I SA / Wr 115/19 - Judgment of the Provincial Administrative Court in Wrocław

Date of judgment	2019-11-20 *the judgment is not final*
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Court	Provincial Administrative Court in Wrocław
referees	Daria Gawlak-Nowakowska / chairman / Jadwiga Danuta Mróz Marta Semiczek / rapporteur /
Symbol with description	6110 Tax on goods and services
Thematic entries	Tax on goods and services
The complained body	Director of the Tax Administration Chamber
Content of the result	* The contested decision was annulled
Regulations cited	OJ 2011 No. 177 item 1054 art. 106e paragraph 1 point 18 *Act of 11 March 2004 on tax on goods and services - consolidated text*

SENTENCE

The Provincial Administrative Court in Wrocław, composed of: Chairman WSA judge Daria Gawlak-Nowakowska, Judges WSA judge Jadwiga Danuta Mróz, WSA judge Marta Semiczek (rapporteur), Senior specialist reporter Katarzyna Motyl, after recognition in Department I at the hearing on November 20, 2019 with the participation of the case from the complaint of "A" sp. z oo in W. against the decision of the Director of the Tax Administration Chamber in W. of [...] No. [...] regarding tax on goods and services for May 2015 I. annuls the contested decision; II. awards the applicant to the applicant from the Director of the Tax Administration Chamber in W. the amount of PLN 14,638.00 (fourteen thousand six hundred and thirty-eight) for reimbursement of court costs.

SUBSTANTIATION

By the contested decision, the Director of the Tax Administration Chamber in W. (DIAS) of [...] 2018, No. [...] upheld the decision of the Head of the [...] Customs and Tax Office in B. of [...]. ..] 2017, No. [...] issued to "A" Sp. z o. o. (hereinafter: the applicant, taxpayer, Party, Company) regarding determining the amount of tax refund to the Party in the amount of PLN 136,713, i.e. in the amount lower than the declared amount by PLN 382,002.

As is apparent from the tax case file, during the reference period in question the applicant was conducting business activities in the field of organizing transport services for an entity established outside the country in the European Union, ie "B" LTD (United Kingdom). In this respect, it issued invoices in accordance with art. 106e paragraph 1 point 18 of the Act of 11 March 2004 on tax on goods and services (Journal of Laws of 2011 No. 177, item 1054 as amended, hereinafter the Act on VAT) without the tax indicated (using reverse charge). The findings made in the course of the tax proceedings conducted against the party showed that the actual place of business of the abovementioned foreign entity and place of its seat was Poland,

The tax authority of the first instance drew these conclusions, among others from documentation obtained from the British tax administration. As regards company "B" (hereinafter also a British company), it follows that this entity, despite being registered in the United Kingdom, showed no signs of doing business at the place notified as its seat.

Considering that "B" was operating in Poland, services for it should have been subject to a 23% VAT rate, in accordance with art. 41 section 1 of the VAT Act, taking as the basis for taxation - in accordance with art. 29a paragraph 1 of the VAT Act - the turnover obtained less the amount of tax due. Thus, in the VAT settlement for May 2015, the amount of tax due on services provided to "B" was increased by PLN 382,002.00.

In connection with the above, the authority of the first instance stated that the inclusion in the sales register for the month of May 2015 of services rendered to "B" LTD as not subject to taxation indicates that the register in this part was kept defective. In connection with the above the record was found to be unreliable and pursuant to art. 193 § 4 and § 6 Op did not recognize it as evidence in part of the indicated sale of services on the basis of invoices issued for the abovementioned entity.

The above findings were reflected in the decision issued by the Head [...] of the Customs and Tax Office in B. decision of [...] 2017, No. [...].

While examining the case in the appeal proceedings, DIAS upheld the findings and conclusions of the first instance, stating that the place of providing services to the abovementioned the company was located in Poland. The service buyer was only formally registered in another country, and the applicant organized services in the country with the participation of domestic carriers for the entity whose place of business was Poland.

Justifying this view, the appeal body pointed to Art. 28b paragraph 1 and item 2 of the VAT Act and art. 10 and art. 11 of the EU Council Implementing Regulation No. 282/2011 of 15 March 2011 establishing implementing measures to Directive 2006/112 / EC on the common value added tax (Official Journal of the EU No. L 77/1, hereinafter EU Council Regulation No. 282 / 2011) defining the place of registered office and permanent business activity. In addition, he cited the jurisprudence of the Court of Justice of the European Union, arguing that the place of the entity's seat is the place where the functions of the company's main management board are exercised, for this purpose the place where significant decisions regarding the management of the company are taken, the address of the registered office and the place of board meetings, in case of doubt, the place decides in which significant decisions are made regarding the overall management of the company. A permanent place of business, on the other hand, means a place other than the seat, which is sufficiently stable and has the appropriate personal and technical structure to enable the receipt and use of services.

Referring to those characteristics to the applicant's contractor, the tax authority stated that the place of supply of services (the entity's operation is Poland).

