the payment center processes the payment and the server sends an e-mail confirmation of the shipment to the retail customer. A L. retains ownership of the goods until the payment is processed by the customer and the goods are released to an external carrier.

As indicated above, the management of Operation A is centralized in L. As a consequence, all strategic decisions in this area are made by A. L. Most operations related to the implementation of business processes in the supply chain, logistics and order processing are carried out by related entities, such as companies that run local logistics centers. All roles related to the supply chain, logistics and execution of orders, which are performed by a related entity on a daily basis, are ultimately subject to A L.

d) whether on the territory of Poland the Applicant's activity consists only of selling goods, if it should not be indicated what other benefits the Applicant's activity covers in Poland

The Applicant's activity on the territory of Poland consists solely of selling goods.

e) what goods are specifically affected by sales made by the Applicant from the territory of Poland

The assortment bought and resold by the Company is very wide and includes, among others: books, films, CDs, electronic and computer equipment, garden tools, animal products, cosmetics, toys, clothing, footwear, food products, sports equipment, car parts and accessories.

f) how exactly the process of selling goods from Poland is organized, i.e. without indicating detailed information, but it should be precisely described how the Applicant's complete delivery of goods from Poland to the customer is carried out, including the process of taking orders and making sales and delivery of goods

- the customer places an order via the purchasing platform A and makes the payment

- the order is being processed

- the goods are placed in a protective packaging

- a label indicating the shipping and delivery address of the goods is placed on the packaging

- the package contains a sales document (or the invoice is available for download electronically by the customer after logging in to page A) and a waybill

- information about the completed order is placed in the system

- the parcel is forwarded for delivery to a courier company and payment is charged at this time

g) when and for what period of time the Applicant concluded a contract for the performance of orders with B

The contract is concluded for an annual period and is automatically renewed on January 1 of each subsequent year. The contract may be terminated without giving a reason by either party with 30 days' notice.

h) who is responsible for organizing the transport of goods belonging to the Applicant, both from and to warehouses B

- Transport to warehouses B: Goods transport orders are organized by the Company's suppliers

- Transport from warehouses B: Goods transport orders are organized and paid for by the Company. The transport of goods is outsourced to company C.

i) for what period of time approximately / approximately the Applicant's goods are stored / stored in warehouse B

Depending on demand, type of assortment, promotion, etc. goods of the Applicant are usually stored / stored in warehouse B from several to several dozen days. However, this time may change depending on the circumstances.

j) what exactly is "inventory management"

Inventory management involves the optimal, in terms of logistics, of the Applicant's goods in individual logistics centers, both within one country (e.g. logistics center under P., under W., etc.) as well as within several countries (e.g. logistics center in Poland, Germany, etc.).

The goal of inventory management is to minimize the costs of storing goods, as well as shorten the lead time (delivery of goods to the customer).

k) what exactly is "packaging, assembly and renewal of goods"

There may be situations when B provides the Applicant with a service for the packaging of goods (sorting and repackaging of goods), their simple assembly or refurbishment of products (refubrishing) returned by customers for sale as refurbished goods.

1) what they consist of, what concerns "packaging, labeling and dispatching of goods, including inserting waybills and, on request, decorative packaging of parcels for gifts"

The goods are placed in protective packaging before shipping. A label indicating the shipping and delivery address of the goods is placed on the packaging. In addition, a sales document and waybill are included in the parcel. At the customer's request, it is possible to pack the package in a decorative packaging ("for a gift").

m) what is involved, what is involved in "handling returns"

The Company's customers have the option of returning unwanted goods. The service of returning goods consists in unpacking the goods, checking their technical condition, entering them in the warehouse records, and placing them back in the warehouse or intended for renewal.

n) what they consist of, what "all other services mutually agreed by the parties" concern

This applies to all other services related to logistics services that may be necessary for the efficient and optimal execution of orders for customers.

o) whether the Applicant in connection with the sale of goods for customers recognizes paid domestic deliveries in Poland, or intra-Community supplies of goods, or exports

In connection with the sale of goods to customers, the Company recognizes in Poland both domestic paid supplies (taxed at 5%, 8% and 23% VAT rates), as well as intra-Community supplies of goods (taxed at 0% VAT rates).

p) whether the Applicant (apart from the benefits purchased from B) purchases any other services or goods on the territory of Poland - if so, please indicate precisely what these services are and what they consist of or what goods they are

Yes. In particular, the Company purchases goods (packaging, damaged goods, etc.) and services (accounting, legal services, etc.).

q) whether the services purchased by the Applicant constitute services to which Art. 28b of the Act of 11 March 2004 on tax on goods and services (Journal of Laws of 2018, item 2174, as amended), hereinafter interchangeably: the Act on VAT, uptu (i.e. these are services no special rules for determining the place of supply of services pursuant to Article 28e, Article 28f (1) and (la), Article 28g (1), Article 28i, Article 28j (1) and (2) and Article 28n) shall apply,

So.

r) an indication (depending on the scope of the newly formulated subject of the interpretation) of the type of services to which the newly formulated subject of the interpretation relates (question), including an accurate and precise description of what they consist in, how they are implemented, what they concern, etc.

The reformulated question concerns services purchased by the Company for which the place of performance is determined on the basis of art. 28b paragraph 2 of the VAT Act - accounting services, tax advisory services, legal advisory services.

s) indication (depending on the scope of the newly formulated subject of interpretation), respectively, information on contractors - the country in which the registered office of the contractor is located, the contractor's permanent place of business in Poland, information on the registration of the contractor as a value added tax payer, active VAT payer, EU VAT payer, etc.).

The Company's contractors are, on the purchasing side, entities registered in Poland as active VAT taxpayers and companies with registered office in Poland, value added tax payers (as part of WNT settlement), as well as the Company itself registered in various EU Member States (within accounting for the transfer of own goods).

In the case of the sale of the Company, the buyers are consumers residing throughout the European Union (mail order), VAT taxpayers, as well as taxpayers of value added tax (WDT), as well as the Company itself registered in various Member States of the European Union (as part of settling the transfer of own goods).

In connection with the above description, the following question was finally formulated in addition to the conclusion:

Is the correct position of the Company according to which in the described facts does not have a permanent place of business in Poland and therefore services for which the place of performance is determined on the basis of art. 28b paragraph 2 of the VAT Act, such as accounting services purchased by the Company, tax advisory services, legal advisory services, will not be taxed in Poland and thus the Company will not be entitled to deduct input tax on these services pursuant to Art. 86 section 1 of the VAT Act, if the service provider issues an invoice with Polish VAT?

Presenting its own position, the Applicant stated that in connection with the described facts, the Company does not have a permanent place of business in Poland and therefore services for which the place of performance is determined on the basis of art. 28b paragraph 2 of the VAT Act, such as accounting services purchased by the Company, tax advisory services, legal advisory services, will not be taxed in Poland. Consequently, if they are invoiced with Polish VAT, the Company will not be entitled to deduct input tax on these services pursuant to art. 86 section 1 of the VAT Act.

In substantiating its position, the party indicated the following.

A. Definition of a permanent place of business within the meaning of the VAT provisions

The VAT Act and its implementing provisions do not define the concept of "permanent establishment." However, this term has been defined in the Executive Regulation, the provisions of which apply directly in all EU Member States (do not require implementation into national law).

In accordance with art. 11 paragraph 1 of the Implementing Regulation, for the purposes of applying Art. 44 of Directive 2006/112 / EC (Council Directive of 28 November 2006 on the common system of value added tax, OJ UL 347 of 11 December 2006, hereinafter the "VAT Directive") "permanent establishment "means any place - other than the place of business of the taxpayer, (...) which is characterized by sufficient stability and an appropriate structure in terms of personnel and technical resources to enable it to receive and use the services provided for its own needs in that permanent place of business . In addition, in accordance with art. 11 paragraph 2 of the Executive Regulation for the purposes of art. 45, art. 56 section 2 subparagraph 2 and art. 192a of the VAT Directive "

In the light of the above definitions, a permanent place of business will arise if, on the territory of a country other than the country in which the taxpayer is established, there will be technical and personnel facilities enabling that entity:

• receipt of purchased services and

• using them for the needs of this permanent establishment.

Both conditions must be met together. A structure that only allows the purchase of services will not be sufficient. Hence, in accordance with paragraph 3 of the Implementing Regulation, the fact of having a VAT identification number is not in itself sufficient to conclude that the taxpayer has a permanent place of business.

The definition of permanent place of business contained in the Executive Regulation constitutes, in fact, sanctioning the well-established position presented in relation to the permanent place of business in the jurisprudence of the Court of Justice of the European Union (hereinafter referred to as "CJEU"), which is confirmed by at least recital 14 to the Executive Regulation, according to which the clarification of the concept of permanent establishment should take into account the case law of the CJEU.

Pursuant to the guidelines of the CJEU contained in the judgment of 4 July 1985 in the case Gunter Berkholz v. Finanzamt Hamburg-Mitte-Altstadt (reference number 168/84), that the place where the taxpayer carries out business activity could be considered a permanent place of business , the following conditions must jointly be met: (i) the place must have a certain minimum scale of activity, and (ii) it must have permanent human and technical resources necessary to carry out the activity. Similarly, in the judgment of 28 June 2007 in the

Planzer Luxembourg v. Bundeszentralamt fur Steuem case (case reference number C-73/06), the CJEU stated that "in accordance with established case-law in the field of VAT, the concept of a permanent enterprise requires minimal stability by gathering permanent human and technical resources, necessary for the provision of specific services. (...) That minimum durability therefore means a sufficient degree of durability and a structure which, from the point of view of human and technical resources, is capable of enabling the provision of the services in question in an independent manner (...) ".

In the judgment of 17 July 1997 in the ARO Lease BV case (case reference number C-190/95), the CJEU stated that an enterprise which has neither its own staff nor an organizational structure in a Member State that is sufficiently durable to provide a framework in which contracts and management decisions could be concluded cannot be considered as having a permanent place of business in that country.

Taking into account the regulations contained in the Executive Regulation, as well as the theses presented in the cited jurisprudence of the CJEU, the taxpayer has a permanent place of business when the following conditions are met;

(a) the place of business has an appropriate structure in terms of personnel and technical facilities to enable the receipt of purchased services and their use for the needs of that place of business or the provision of services (conducting business) from that place;

b) the place has a certain level of permanence, i.e. the taxpayer intends to conduct business in this place on a permanent (non-periodic) basis;

c) the activity carried out here is independent of the main activity (the place is characterized by decision-making independence).

The above criteria must be met together. In the event that any of them is not met, it will not be possible to establish that a permanent place of business has been created.

In view of the above, it should be stated that the Applicant will not have a permanent place of business in Poland.

Lack of adequate structure in terms of personnel

According to the Applicant, in the facts described in the application, he will not have an adequate structure in Poland in terms of human resources necessary for establishing a permanent place of business. It will not employ employees on the territory of Poland, delegate its employees to perform tasks on the territory of Poland, or acquire them from external resources - based on the requirement of sufficient stability of the place of activity. The Company's activities will be managed entirely from the Company's headquarters, i.e. from L. The Company's headquarters are and will take key actions from the point of view of its activities, such as concluding contracts for the purchase and sale of goods, placing orders for the delivery of goods, taking orders from customers, e.t.c. The Company has not appointed or plans to appoint in Poland any persons to support its activities that would be associated with the Company by a relationship relationship (e.g. employment contract, mandate contract, etc.). This activity undertaken in L. will ensure that the Company will be able to sell goods and, as a consequence, use the goods acquired in Poland for the Company's business.

In the analyzed facts, the condition for having an adequate structure in terms of personnel facilities will not be met.

The above position is confirmed by numerous individual interpretations cited by the party, e.g. from [...] No. [...], from [...], No. [...], from [...] , No. [...].

It was emphasized here that the Company has no control over the solutions used by B, which are used to perform the Contract Execution Contract. It is already clear from the provisions of this agreement that logistics

issues and decisions on the most favorable placement of goods belonging to the Company are left to B.

In addition, B, and more specifically its staff, also provides services to other entities that sell via logistics centers.

In addition, in the Opinion of the Advocate General delivered on 15 May 2014 in case C-605/12 **Welmory**that a permanent place of business in the meaning of art. The second sentence of Article 44 of the VAT Directive means a place that is characterized by sufficient stability and an appropriate structure in terms of personnel and technical resources to enable the collection and use of services provided for its own needs in that permanent place of establishment. Own personal and technical facilities are not necessary for this purpose, as long as the availability of other facilities is comparable to the availability of own facilities ". to enable the receipt and use of services provided for the needs of this permanent establishment. Own personal and technical facilities are not necessary for this purpose, as long as the availability of other facilities is comparable to the availability of own facilities ". to enable the receipt and use of services provided for the needs of this permanent establishment. Own personal and technical facilities are not necessary for this purpose, as long as the availability of other facilities is comparable to the availability of own facilities ".

The above position of the CJEU fully approved in case C-605/12, which is also confirmed by the subsequent case law of the CJEU.

For this reason, to attribute a taxpayer to the existence of a permanent place of business in the territory of the country, it is not enough to simply use other people's personal and technical resources - at the same time the taxpayer's control over these other resources is required, as if they were the taxpayer's own resources.