Justifying this view, he referred to information from the British tax services, which showed that in fact the British company, despite formal registration, does not operate at the address indicated, it is the address of the place of residence used by Polish companies for registration as VAT taxpayers. No person representing the company was found there, on request AJ came from Poland - a shareholder and director of this company since October 2013, who is a Polish citizen, runs a business in Poland and permanently lives there. Current company records are kept in Poland. There are no significant decisions regarding the general management of the enterprise at the company's headquarters and it is not a meeting place for the company's management board. Payments for services rendered company "B" makes from an account opened in a Polish bank. The findings of the British tax administration also show that the company is a Polish taxpayer registered in the United Kingdom, which declares a "reverse charge" in relation to the purchase of transport charges incurred in Poland. Taxes due are not paid in the United Kingdom. "B" invoices with proven fuel are again sent to entities in Slovakia: "C" SK, "D" SK and "E" sro SK, which are managed by Polish citizens as a "reverse charge" fee plus 5%. All payments from Slovak companies are directly transferred to the company's Polish account in P. The British tax administration suspects these companies that they are either disappearing taxpayers or will also send a charge to another Member State as a "reverse charge". In addition, HMRC (abbreviation of the name of the British office, which deals, among others, with taxes and customs) noted that companies from Slovakia "D" and "C" use Polish bank account numbers. The company "B" has signed a cooperation agreement with DW, which conducts business activity in Poland (according to CEIDG). Her testimony showed that she was responsible for the initial verification of documentation, organization of transport, preparation of orders, sales invoices, documentation for the driver, contracts for suppliers. they use Polish bank account numbers. The

company "B" has signed a cooperation agreement with DW, which conducts business activity in Poland (according to CEIDG). Her testimony showed that she was responsible for the initial verification of documentation, organization of transport, preparation of orders, sales invoices, documentation for the driver, contracts for suppliers. they use Polish bank account numbers. The company "B" has signed a cooperation agreement with DW, which conducts business activity in Poland (according to CEIDG). Her testimony showed that she was responsible for the initial verification of documentation, organization of transport, preparation of orders, sales invoices, documentation for the driver, contracts for suppliers.

AJ, DW and LK (applicant's representative) were questioned regarding cooperation - its establishment, rates, circulation of documents, and reference was made to the Company's source documentation in this regard. AJ testified that "B" LTD, apart from an account in a Polish bank, has an account in a British bank, to which only he has power of attorney. The representative of the Party indicated that it was the contractor who proposed cooperation, exchanged electronic company registration documents, the cooperation agreement was signed in Wa., Contacted by phone or e-mail with AJ and DW. In addition, he verified the contractor in an available manner, checked EU VAT registration and official registers and did not find any information disparaging the abovementioned company. He doesn't know and wasn't interested in whose deliveries were made, who was the owner of the delivered goods has no research tools for this. Invoices were issued in Polish and English, they were paid by bank transfer to a domestic account.

Assessing these circumstances, the appeal body indicated that, despite the formal registration in Great Britain, "B" LTD has no registered office and place of business. This company provides services in Poland, here decisions regarding the company are made and documents are stored, as the sole owner and director has a permanent residence here. This is also demonstrated by the lack of employees in the place indicated as the seat, the lack of assets belonging to the company, the lack of documentation in the place indicated as the seat, the director is a Polish citizen and lives in Poland, communication with contractors takes place electronically or by telephone, the documentation is kept by DW, a person having place of residence and activity in Poland. The thesis that the company employs an employee was not confirmed, because it was negated by the British tax services, pointing to the lack of signs of doing business in the UK. Also the circumstances of cooperation with the party prove that matters related to the implementation of services took place in Poland - contract signing, payments. The goods were delivered as part of the service and passed through companies whose existence gave rise to significant doubts, they were "B" contractors (e.g. "C"), eventually the goods were delivered to companies in Poland.

In the view of the appeal body, the applicant company failed to exercise due diligence in verifying its contractor and did not ascertain where the services would be provided. This is contradicted by the above circumstances regarding, among others how to establish cooperation and contact the Company with the contractor, make payments from a Polish bank account, to recipients of domestic services. These circumstances should raise the Company's doubts as to the place of providing services. He emphasized that proper recognition of the status of a contractor is charged to the Party as a service provider. The mere fact that a Party has obtained information about its headquarters from a contractor and sent correspondence to an address in England cannot constitute grounds for a different assessment of the collected evidence. The correspondence address is not a registered office. The appeal body noted that the verification of the entity "B" LTD carried out by the applicant Company only through the website of the European Commission, which confirmed the activity of the VAT number of this entity cannot constitute protection and be used to protect the interests of persons who are involved in fraud or abuse in the tax on goods and services, or do not exercise due diligence to avoid participating in such illegal activities. Simply verifying the activity of the contractor's VAT number cannot be the basis for applying the "reverse charge" procedure in a situation where the place of business and permanent place of business of entities registered in a European Union country other than Poland is actually located in Poland.

Therefore, the appeal body did not believe the Company's claims that it did not know and was unable to verify that the actual place of business and permanent establishment of "B" LTD was Poland, since she knew that: the shareholder and president of the company is a Polish citizen , resident in Poland, who did not speak English, the representatives of this company contacted the applicant from Polish telephone numbers, the administrative matters of this company were handled by DW, operating in Poland, the cooperation agreement with this company was concluded in Poland in the restaurant "F", transport fuel, which the applicant organized for the abovementioned company, was always in Poland, the entity had an account with a Polish bank and made payments for invoices issued from them.