Meanwhile, the Company has no control over the personnel and technical facilities of B, while B itself also provides the same services to external sellers who use the service [...] ([...]).

C. Lack of proper structure in terms of technical facilities

This condition is also not met, as the Company will not have in Poland for its own exclusive use the infrastructure necessary to operate in Poland. The availability of technical facilities being the subject of services rendered to the Applicant is not comparable to the availability of own facilities.

It is worth emphasizing that the Applicant's employees do not issue B orders as to where logistics services should be provided from, as well as where to store goods on Polish territory. The company does not own or rent any commercial office in Poland, through which it could sell goods, nor does it have staff authorized to conclude and negotiate contracts in Poland, and therefore does not have a technical and human structure in the territory of the country enabling it to conduct business activities in its core business, i.e. running an online store. Agreements are negotiated and concluded only by the Company, without the slightest participation of B.

The company will not have any office or other trading point in Poland through which it could conduct independent operations in this area.

The fact of storing own goods on the territory of the country in no way determines the possession of sufficient technical facilities. On the contrary, storage of goods is a resultant of the logistics process and not the essence of the business. The storage of goods in this place, not elsewhere, is aimed at optimizing the service process (in terms of time and cost).

For example, logistics centers in Poland are, as a rule, currently intended primarily to serve the German market. The above may change in the future, however, the storage - as part of the logistics process - of goods in Poland, which are ultimately sold primarily on other markets, may not lead to the creation of a permanent place of business in Poland, and the Company's operations, including the logistics process, should be considered more broadly.

The Company's position regarding the criterion for the existence of technical facilities is confirmed by numerous individual interpretations, including, for example, the individual interpretation of the Director of the National Tax Information of [...], No. [...], of [...], No. [..] .], dated [...], no. [...], dated [...], reference number [...], dated [...], no. [...].

They indicated that in the absence of control of the recipient over the back office of the service provider, only the normal relationship between service recipient and service provider takes place. It is impossible to assume that every entity establishing cooperation with a foreign entity, or storing own goods on the territory of another country, has a permanent place of business there, even if storage was only a derivative of the logistics process. The use of logistics services cannot also be identified as an end in itself. The essence of the Company's activity is the sale of goods, which takes place remotely (via the website), which does not result in the Company's physical presence in Poland.

D. Lack of decision-making independence

The applicant will also not have any structure in Poland that could participate in making management decisions or the process of negotiating and concluding contracts. In particular, there will be no employee of the Company or other person authorized to represent or conclude contracts on behalf of the Company in Poland. All activities related to the commercial activity of the Company will be undertaken at the Company's headquarters in L. - there will be contracts for the purchase and sale of goods, orders for the delivery of goods, etc., as well as strategic decisions related to the functioning of the Applicant.

Consequently, in the analyzed facts, the condition of conducting business in an independent manner from the Company's operations in L. will not be met. The lack of decision-making independence in itself excludes the existence of a permanent place of business.

This position was confirmed, among others in individual interpretations of [...], No. [...], of [...], reference number [...].

The above approach is also consistent with the position of Polish administrative courts. For example, in the decision of 26 June 2009, reference number III SA / Wa 110/09, citing the CJEU judgments, the Provincial Administrative Court in Warsaw stated that: In cases: 168/84, C-190/95, C-260/95, C-231/94, the ECJ defined the concept of a permanent place of business as where the entity has human resources, technical resources as well as infrastructure enabling the conclusion of contracts and making management decisions. In addition, the above resources and infrastructure must be characterized by a certain stability and enable the provision of services in an independent manner. However, as the NSA pointed out in its judgment of 15 February 2017, reference number I FSK 1379/15, favoring the position of tax authorities about establishing a permanent place of business for a taxpayer in Poland " the plant located in Poland, which produces metal packaging exclusively for the complainant, together with the rented warehouses indicated in the application, will be the separate legal entity, acting depending on the complainant, whose main activity is trade and distribution of these manufactured packaging. The applicant, by submitting a description of the case, indicated that it would supply materials and raw materials for the production of its packaging directly to the production plant located in Poland. Importantly, from the point of view of recognizing a certain stability of operations on the territory of the Republic of Poland. The applicant entered into a contract of indefinite duration with the contractor (manufacturing plant). The court agreed with the Minister of Finance that in the dispute in question, it is the possession and control over these material resources, necessary for operating in Poland, determines that the applicant has sufficient technical and personnel resources to conduct business in Poland. In the opinion of the Court, against the background of the facts presented by the applicant, it can be concluded that the applicant, through close links with the manufacturing plant performing on her behalf - under the conditions of exclusive packaging, as well as by using auxiliary resources in the country in the form of rented warehouses, external administration, logistics and forwarding has the necessary elements to recognize that it has a permanent place of business in the country. "

Considering the above, the Applicant pointed out that in the presented facts there were no premises on which national and EU authorities make the establishment of a permanent place of business conditional.

Based on Article. 86 section 1 of the VAT Act to the extent that goods and services are used to perform taxable activities, the taxpayer has the right to reduce the amount of tax due by the amount of input tax. In the case in question, the place of supply of services is of key importance for assessing whether the conditions for the right to deduct are met.

As a rule, 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 (Article 28b (1) of the VAT Act). In accordance with art. 28b paragraph 2 of the VAT Act, if the services are provided for a permanent place of business of the taxpayer, which is located other than his registered office, the place of performance of these services is the permanent place of business.

In connection with the above, the Company stated that due to the lack of a permanent place of business of the Company in Poland, the place of rendering services taxed in accordance with art. 28b paragraph 2 of the VAT Act (accounting services purchased by the Company, tax consultancy services, legal consultancy services) will be located in Luxembourg, i.e. in the country of the Company's registered office.

At the same time, it was pointed out that in accordance with art. 88 clause 3a point 7 of the VAT Act, do not constitute a basis for reducing the tax due and refunding the tax difference or refunding the input invoices and customs documents if invoices were issued in which the amount of tax was shown in relation to taxable activities for which no the amount of tax on the invoice (in the part concerning these activities). In connection with the above, on the basis of the above provision, there is no doubt that in the event that the seller taxed the services rendered to the Company to which the principle expressed in art. 28b paragraph 2 of the VAT Act, it is based on art. 88 clause 3 a point 7 of the VAT Act, the Company would not be entitled to deduct VAT on the purchase of these services.

The interpretative body considered the above position of the Company to be incorrect.

Justifying this assessment, at the beginning he quoted Art. 5 paragraph 1 of the VAT Act, indicating that from point 1 of this regulation and art. 2 point 1 of this Act follows the so-called principle of territoriality. Taxation on value added tax is subject to, among others paid services in the territory of the Republic of Poland. According to art. 8 clause 1 of the Act, by rendering services referred to in art. 5 paragraph 1 point 1, shall mean any performance for a natural person, legal person or an organizational unit without legal personality that does not constitute a supply of goods within the meaning of Art. 7. However, in accordance with the general principle expressed in art. 28b paragraph 1 of the Act, 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 lila, art. 28g paragraph 1, art. 28i, art. 28j paragraph 1 and 2 and art. 28n. In turn, art. 28b paragraph 2 of the VAT Act stipulates that where services are provided for a permanent place of business of the taxpayer, which is located in a different place from his place of business, the place of supply of these services is a permanent place of business.

It follows from the above provisions that the place of rendering services to the taxpayer within the meaning of Art. 28a of the Act is the place where this taxpayer has its registered office. However, if these services are provided to a permanent place of business of a taxable person located in a place other than his place of business, the place of performance of these services is the permanent place of business. This general rule should apply when the service is provided to the taxpayer and the provisions of Art. 28e, 28f paragraph 1 and la, 28g paragraph 1, 28i, 28j paragraph 1 and 2 and 28n of the Act will not provide for other rules for determining the place of performance.

Pursuant to art. 86 section 1 of the VAT Act to the extent that goods and services are used to perform taxable activities, the taxpayer referred to in art. 15, shall have the right to reduce the amount of tax due by the amount of input tax, subject to art. 114, art. 119 section 4, art. 120 paragraph 17 and 19 and art. 124.

According to art. 86 section 2 point 1 of the VAT Act, the amount of input tax is the sum of the amounts of tax resulting from invoices received by the taxpayer for:

a) purchase of goods and services,

b) making all or part of the payment before purchasing the goods or performing the service.

It follows from the above that the right to reduce the amount of tax due by the amount of input tax is granted when certain conditions are met, i.e. the deduction is made by the taxpayer of the goods and services tax and when the goods and services from which the tax was calculated are used to perform taxable activities, i.e. those that have the consequence of determining the tax due (incurring a tax liability).

Przedstawiona generalna zasada odliczenia podatku wyklucza zatem możliwość dokonania obniżenia kwoty podatku należnego o kwotę podatku naliczonego związanego z towarami i usługami, które nie są wykorzystywane do wykonywania czynności opodatkowanych, czyli w przypadku ich wykorzystania do czynności zwolnionych od podatku VAT oraz niepodlegających temu podatkowi. Prawo do odliczenia podatku naliczonego w całości lub w części przysługuje pod warunkiem spełnienia przez niego zarówno przesłanek pozytywnych, wynikających z art. 86 ust. 1 ustawy oraz niezaistnienia przesłanek negatywnych, określonych w art. 88 tej ustawy. Jedna z nich określona jest w art. 88 ust. 3a pkt 7 ustawy o VAT, zgodnie z którym nie stanowią podstawy do obniżenia podatku należnego oraz zwrotu różnicy podatku lub zwrotu podatku naliczonego faktury i dokumenty celne w przypadku, gdy wystawiono faktury, w których została wykazana kwota podatku w stosunku do czynności opodatkowanych, dla których nie wykazuje się kwoty podatku na fakturze - w części dotyczącej tych czynności.

The interpretative body further indicated that for the purpose of harmonizing the applicable rules regarding the place of taxation of taxable transactions, the definition of "permanent establishment" is contained in Council Implementing Regulation (DE) No 282/20 of 15 March 2011 establishing implementing measures for Directive 2006 / 112 / EC on the common system of value added tax applicable in this field from 1 July 2011, hereinafter referred to as "the Regulation".

It follows from the introductory part (recital) - point (4) that the primary purpose of this Regulation is to ensure uniform application of the current VAT system, by laying down implementing provisions for Directive 2006/112 / EC, in particular as regards taxable persons, the supply of goods and the provision of services and the place of taxable transactions. In accordance with the principle of proportionality set out in art. 5 paragraph 4 of the Treaty on European Union, this Regulation does not go beyond what is necessary to achieve that objective. The adoption of the regulation as binding and directly applicable in all Member States ensures the most uniform application. However, in point (14) it was stated that to ensure uniform application of the rules on the place of taxable transactions, it is necessary to clarify concepts such as the taxable person's place of business, permanent establishment, permanent residence and habitual residence. The use of the most precise and objective criteria should facilitate the application of these concepts in practice; account should be taken of the case law of the Court of Justice.

According to art. 11 paragraph 1 of the Regulation, for the purposes of applying Art. 44 of Directive 2006/112 / EC "permanent place of business" means any place other than the place of business of the taxpayer referred to in Art. 10 of this Regulation - which is characterized by sufficient stability and appropriate structure in terms of personnel and technical resources to enable it to receive and use services provided for its own needs in this permanent place of business.

In accordance with art. 11 paragraph 2 of the Regulation, for the purposes of applying the following articles, a permanent place of business means any place - other than the place of business of the taxpayer referred to in art. 10 of this Regulation - which is characterized by sufficient stability and appropriate structure in terms of personnel and technical resources to enable it to provide services that it performs:

a) art. 45 of Directive 2006/112 / EC;

b) from January 1, 2013 - art. 56 section 2, second paragraph, of Directive 2006/112 / EC;

c) until December 31, 2014 - art. 58 of Directive 2006/112 / EC;

d) art. 192a of Directive 2006/112 / EC.

The fact of having a VAT identification number is not sufficient in itself to consider that a taxable person has a permanent place of business (Article 11 (3) of the Regulation).

Based on Article. 53 section 1 of the Regulation, for the purposes of applying Art. 192a of Directive 2006/112 / EC the permanent place of business of a taxpayer is taken into account only if it has sufficient stability and an appropriate structure in terms of personnel and technical resources to enable it to supply goods or provide services in which it participates.

Further, referring to the rulings of the CJEU, the interpretative body pointed out that the place can be said if there is an appropriate structure in terms of personnel and technical facilities necessary to conduct business activity and there is a certain minimum scale of business activity that allows recognition that the taxpayer's activity in this place is not carried out periodically, as well as activities from this place is run independently in relation to the business seat of the enterprise. In this regard, the case law of the CJEU is valid, including judgments: C-168/84, C-231/94, C-190/95,

C-260/95, C-390/96, as well as C-605/12.