The authority emphasized that the Company, as an experienced forwarder, was aware that by organizing fuel transport in cooperation with "B" LTD it was also involved in tax fraud. He stated that the presented circumstances of the case prove that the Company's behavior regarding the verification of its contractors and determining the place of providing services indicates a total lack of due diligence.

The authority noted that LK's prosecutor, as he testified, was aware of the hazards in fuel trading, alleged against the Company about tax fraud by placing entities providing logistics and transport services in order to extort VAT. Despite this, as a prudent entrepreneur, he did not recognize the status of contractors, joining the chain of entities using the "reverse charge" mechanism and not paying the due tax.

In the opinion of the authority, the Party is also disadvantaged by the fact that the CMR documents showed that several "buyers" from different countries had fuel. Multiplication of intermediaries only increases costs, which means that this is not a normal business procedure. This clearly shows that "buyers" have been placed in the fuel supply chain to create a tax carousel. It is hard to believe that the Party, as an experienced freight forwarder, was not aware that by organizing fuel transport it was also involved in this procedure.

Finally, referring to the allegation of cancellation of the TD interrogation, the authority noted that the party did not formulate such requests, and according to information from the UK tax services that the company did not employ employees, neither was AJ confirmed

In the complaint, the Party demanded that the contested decision be set aside and that the body be ordered to reimburse the costs of court proceedings.

The contested decision alleged infringement:

1) violation of art. 99 clause 12 in connection from art. 86 section 1 and 2 point 1 lit. a) in connection from art. 87 paragraph 1, paragraph 2 and 6 of the VAT Act, by failing to apply them and accepting the violation by the first instance authority of the principle of proportionality, neutrality and thus the violation of the applicant's right to deduct input tax, VAT paid by the Company at an earlier stage of trading;

2) violation of art. 84c paragraph 5 and art. 84c paragraph 12 in connection from art. 84c paragraph 1 and in connection with art. 9 and art. 11 paragraph 1 and art. 11 paragraph 9 of the Act on freedom of economic activity of July 2, 2004 due to the lack of issuance of a decision and erroneous recognition that the response to the opposition application may be given at any time, which had a significant impact on the case in question;

3) violation of art. 22 paragraph 1 of Council Regulation EU No. 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax by mistakenly acknowledging that this provision provides the basis for verifying the status of VAT-EU taxpayer, in a situation where this can only be derived from the competence of tax authorities to take steps to obtain reliable taxpayer registration information;

4) violation of art. 99 clause 12 in connection from art. 86 section 1 and 2 point 1 lit. a) in connection from art. 87 paragraph 1, paragraph 2 and 6 in connection from art. 28b paragraph 1 and item 2 of the VAT Act and art. 44 of Council Directive 2006/112 / EC of 28.11.2006 on the common system of value added tax (hereinafter:

Directive 112) in conjunction Art. 5 paragraph 1 point, 1 and art. 19a paragraph 1 in relation from art. 8 clause 1 in relation from art. 17 paragraph 1 point 4 lit. a) and b) in connection from art. 28a point 1 lit. a) and lit. b) in connection from art. 15 paragraph 1 and art. 99 item 12 of the VAT Act in connection from art. 21 § 3 and art. 207 Op in conjunction from art. 106e paragraph 1 point 18 in connection from art. 106e paragraph 1 point 5 and 3 in connection from art. 28b paragraph 1 and item 2 of the VAT Act and art. 44 of Directive 112 in connection from point 21 in connection from point 18 in connection from recital 14 in connection from art. 11 in relation from art. 18 clause 1 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 in connection with from art. 21 § 3a O. p, in connection from art. 24 paragraph 1 point 1 letter a) the Act of 1991 on fiscal control in connection with from art. 233 § 1 point 1, by maintaining in force the decision of the first instance authority regarding the determination of the amount of tax refund for May 2015 in the amount of PLN 136,713, when the circumstances of the case and the documents submitted by the party show that the difference between the input tax and the one due in May 2015, to be returned to the bank account should amount to PLN 518,715;

5) violation of art. 99 clause 12 in connection from art. 86 section 1 and 2 point 1 lit. a) in connection from art. 87 paragraph 1, paragraph 2 and 6 in connection from art. 28b paragraph 1 and item 2 of the VAT Act and art. 44 of Directive 112 in connection Art. 5 paragraph 1 point 1 and art. 19a paragraph 1 in relation from art. 8 clause 1 in relation from art. 17 paragraph 1 point 4 lit. a) and b) in connection from art. 28a point 1 lit. a) and lit. b) in connection from art. 15 paragraph 1 in relation from art. 106e paragraph 1 point 18 in connection from art. 106e paragraph 1 point 5 and 3 in connection from art. 28b paragraph 1 and item 2 of the VAT Act and art. 44 of Directive 112 in connection from point 21 in connection from point 18 in connection from recital 14 in connection from art. 11 in relation from art. 18 clause 1 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 in connection with from art. 207 and art. 210 § 1 item 6 and § 4 Op in connection from art. 2a Op, by the lack of such factual and legal justification,