When determining the permanent place of business in Poland, the need to refer to the CJEU judgments has been repeatedly emphasized by Polish administrative courts. For example, the Supreme Administrative Court in its judgment of 16 February 2015, reference number Act I FSK 2004/13, referring to the judgment of the CJEU C-260/95, stated that all resources used by a potential permanent place of business, including technical resources, do not have to be the property of the taxpayer. According to the NSA, the taxpayer can therefore "create" the required structure based on renting, leasing and other similar forms. In turn, the Provincial Administrative Court in Olsztyn in a judgment of September 30, 2009, reference number act I SA / Ol 563/09 stated that the entity has a permanent place of business in the territory of the country, if using infrastructure and personnel within the territory of the country, in an organized and continuous manner, it carries out activities in 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. Similarly, theses contained in the verdicts of the Provincial Administrative Court reference number Acts III SAAVa 3332/14 and III SA / Wa 3741/14, taking into account the jurisprudence of the CJEU, are helpful for analyzing the issue of determining a permanent place of business.

Due to the above the definition of a permanent place of business arising from the said Executive Regulation 282/2011, as well as the settled case law of the CJEU and the case law of Polish administrative courts in the above-mentioned area, several premises may be mentioned, the existence of which means that one can speak of a "permanent place of business". As the name implies, "permanent" is permanently connected to a given place, non-portable, unchangeable. The above indicates that a permanent place of business must have a certain degree of involvement, which allows it to be considered that the business is conducted in this place not in a transient or periodic manner. Therefore, a certain minimum scale of activity is necessary, which is an external sign, that activity in this place is carried out constantly. The commitment should also take on a specific

personal and material dimension, allowing the provision of services in an independent manner. In other words, in order to recognize that a particular place of business is permanent, it is necessary to have technical infrastructure and human staff in this place who alone can perform certain activities. Such a personal and business structure in a permanent place of business should occur in a permanent way, i.e. repeatable and lasting. it is necessary to have here technical infrastructure and human staff who can independently perform specific activities. Such a personal and business structure in a permanent place of business should occur in a permanent way, i.e. repeatable and lasting. it is necessary to have here technical infrastructure and human staff who can independently perform specific activities. Such a personal and business structure in a permanent place of business should occur in a permanent way, i.e. repeatable and lasting.

The concept of a permanent place of business, in the opinion of the authority, also cannot be considered in isolation from the definition of economic activity referred to in art. 15 paragraph 2 of the Act. Pursuant to this provision, business activity includes all activities of producers, traders or service providers, including entities acquiring natural resources and farmers, as well as the activities of freelancers. Economic activity includes, in particular, activities consisting in the use of goods or intangible assets on a continuous basis for profit.

Due to the criteria referred to in the above-mentioned provision, an entity has a permanent place of business in the territory of the country, if, using its infrastructure and personnel in its territory, it conducts activities in an organized and continuous manner, under which it carries out activities subject to value added tax . Technical infrastructure and personal involvement must therefore be closely related to the performance of taxable activities. It is therefore necessary, for the permanent establishment, that this place not only use goods and services, but also itself be able to carry out taxable activities in accordance with Article 5 paragraph 1 of the Act. It is not necessary that the entity itself provides services or supplies of goods with sufficient funds. It is also important that the created business structure of the entity should be able to receive and use services provided for its own needs.

At the same time, it is not necessary to have your own personal and technical base to adopt a permanent place of business in a given country, but the taxpayer must have - based on the requirement of sufficient stability of the place of business - comparable control over the personnel and technical base.

It follows from the above that if a given entity has its staff in a given country and its structure (including technical infrastructure), characterized by adequate stability, then it has a permanent place of business in that country. However, what should be emphasized is irrelevant whether they are employees employed directly by this entity or "own" infrastructure. The case law of the CJEU indicates that also the use of human and technical resources of another entity may lead to the creation of a permanent place of business in another country.

Importantly, for a permanent establishment in a given country it is not necessary for the taxpayer to have the staff he employs and the technical facilities which he owns. It is sufficient that the entity uses both the personnel and technical facilities of other entities, so that it enables it to receive and use the services provided for its own needs of 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. Also, technical resources do not have to belong to the taxpayer (i.e. be his property). It is sufficient to rent them or provide them in another way.

Considering the circumstances of the case presented in the application and the applicable provisions of tax law, the interpretative body stated that the conditions for recognizing the Applicant's described activity in the territory of Poland as a permanent place of business activity were met, which was characterized by sufficient stability and adequate back office structure personal and technical.

In the created structure of the Applicant's activity in Poland, the criterion of permanence (understood as the fact that the entity possessing such a place intends to conduct business from this place on a permanent basis)

results from involvement in tasks related to the distribution of goods via websites A sufficient personal and technical resources .

As indicated in the application, the Applicant's activity consists in purchasing goods directly from suppliers (third parties), remaining in their possession until the time of sale (or until the liquidation of goods) and the sale of these goods to final recipients. The commercial activity of the Company is divided into four product lines based on the nature of the goods supplied. The Applicant's activity on the territory of Poland consists solely of selling goods. In connection with the sale of goods to customers, the Company recognizes both domestic paid supplies in Poland and recognizes intra-Community supplies of goods. At the same time, the Applicant in Poland concluded with the company B Sp. z o. o. a one-year contract, automatically renewed on January 1 of each subsequent year, pursuant to which B undertook to provide the Applicant with, among others storage, warehousing and guarding services of the Applicant's inventory, inventory management, confectioning, assembly and renewal of goods, packaging, labeling and dispatch of goods, including insertion of waybills and, on request, decorative packaging of parcels for gifts, maintaining a sufficient number of packaging articles, such as boxes, wrapping materials, gift wrapping materials, tapes, and other resources, handling returns and any other services mutually agreed by the parties. The applicant entrusts goods B with the purpose of storing and executing the orders of its customers, and B ensures that the transferred inventory of goods of the Applicant placed in its centers are managed in accordance with previously established quality standards, the purpose of which is to minimize the time of order processing. Orders for the transport of goods to B warehouses are organized by the Company's suppliers, while transport from B warehouses is organized and paid for by the Company. Depending on demand, type of assortment, promotion, etc. goods of the Applicant are usually stored / stored in warehouse B from several to several dozen days. In addition, there may be situations when B performs for the Applicant the service of packaging goods (sorting and repackaging goods), their simple assembly or refurbishment of products (refubrishing) returned by customers for sale as refurbished goods. Moreover,

Thus, in the present case the criterion of possessing technical and personal resources necessary to conduct part of the economic activity on the territory of the country is met. The presented circumstances indicate that the Applicant has actual power over the technical and personnel base, because he is able to properly use them in their activities in the field of selling goods via websites A. Services purchased in Poland, as well as personal involvement and infrastructure, above all B , used by the Applicant, are closely related to the Applicant's taxable activities on the territory of the country. The scope of services ordered and used by the Applicant allows to recognize

As has already been indicated, it is not necessary to have your own personal and technical support for adopting a permanent establishment in a given country, provided that the availability of other facilities is comparable to the availability of own facilities. Although formally the Applicant does not have its own technical and personnel resources in Poland, economic use of people and equipment is important. This situation is similar to the economic realities in the use of outsourcing companies by domestic entities, which also provide appropriate staff and provide various services, without the employer having to employ their own employees. For the purposes of the commercial activity of the Applicant, the resources at his disposal allow for admission,

The fact that all activities related to the commercial activity of the Company will be undertaken at the headquarters, including contracts for the purchase and sale of goods, orders for the delivery of goods, etc., as well as strategic decisions related to the matter remain irrelevant in this case. with the functioning of the Applicant, because the stability of the place of business cannot be equated with the intensity and frequency of actions taken as part of business operations, as well as with management decisions that are not taken in the country. Determining the place of the function of the company's management board is important when determining the place of business residence, however, these functions do not determine a permanent place of business. At the same time, it should be noted that the Applicant, despite having its registered office in L. and

also conducting operations there, which deals in the purchase of goods directly from suppliers (third parties) and the sale of goods to final recipients, also sells goods in Poland .