6) violation of art. 99 clause 12 in connection from art. 86 section 1 and 2 point 1 lit. a) in connection from art. 87 paragraph 1, paragraph 2 and 6 in connection from art. 28b paragraph 1 and item 2 of the VAT Act and art. 44 of Directive 112 in connection Art. 5 paragraph 1 point 1 and art. 19a paragraph 1 in relation from art. 8 clause 1 in relation from art. 17 paragraph 1 point 4 lit. a) and b) in connection from art. 28a point 1 lit. a) and lit. b) in connection from art. 15 paragraph 1 in relation from art. 106e paragraph 1 point 18 in connection from art. 106e paragraph 1 point 5 and 3 in connection from art. 28b paragraph 1 and item 2 of the VAT Act and art. 44 of Directive 112 in connection from point 21 in connection from point 18 in connection from recital 14 in connection from art. 11 in relation from art. 18 clause 1 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 in connection with from art. 207, art. 191 and art. 187 § 1, art. 180 § 1, art. 188, art. 120, art. 121 § 1, art. 122, art. 124 in connection from art. 2a Op in connection from art. 6 clause 1 of the Act of July 2, 2004. determination of the facts in the case in a manner inconsistent with the evidence gathered in the case, without taking into account the party's request for the taking of evidence relevant for the case, treating the evidence in a selective manner, excluding those that undermine the allegations and theses of the taxpayer's conscious participation in tax fraud, and hence manipulation of evidence, which raises doubts as to the compliance with the reality of the established facts and may raise doubts as to the accuracy of the assessment of other evidence; not explaining all the facts of the case, in particular as regards the determination of the actual pattern of economic activity carried out by the taxpayer making the VAT payment at an earlier stage of turnover and the omission in this respect of the evidence submitted by the applicant, contrary to applicable law and the material collected in the case, the determination by the authority of the standard of due diligence, by requiring the applicant taking steps to verify contractors that are impossible to perform or are subject to a criminal sanction as illegal activities; failure to indicate by the tax authority why it omitted the evidence submitted by the applicant, failure to indicate by the authority what action it was taking to establish the facts of the case without doubt, as well as to indicate which of the evidence it considered reliable,

7) violation of art. 99 clause 12 in connection from art. 86 section 1 and 2 point 1 lit. a) in connection from art. 87 paragraph 1, paragraph 2 and 6 in connection from art. 28b paragraph 1 and item 2 of the VAT Act and art. 44 of Directive 112 in connection from art. 288 (ex Article 249 TEC) of the Treaty establishing the European Community in Art. 167 of Directive 112 in connection from art. 5 paragraph 1 point 1 in relation from art. 28b paragraph 3 of the VAT Act in connection with from art. 41 section 1 in relation from art. 109 section 3 of the VAT Act in connection with from art. 193 § 4 Op, by unjustifiably depriving the applicant of the right to reduce the amount of tax due by the amount of input tax by assuming that the Company obtained unjustified financial benefit in the form of VAT, by mistakenly assuming that the legal person being the recipient of the service has no registered office and place of performance service to her is the place where she holds "

8) violation of general principles of conducting tax proceedings, i.e.

- the principles of legality and the rule of law (Article 120 Op), by issuing, on the basis of the same provisions, two conflicting decisions in identical cases, where the Head of the Tax Office W. - [...] in W. confirmed the correct determination of the place of taxation carried out by the complainant of services to the company "B" LTD and stated that the Company verifies its contractors with due diligence, in a situation where the Head [...] of the Customs and Tax Office in B. expressed a different view in a twin factual and legal state;

- rules of conduct in a manner that raises trust in tax authorities (Article 121 § 1 of the Op) by conducting tax proceedings in the case in a way that does not raise the taxpayer's conviction that the actions relating to him are correct and comply with the law and that the proceedings is conducted in an impartial manner, especially in a situation where the Director of the Tax Administration Chamber in L. Mr [...] LB interfered by letter of 26 May 2017, No. [...] in led by the Director of the Tax Administration Chamber in W. appeal proceedings;

- the principle of objective truth (Article 122 Op) according to which the tax authorities take all necessary actions to accurately clarify the facts in a situation where theses were not confirmed by the collected evidence and no evidence indicated by the party having legal significance for the resolution of the case was carried out, which could confirm or deny the theses made by tax authorities;

- the principle of the active participation of the parties (Article 123 Op), which provides that the tax authorities are obliged to ensure the parties active participation at each stage of the proceedings, and before issuing a decision, enable them to express their views on the evidence and materials collected and requests made, by not carrying them out evidence submitted by the party for the circumstances indicated in the letter of 20 June 2018;

- the principle of persuasion (Article 124 Op), which provides that in the course of tax proceedings, tax authorities should explain to the parties the legitimacy of the premises they follow when dealing with the case, in order to as far as possible lead to the parties implementing the decision without using coercive measures, in a situation when in identical cases the tax authorities issue controversial rulings with each other, it is difficult to convince anyone of the legitimacy of the premises followed by the authority in the case, in particular the party to the proceedings.

In response to the complaint, the authority requested that it be dismissed and upheld its position expressed in the contested decision.

On May 20, 2019, a procedural letter of the Party of May 15, 2019 containing a request for admission of evidence from: a copy of the email of January 8, 2019 addressed to the Senior Tax Inspector Ms. BR as an answer to the Head of the Tax Office - [...] in W. in connection with the applicant's request for the taking of evidence submitted that DW has no accounting rights and never kept the accounting records of company "B" and the accounts were kept by company "G" in La. Which kept all of her documentation, company "B" had English telephone numbers and employed an employee of KD; notes of November 23, 2018 made by [...] the Customs and Tax Office at G. Delegatura in Z. on the grounds that the taxpayer is not at the registered address,

does not conduct business activity there and has no technical facilities; the applicant's letter of 13 September 2018 to the Head of the Tax Office in C. for indication whether her contractor is based in Poland together with the negative reply of that authority that "B" LTD has no NIP in Poland; protocol of the applicant's inspection carried out by the Head of the Tax Office W. [...]

of [...] 2015 on the confirmation of the fact that the applicant had correctly taxed services, the contractor's VAT registers. Parties confirming the booking of the services purchased, a request from a British company for a tax refund for the fact that the company was active in the United Kingdom and owned a residence there tax, AJ's statement of November 8, 2018, issued at the request of the Head of the Tax Office W. [...] on the occasion that KD was employed in "B" in 2015 as an office worker and with his family for 10 years he permanently resides in Great Britain and that the documentation of the British company was kept at the "G" office in La .; the decisions of the Head of the Tax Office in C. of [...] 2017 on the occasion that the Head of the Tax Office W. - [...

In addition, in this letter the party alleged that there were no arrangements regarding: the place of business or the seat of the British company, whether it had an employee, the place of storing documents in Poland, what actions should be taken by the party for proper verification of contractors, challenging the thesis that the party had deliberately acted in the chain of entities aimed at tax evasion.

The Provincial Administrative Court in Wrocław considered as follows:

The dispute in the present case boils down to assessing whether the tax authorities had sufficient grounds to conclude that the applicant had lowered the tax base in the value added tax for May 2015 as a result of not showing the tax due on forwarding services provided to company "B" LTD with registered office in Great Britain due to incorrect qualification of the place of supply of services.

As is clear from the file, the reason for questioning the VAT declaration submitted by the applicant is the VAT records in the field of services rendered for the abovementioned the contractor was stating that, despite the notification of business activity and registration in other Member States, the company actually did business in Poland. This is confirmed by the findings from foreign tax services, which showed that in the place reported as the seat of this company there were no signs of business activity, no tax books were stored, the company did not employ employees. The managing entity is a Polish citizen residing permanently in the country. Therefore, in a place reported abroad, there are no board meetings, no decisions relevant for this entity are taken, which precludes recognition of his registered office at the place formally notified to the registers. Lack of technical and personal facilities and storage of tax books makes it impossible to assume that there is a permanent place of business. The applicant, who should verify her contractor to establish the actual place of supply of services, did not exercise due diligence in that regard. She ignored the fact that this entity was managed by a Polish citizen, that payments were made from domestic bank accounts, the contract was signed in Poland, contacts were e-mail or telephone from national numbers, and ultimately the services were performed in Poland. As a result, the tax authorities took the view that the services provided by the applicant should be qualified as being performed for a domestic entity,

Questioning those findings, the applicant's representative raised in the application both procedural and violation allegations. He pointed out shortcomings in the scope of determining the seat of the contractor, highlighting contradictions and deficiencies in the documentation sent by the British tax authorities, errors in the findings made by the tax authorities conducting the proceedings, omitting favorable explanations for the party regarding the place of storage of tax books and an employee of a British company as well as possession and use by its representative from foreign (English) numbers. Lack of indication what actions or actions the applicant should take to verify contractors in order to determine the place of rendering services,

It should be noted that the same problem was the subject of assessment by the Provincial Administrative Court in Wrocław in the judgments of 28 January 2019, reference number act I SA / Wr 397/18 and from 9 May

2019 reference number act I SA / Wr 949/18. The view presented in the judgments cited above, the adjudicating court agrees and refers to it in its justification.

Referring to the issues disputed in this case, it should be noted that the applicant's settlement and invoicing based on art. 106e paragraph 1 point 18 of the VAT Act requires, among others that the place of supply of services is outside the country. According to the content of art. 28b paragraph 1 of the VAT Act, in the version applicable in June 2015, 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. On the other hand, paragraph 2 of this provision provides that where services are provided for a permanent place of business of a taxable person,

The cited provision is an implementation of Art. 44 of Directive 112.

The cited regulations show that the rule is that the place of rendering services is the place where the recipient has his business establishment.

The Act stipulates that this rule does not apply when the services are provided for the permanent place of business of the recipient. In this case, the place of supply of services is a permanent place of business.

These regulations seek to tax the service provided in the place of actual use, i.e. its consumption by the recipient: at his registered office, place of residence, permanent place of business or place where he usually conducts business or in which he has his habitual residence.