In conclusion, the interpretative body stated that in the present case the criteria were met for having a minimum size of activity characterized by a certain level of constancy in which the presence of human and technical resources necessary for carrying out the taxable person's business was taking place. Thus, the use of technical infrastructure located in Poland and personnel to perform part of the Applicant's business activity, in an organized and continuous manner, qualifies the Applicant's activity on the territory of the country as a permanent place of business in Poland.

Consequently, since the Applicant in Poland has a permanent place of business, as a rule, the services purchased by the Applicant (accounting, tax consultancy, legal consultancy), for which the place of performance is determined in accordance with the rule arising from art. 28b of the Act should be based on art. 28b paragraph 2 of this Act taxed in Poland, i.e. in the country where the buyer of services has a permanent place of business for which the services are provided. At the same time, if the service provider issues invoices with Polish VAT, the Company will have the right to deduct input tax on these services on the basis of art. 86 section 1 of the Act. The applicant is in fact registered in Poland as an active VAT taxpayer and carries out operations in Poland subject to value added tax. In addition, the exemptions arising from art. 88 clause 3a item 7 of the Act.

Referring to the individual interpretations and judgments cited by the Applicant, it was noted that the way of understanding the concept of a permanent place of business has evolved in subsequent judgments of the Court of Justice of the European Union and administrative court judgments. An analysis of the current case law of the CJEU and national courts shows that all resources used by a potential permanent establishment, including technical resources, do not have to be the taxpayer's property. The taxpayer can "create" the required infrastructure based on renting, leasing and other similar forms. In the light of current rulings, a thesis is presented in the literature on the subject,

At the same time, it was noted that individual interpretations are issued in individual cases, relate to various facts and do not bind other taxpayers, as do judgments. Having a permanent place of business should be assessed in terms of the industry in which the entity operates, which differentiates the requirements for the required / used technical and organizational facilities.

In his complaint against the above interpretation, brought to the Provincial Administrative Court in Gliwice, the tax advisor representing the applicant alleged:

1. breach of substantive law, i.e. art. 28b paragraph 1 and item 2 of the VAT Act in connection with from art. 11 paragraph 1 and art. 21 sentences 2 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 establishing implementing measures for Directive 2006/112 / EC on the common system of value added tax (Journal of Laws of the EU. Series L of 23 March 2011 r., No. 77 as amended (hereinafter: "Implementing Regulation 282/2011") consisting in:

a) incorrect interpretation and incorrect assessment as to their application of the assumption that, in the facts described in the application for interpretation, the applicant has a "permanent place of business in Poland", including in particular the recognition that:

- the circumstances presented by the Company indicate that it has actual power over the technical and personnel resources of B sp. z oo due to the fact that "it is able to properly use them in its activities in the field of selling goods via websites (p. 23 interpretations),

- the facts described by the Company are similar to economic realities in terms of using by domestic entities the services of outsourcing companies that provide adequate staff and provide various services, without the need to employ their own employees by the principals (p. 23 interpretations),

- the applicant de facto operates in Poland on a permanent basis using infrastructure and employees [...] (page 23 of the interpretation),

- the fact that all activities related to the commercial activity of the Company are taken at its headquarters, including contracts for the purchase and sale of goods, orders for the delivery of goods, etc., as well as strategic and management decisions related to with the functioning of the Company (p. 23 of the interpretation);

b) misinterpretation and incorrect assessment as to their application, consisting in the assumption that the place of taxation of services rendered to the applicant by entities established in Poland (e.g. legal advisory, tax advisory and accounting services) is Poland (and not place of business of the applicant).

2. breach of substantive law, i.e. art. 86 section 1 and art. 88 clause 3a point 7 of the VAT Act by incorrect assessment as to their application, consisting in the assumption that the Company will be entitled to deduct input tax shown on invoices by Polish service providers, while a correct assessment as to the application of these provisions should lead to the conclusion that (possibly) VAT charged by these entities will not be deductible for the Company (as a tax incorrectly shown on the invoice);

3. breach of the provisions of procedure, i.e. art. 14b § 2, art. 14b § 3 and 14c § 1 Op, consisting in not taking into account in the interpretation given the relevant circumstances indicated by the applicant in the facts, which determine that the Company does not have a permanent place of business in Poland.

In view of the allegations formulated in this way, it was proposed to repeal the contested interpretation in its entirety and to award the costs of the proceedings, including the costs of legal representation, according to prescribed norms.

In support of its application, the applicant maintained all the arguments put forward in the application initiating the interpretative proceedings in the present case, stating in particular the following.

As part of the alleged violation of Art. 28b paragraph 1 and 2 of the VAT Act in connection with from art. 11 paragraph 1 and art. 21 sentences 2 of Executive Regulation 282/2011, it was raised that the acquisition of logistics services (order processing services) from a related entity did not lead to the establishment of a permanent place of business for the Company in Poland.

In the Company's opinion, the absence of a permanent place of business is evidenced by the following arguments (discussed in detail in the subsequent sections of the complaint):

- a permanent establishment must have the ability to make management decisions and cannot perform only ancillary activities.

- the storage and dispatch of goods is only an element (resultant) of the logistics process and in essence is an ancillary activity. A different interpretation would lead to the fact that, in fact, every foreign entrepreneur who regularly sells goods that are in Poland at the time of commencement of shipment (they are stored in Poland, loaded onto a means of transport, repackaged) has a permanent place of business in Poland.

- recognition that the external provider of logistics services / warehousing and shipment services automatically becomes a "permanent establishment" leads to the illogical and irrational conclusion that the same infrastructure becomes a service provider and recipient of one service,

- the position of the authority is contrary to the position resulting from the judgment of the CJEU in the Polish case C-115/12 RR Donnelley.

Secondly, even if it were considered that the mere presence of logistics centers in Poland for handling the process of storage and dispatch of goods could lead to the creation of a "permanent place of business" (with

which the Company does not agree), the infrastructure located in Poland should be available for taxpayer at least in a manner comparable to own infrastructure. Meanwhile, purchasing storage / order processing services from an external entity does not mean that the service provider's infrastructure automatically becomes the "human and technical resources" of the recipient referred to in art. 11 paragraph 1 of Executive Regulation 282/2011. Another thing is the case of the conclusion of a contract, as a result of which there is an actual acquisition of control over the resources of another entity, e.g. rental of warehouse equipment or the posting of specific personnel, and another thing is to acquire the service of storage and shipment of goods from an external entity over which the purchaser of the service has no control. In particular, if - as in this case, the entity providing storage and handling services for the dispatch of goods also performs these services for the benefit of other entities and there is no control over its human resources.

Thirdly, in the light of the case-law cited in the complaint, this place would have to be characterized by: (a) the ability to make decisions, (b) the ability to independently conduct economic transactions (c) the existence of supervision over the performance of services purchased by the recipient, (d) remaining for the exclusive use of the recipient (or even the isolation of a specific area for the recipient), (e) the possibility for employees employed by the service provider to act directly on behalf of or for the benefit of the recipient - which was not the case here.

Further arguments of the complaint (on pages 5 to 16) provide a brief justification of individual arguments, referring to the case law of the CJEU and the judgments of national administrative courts.

Next, as part of an allegation of violation of the provision of art. 86 section 1 and art. 88 clause 3a point 7 of the Act, it was pointed out that it is a direct consequence of violation of Art. 28b paragraph 2 of the VAT Act regarding from art. 11 paragraph 1 of Executive Regulation 282/2011. In the Company's opinion, the services provided to it should be taxed in the recipient's country of residence, i.e. in Luxembourg.

In turn, developing the allegation of violation of Art. 14b § 2, art. 14b § 3 and art. 14c § 1 Op, it was pointed out that the contested interpretation did not take into account the relevant circumstances indicated in the facts, in particular the fact that the service provider also provides services to other entities, the applicant has no control over B staff, which operates independently, and the Company does not have technical resources / infrastructure on the national territory.

In its response to the complaint, the interpretative body fully upheld its position and requested that the complaint be dismissed. He also pointed out in particular that the applicant's judgments of the Provincial Administrative Court in Gliwice with reference number III SA / Gl 908/18, III SA / Gl 909/18, III SA / Gl 912/18, III SA / Gl 913/18, III SA / Gl 800/18 are not final judgments, and therefore the decisions contained in these judgments they cannot affect the legal assessment in the present case. On the other hand, the final judgment of WSA III SA / Wa 942/17, contrary to the applicant's claims, supports the position of the authority. It indicated that the Applicant has actual power over the technical and personnel base, because he is able to properly use them when purchasing and using services.

In a multi-page plead of 1 August 2019, the applicant's representative responded to the position of the body adopted in the contested interpretation and in the defense, alleging that the body engages in a polemic with the facts presented by the Company, questions this factual status, or presents arguments that cannot relate to events described by the Company. In this regard, the following were questioned in particular:

- recognition that the Company has control over the resources [...] (despite a clear indication that such control is not exercised);

- recognition that the Company controls the process of providing services by [...] (on the basis that the Company has provided that a standard of services has been agreed between the parties), although such control is not exercised;

- recognition of the essence of the services provided by [...] the Company as services consisting in "making infrastructure available" to the Company (while providing storage and handling services for dispatching goods is something else, and making storage infrastructure available);

- recognition of human and technical [...] resources as "sufficient" for the independent operation of the Company (while the Company described the entire advanced process consisting of making deliveries via the A platform, under which the storage of goods and handling of their shipment and returns are only an ancillary activity);

- recognition that the services rendered to the Company by [...] are not - from the Company's point of view - ancillary activities, but the essence of the business conducted by the Company;

- recognition that, using the infrastructure [...], the Company performs in Poland functions similar to those performed by the Company outside Poland (which is contrary to the presented facts, which describes what functions are performed in L. and which in Poland)

The Provincial Administrative Court considered the following.

The complaint deserved to be upheld.

Court control - pursuant to art. 3 § 1 and § 2 point 4a of the Act of 30 August 2002 Law on proceedings before administrative courts (Journal of Laws of 2019, item 2325, hereinafter: Ppsa), the individual interpretation of tax law of [...] ...] regarding tax on goods and services in the scope of determining permanent place of business activity, place of taxation of services and the right to deduct tax.

This control should be started by indicating that in accordance with art. 57a Ppsa, a complaint about a written interpretation of tax law provisions issued in an individual case, (...) may be based solely on the allegation of violation of the procedural rules, error of interpretation or wrong 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. Therefore, 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 in it. In particular, the court may not take any action to determine other than the violations indicated in the complaint. If such defects are found in the course of an inspection carried out within the limits set out by the complaint,

The dispute in the present case revolves around the question whether, in the facts described, which, pursuant to Article 14c Op, binds both the interpretative body and the Court, the applicant has a permanent place of business in Poland within the meaning of Article 28b paragraph 2 of the VAT Act 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 by the Company will be taxed in Poland and whether the applicant will have the right to deduct input tax on these services on the basis of art. 86 section 1 of the VAT Act.

In the Company's opinion, the interpretative body incorrectly found that it has a permanent place of business in Poland, which has 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 it does not employ employees on the territory of Poland, does not delegate its employees to perform tasks on the territory of Poland, nor does it acquire them from external resources, the Company's operations are entirely managed from the headquarters in L. and key activities are undertaken there activities from the point of view of its activities, it has no control over the solutions used by B, which are used to perform the contract between the parties.

The interpretative authority negated this position, stating in particular that the criteria for having a minimum size of activity characterized by a certain level of stability, in which the presence of human and technical resources necessary to conduct the business of the taxpayer, are met. The use of technical infrastructure located

in Poland and staff to perform part of the applicant's business in an organized and continuous manner qualifies the applicant's activity on the territory of the country as a permanent place of business in Poland.

In resolving the dispute thus outlined, in which the applicant should be right, the court will use, inter alia argumentation presented in the verdicts of the Provincial Administrative Court in Gliwice: of January 7, 2019, reference number act III SA / Gl 908/18 and dated 27 February 2019, reference number no. III SA / Gl 913/18, all cited administrative court rulings available in the NSA online judgment database at: http://orzeczenia.nsa.gov.pl), which it fully shares.

In accordance with art. 15 of the VAT Act, 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 VAT Act, 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 VAT, 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.

If the services are provided for a permanent place of business of the taxpayer, which is located in a place other than his registered office, the place of supply of these services is the permanent place of business.