The rule is then the tax settlement by the buyer under the so-called reverse charge mechanism - the customer calculates and deducts VAT in the declaration submitted in the country of his registered office, place of residence or place of permanent business (cf. J. Zubrzycki, "Lex Lex", Unimex 2010, p. 355).

The notion of the place of business of the taxpayer is defined in art. 10 of EU Council Regulation No. 282/2011. Pursuant to the content of this provision, this is the place where the functions of the company's management board are performed (paragraph 1). As stated in paragraph 2 of this provision: in determining this place, account shall be taken of the place where important decisions regarding general management of the enterprise are taken, the address of the registered office of the enterprise and the place of meetings of the management board of the enterprise. If these criteria do not allow to determine with absolute certainty the place of business of the taxpayer, the decisive criterion is the place where important decisions regarding the general management of the enterprise are made. In addition, it is indicated (paragraph 3 Article 10), that the postal address alone cannot be considered as the place of business of the taxpayer. Pursuant to the ruling of the CJEU of June 28, 2007, reference number Act C-73/06 (Planzer Luxembourg S§rl v Bundeszentralamt für Steuern, ECLI: EU: C: 2007: 397), the seat for the purpose of conducting business activities of a company is the place where important decisions regarding the general management of that company are taken and in which its central administrative tasks are performed.

This regulation also contains in art. 11 paragraph 1 legal definition of "permanent establishment". Pursuant to this provision, 'for the purposes of applying Article 44 of Directive 2006/112 / EC, the place of business is any place - other than the place of business of the taxable person referred to in Article 10 of this Regulation - which is sufficiently stable 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 establishment. "

CJEU case law shows that in order to determine the place of permanent establishment, a certain minimum scale of activity is necessary, which is an external hallmark that activity in this place is carried out constantly (see judgment of the ECJ of 2 May 1996 in case reference number C-231/94 Faaborg-gelting Linien a / s v. Finanzamt Flensburg ECLI: EU: C: 1996: 184). To recognize that a particular place of business is permanent - it is necessary to have there technical infrastructure (if it is necessary to perform services) and human staff.

Such a personal - substantive structure in a permanent place of business should appear in a permanent way, i.e. repetitive and lasting (as per ECJ ruling on July 4, 1985, reference number 168/84 - Gunter Berkholz v. Finanzamt Hamburg-Mitte-Aitstadt ECLI: EU: C: 1985: 299).

On the other hand, however, the CJEU jurisprudence notes that the fact that the forces and means at a given location are appropriate for the establishment of a permanent place of business should be assessed in the context of specific services or supplies. In the judgment of the CJEU of October 16, 2014, reference number act C - 605/12 **Welmory** v. Director of the Tax Chamber in Gdańsk ECLI: EU: C: 2014: 2298, the Tribunal reminded that in view of the multitude and diversity of facts of the case, the assessment whether we are dealing with a permanent place of business belongs rather to facts, which is why this assessment should be taken primarily by national authorities and national courts, not by the Court.

Therefore, determining the place of supply of services, it is necessary to make an assessment, based on the circumstances of the specific case, where the recipient of this service is established or the place of permanent establishment. The tax authority is right that simply specifying a postal address is not enough to designate a registered office. Similarly, the fact of having a VAT identification number is not in itself sufficient to conclude that the taxpayer has a permanent establishment. It is necessary to make the arrangements referred to in the provisions of EU Council Regulation No. 282/2011.

In this regard, tax authorities correctly interpret both national and EU regulations.

However, the Court's objections are raised by factual findings and the assessment derived therefrom. In this respect, it must be stated that the taking of evidence in tax matters is not an end in itself, but is intended to establish the actual facts in the context of a specific norm of substantive law. Based on Article. 121 Op tax proceedings should be conducted in a way that inspires confidence in tax authorities, and pursuant to art. 122 Op, in the course of proceedings, the tax authorities take all necessary actions to thoroughly clarify the facts and settle the matter in tax proceedings, guided by the principle of finding material truth. Expressed in art. 122 The principle of material truth has been specified in art. 187 § 1 Op, which imposes an obligation on the tax authority to collect and exhaustively examine all evidence, and then in accordance with art. 191 Op to assess, on the basis of all evidence gathered, whether the circumstance has been proved. In this regard, tax authorities should make use of their knowledge, experience and logic principles in a convincing way to assess the probative value of individual means of evidence, indicating which evidence and for what reasons they refused credibility, they considered individual evidence not only each individually but also in mutual communication .

These rules were violated by the tax authorities on the basis of evidence that was not unambiguous and consistent, omitted significant contradictions arising from the compilation of individual pieces of evidence, therefore the facts were not correctly established, which negates the possibility of its correct assessment.

In the opinion of the Court, there are significant reservations regarding the assessment of evidence obtained from British tax services. In the context of the case being examined, they have significant evidential value. However, this does not imply any special evidentiary status, which indicates that they are subject to the same assessment as any other evidence in tax proceedings.