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 the services provided for its own needs of this permanent place of business.

The issue of the conditions for recognition of 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 economic trading. However, there are still many doubts in this respect, as evidenced by the preliminary question of the Provincial Administrative Court in Wrocław of 6 June 2018, reference number file I SA / Wr 286/18. It includes the question: can the existence of a permanent place of business in Poland within the meaning of Art. 44 of Council Directive 2006/112 / EC of 28 November 2006 on the common system of value added tax (Journal of Laws of the EU of 11 December 2006 No. L 347, p. 1 et seq.) and art. 11 paragraph 1 of the implementing regulation? It therefore undoubtedly concerns the interpretation of art. 28b paragraph 2 of the VAT Act.

It should also be noted that the Provincial Administrative Court in Olsztyn in its 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 in which it carries out activities subject to tax on goods and services. 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 concerned 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 case, provides important guidance on the definition of the concept of permanent establishment.

Based on the above indications, also resulting from other judgments of the CJEU, regarding the establishment of a place of permanent establishment, it should be noted that a certain minimum scale of activity is necessary, which is an external hallmark that activity in this place is conducted constantly (judgment C-231/94), i.e. in a permanent, repetitive and timeless manner (judgment 168/84), requires minimum durability, by accumulating permanent human and technical resources necessary to provide certain services independently (judgment C-73/06 or C-260/95).

It is not disputed that the applicant's headquarters is L. and this is her principal place of business. The activity conducted in L. consists in the purchase of goods directly from suppliers (third parties), remaining in their possession until the moment of sale (or until the liquidation of goods, e.g. due to expiry of the expiry date) and sale of these goods to final recipients. The company manages the European part of retail sales and is a seller of goods offered by A throughout Europe, carries out strategic and management tasks in order to conduct business in Europe, as well as bears business risks related to the above.

Services provided in Poland by [...] include primarily packaging, labeling and dispatching of goods, as well as storage, storage and care of the applicant's inventory of goods, inventory management, handling returns. The applicant entrusts goods B with the purpose of storing and executing the orders of its customers, and B ensures that the transferred inventory of goods of the Applicant placed in its centers are managed in accordance with pre-established quality standards, which aim is to minimize the time of order processing.

Therefore, the activity [...] for the Applicant is only part of his activity without the possibility of supervising the performance of purchased services, without the personnel or necessary infrastructure. The applicant does not employ employees on Polish territory, does not delegate her employees to perform tasks on Polish territory, nor does she outsource them. It has no control over B. B's staff, performing the (technical) activities constituting the provision of ancillary services purchased by the applicant, do not act on behalf of the applicant or on her behalf, are employed by the service provider, follow his instructions. The same applies to infrastructure that is not shared in any way, it is not subject to the applicant's supervision and is also used to provide similar services to other entities. A distinction must be drawn between the provision of goods storage and shipping services and the provision of access to the applicant's storage infrastructure, which is not the case in the facts in question.

It should be emphasized that this necessary control of the applicant over the personnel and technical facilities in Poland cannot, contrary to the interpretative body's position, be derived from the quality standards established between the applicant and [...] which, of course, are defined between the parties to each service contract. services.

Therefore, taking into account the indicated premises for determining a permanent place of business and the facts presented by the party, it should be stated that the party only purchases in Poland ancillary services for the main activity conducted outside of Poland. There is no doubt that without the goods bought and sold in a country other than Poland, there would be no need to purchase services rendered to the applicant in Poland.

In the Court's opinion, the interpretative body wrongly assumed that the party has sufficient technical and personnel facilities in Poland to believe that it has a permanent place of business here.

Contrary to the position of the interpretative body, the availability of personnel and technical facilities comparable to the availability of own facilities is not determined by the economic use of people and equipment. Undoubtedly, the purchase of any service purchased by an economic entity is focused on specific economic benefits, which, however, does not automatically create a place of permanent operation in the country in which the service provider provides services.

It is also worth noting that in the recent Opinion of the Advocate General of November 14, 2019 in the abovementioned case C-547/18, it was stated that a subsidiary of a company (from a third country) is generally not its permanent place of business in meaning of art. 44 second sentence of Directive 2006/112 / EC and Art. 11 paragraph 1 of Implementing Regulation (EU) No 282/2011. Another conclusion, however, would be possible if the contractual structure formed by the recipient violated the prohibition of abusive practices. It is for the referring court to examine this issue.

The introduction to this opinion states that, although the Court has repeatedly already decided in the past when we are dealing with a permanent establishment in the meaning of VAT, there is no clear statement in these judgments regarding the possibility of treating a subsidiary as a permanent establishment economic, parent company. In the DFDS ruling, the Court was initially apparently inclined to recognize the subsidiary as a permanent establishment. However, in the decision in the Daimler case he again distanced himself from this possibility. In the **Welmory** case, **he** recently refrained from answering.

So, as demonstrated above, the interpretative body misinterpreted art. 28b paragraph 1 and item 2 of the VAT Act in connection with from art. 11 paragraph 1 and art. 21 sentences 2 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 establishing implementing measures for Directive 2006/112 / EC on the common system of value added tax (Journal of Laws of the EU. Series L of 23 March 2011 , No. 77, as amended).

The consequence of the above is that in the light of art. 86 section 1 and art. 88 clause 3a point 7 of the VAT Act, the Company will not be entitled to deduct input tax shown on invoices by Polish service providers

providing accounting services, tax advisory services and legal advisory services.

It was also reasonably pointed out in the complaint that the interpretative body, while denying the applicant's position, did not take into account all the relevant circumstances indicated by the party in the exhaustive description of the facts, which resulted in a faulty assumption that the Company had a permanent place of business in Poland. Regarding the alleged violation of the procedural provisions, i.e. 14b § 2, art. 14b § 3 and art. 14c § 1 Op, however, it should be indicated in particular that the interpretative body sent the party a precise request to supplement the description of the facts. Undoubtedly, the contested individual interpretation also contains a comprehensive description of the facts presented in the application and an assessment of the Applicant's position, together with the legal justification for this assessment, which is a requirement specified in art. 14 c § 1 Op

In view of the above, the Court pursuant to art. 146 Ppsa overruled the contested interpretation, obliging the interpretative body to consider the arguments presented.

The costs of the proceedings were decided on the basis of art. 200 and art. 205 § 1 Ppsa, awarding the applicant PLN 697, covering the payment of the complaint (PLN 200), legal representation costs (PLN 480) specified in § 2 item 1 point 2 of the Regulation of the Minister of Justice of 16 August 2018. on remuneration for acts of tax adviser in proceedings before administrative courts (Journal of Laws of 2018, item 1687) and stamp duty on a power of attorney (PLN 17