In the Court's opinion, the conclusions described in the contested decision, together with the content of the abovementioned evidence, indicate that they have not been subjected to any analysis necessary for the correct inference to meet the requirements arising from Article. 191 Op. The content of the decisions of the bodies of both instances argues that the findings (and sometimes also the conclusions) of the British tax authorities have been fully and uncritically duplicated, despite the fact that in the Court's opinion their content raises objections, which strengthens their pledge with other evidence gathered in the case.

The information provided in them is not explicit, they raise doubts as to the facts and how to read them. They also contain, as indicated, an assessment of the facts, which is reserved to the tax authority competent to issue

a decision to the party. It should be emphasized here that the fact of including such an assessment in information, but its uncritical (and literal) duplication by the tax authorities ruling in the case does not raise objections of the Court.

In the Court's opinion, as the applicant also argued, there is no clear and unambiguous information regarding the place of business of the British company, which is a fundamental and important factor in this case.

From the SCAC information of 13 August 2015, which is a response to the query regarding the settlement of the abovementioned of the entity for May 2015, it does not appear when the tax authorities of the Member State visited the company. Doubts in this respect arise from the analysis of information, further letters from the British tax services, and the case file, in particular the letter of the British company of 7 September 2015 omitted by the appeal body.

It shows that employees of the British tax services were in this company only once in September 2014. The above calls into question whether in fact on the date of the transaction with the party, and therefore 8 months later, the facts were the same as in September 2014. .

This doubt is not dispelled by further SCAC information, as it dated August 19, 2015 does not contain any data as to the description of the company's headquarters, but contains an assessment of its activities and information that registers were forwarded upon further request and what results from them.

Another information from December 23, 2015 indicates that the taxpayer (company) was re-audited and its director questioned. However, there is no data as to whether the interview took place at the company's headquarters or at the headquarters of the tax authority, the lack of description of the place of business, a significant part of the information is the assessment of the company's operations by the local tax authorities.

The tax authority did not resolve any doubts regarding these issues, merely claiming that the British tax services stated that there was no economic activity in the place reported as the seat of the company and that it was the place of residence where Polish companies were registered for VAT purposes (information from 13 August 2015). There is no indication as to what this claim is based on, which is important given the nature of the company's operations.

From the testimony of its director AJ it appeared that she deals with the agency. This type of activity does not require any special structure in terms of personnel and technical facilities. Such services can be organized from anywhere in the world using Internet access and the simplest technical means, such as a laptop and a mobile phone. Contact with the customer, as the example of this case indicates, can only take place in electronic or telephone form. Hence, even if the place of business (business) is located in a flat, activity can be carried out and only this circumstance cannot prejudge the lack of place of business. Hence, given the specificity of operations, specific factual findings are important. In this case, the evidence provided does not allow for the explicit exclusion that in the place notified by the company it could not conduct business activity. Such an assessment cannot be based on the statement that there are no signs of activity, as it is not known what the statement is based on, at what time and whether any arrangements were made in this respect (whether the place of business activity of the company was inspected), because apart from the thesis itself, which seems to be rather an assessment, has no further information. However, establishing this circumstance has important consequences for the case in question. because it is not known on which this statement is supported, at what time and whether any arrangements were made in this respect (whether the place of business of the company was examined), because apart from the thesis itself, which seems to be rather an assessment, there are no closer information. However, establishing this circumstance has important consequences for the case in question. because it is not known on which this statement is supported, at what time and whether any arrangements were made in this respect (whether the place of business of the company was examined), because apart from the thesis itself, which seems to be rather an assessment, there are no closer information. However, establishing this circumstance has important consequences for the case in question.

Further evidence (AJ's testimony given on September 11, 2015 to the Tax Control Office in P.) shows that the company in England rents a separate premises where there are no other companies and there is an employee employed who administers all documentation. In these circumstances, by denying the testimony of a witness, the tax authorities should show evidence on the basis of which the statements of the witness are considered to be false. In this respect, the doubts described abrogate the possibility of relying on evidence from British tax authorities due to their deficiencies in matters relevant to the case.

A similar assessment concerns the issue of the existence of an employee of the company, who permanently resides in the UK and administers all company documentation, omitted by the tax authorities.

The lack of indication in the SCAC information whether in the audited period the company carried out an inspection consisting in a visual inspection of the place of activity and the lack of other evidence in this respect excludes the possibility of omitting the testimony of a witness about employment in the company of the employee. The more that this thesis is confirmed in the testimony of another witness DW

These doubts are not explained by information from British tax services citing DW explanations, as there is no information when the person made such an explanation and questioned in Poland on November 5, 2015 - as indicated - testified that the company employs an employee - Mr. K. - permanently living in England, but she does not know in what capacity.

Inconsistencies and deficiencies in the factual findings exclude the possibility of considering that the facts were established correctly, especially since in the content of the decision the tax authorities denied that the witness AJ testified that the company employed an employee, which is not true.

Further inconsistencies arising from evidence submitted by UK tax authorities relate to the issue of retaining tax books. Although this issue in itself is not prejudicial to the assessment of the place of establishment or place of business, it may constitute an element that may outweigh the assessment of that circumstance. Listened as a witness, the director of a British company testified that the company's accounting is kept by the British company "G", this is confirmed by DW's testimony of November 5, 2015. On the other hand, reading information from British services on which the tax authority relied is at least inconsistent. It shows (information of 13 August 2015) that the applicant's main place of business is run by "G", the company director was not present but his representative DW

On this basis, the tax authorities came to the conclusion that registers are not stored at the headquarters of a British company and that they are kept in Poland. On the plea of the party, alleging the groundlessness of these claims and the inconsistency of the findings of the British tax authorities, the tax authority stated that there were no records and that they were produced only after the summons.

In the Court's opinion, however, this assessment is arbitrary because it is based on a presumption. It may equally well be assumed that the head office inspection was carried out in September 2014, the registers were then collected, as the representative of DW was present, and in subsequent periods only documents were requested, which were presented on request. This course of events is also a presumption, as there is no specific evidence to support it. At the same time, it is more likely, because it is confirmed in the company's statement that the visit of tax authorities was one - in September 2014, which can also confirm the time range of the acquired registers.

The arguments put forward prove that the evidence carried out in the case are inconclusive and may lead to divergent conclusions, which precludes their adoption as a basis of factual findings. Undoubtedly, they require supplementing with facts which have been indicated by the Court and which will contribute to clarifying the issues relevant to the case.

As a side note, it is only necessary to point out that it has not been clarified and, strangely enough, it did not arouse the interest of tax authorities that the British tax services indicated the name Ka. As the person who

provided explanations regarding the British company. Therefore, it is not known what role it played, the SCAC information does not explain it, and perhaps it will bring relevant information to the case. In the circumstances of this case, a party cannot pay attention to its participation and role in the proceedings, as it concerns a person associated with its contractor. These issues should be clarified by the tax authority, which has not made any arrangements in this respect.

Recognized procedural irregularities consisting in violation of the provisions of art. 122, art. 187 § 1 and art. 191 Op, to the extent that affects the outcome of this case, gave rise to annulment of the contested decision in order to supplement the evidentiary proceedings in the indicated scope.

In this regard, it will be necessary to determine whether, at the date of the disputed transactions, the company's counterparty had its headquarters or permanent place of business in the United Kingdom. The choice of evidence is left to the tax authorities. They may ask for additional explanations, sending reports or further information regarding, for example, the fact of hiring an employee at that time and evidence of this fact, costs incurred for business activities, e.g. office or media supplies.

In the re-conducted proceedings, it is also worth determining whether and on what terms the tax settled the person performing management functions in the company being the applicant's contractor, since these facts can be deduced or resided in the country and here made decisions relevant for that company. Whether she was abroad, she settled income tax there and there is evidence confirming the costs associated with their travel to the place of business of this company.

If these findings prove that the company did not have a registered office and permanent place of business abroad, then it would be necessary - in order to derive the effects resulting from the contested decision - firstly to determine, according to the same rules, whether this entity has its registered office or place of permanent establishment in Poland . Only this circumstance, proved as in this proceeding - the lack of signs of business activity and headquarters abroad in Poland, will give grounds to assume that these services were provided in Poland.

In the Court's opinion, the tax authorities did not make such determinations, and without them it is not possible to determine whether the applicant's contractor had its registered office or permanent establishment in Poland,

Deficiencies in factual findings prove violations also in this respect of Art. 122, art. 187 § 1 and art. 191 Op and this issue will require re-examination.

Secondly, if as a result of these tests it is clearly established that the abovementioned the entity has neither the registered office or the place of permanent operation abroad, but has them in Poland, this circumstance will not give rise to correction of the applicant's tax settlement.

However, in the context of the obligations arising from art. 20, art. 21 and art. 22 of Council Regulation No. 282/2011 since the introduction of the reverse charge for services, it is the service provider's responsibility to correctly determine the place of supply of services. It is in the Court's opinion that in these circumstances it is necessary to indicate what information the service provider must have in order to assume where the place of business is located (within the meaning of Article 10 of the abovementioned Regulation) or where the place of business is permanent (Article 11 of the Regulation). It is therefore necessary to indicate what information the service provider should have about the recipient in the established facts in order to correctly determine the place of supply of the service,

In the proceeding audited by the Court, the tax authorities considered it reasonable to establish whether the applicant had exercised due diligence in verifying the contractor, finding that it had not.

Without denying this action and the legitimacy of examining the applicant's "good faith" test in the present case, it must be stated, however, that the analysis carried out by the tax authorities in the context of the

principles arising from the case-law of the Court of Justice of the European Union was not sufficient.

In the jurisprudence regarding due diligence, the CJEU has repeatedly emphasized the need to refer to the circumstances of the case. He claimed that if an economic operator took all reasonable steps to expect him to make sure that the transactions in which he was involved did not involve a criminal offense, be it in the field of VAT or in another field, he could presuming the legality of these transactions without the risk of losing the right to deduct input VAT. The taxpayer could be denied the right to deduct only if it is proved on the basis of objective evidence that he knew or should have known that the transactions underlying the right of deduction are connected with an offense committed by a supplier or another entity operating at an earlier stage of trading. Definition of activities, which in a particular case can reasonably be expected from a taxpayer who intends to exercise the right to deduct VAT in order to make sure that his transactions do not involve a crime by an entity operating at an earlier stage of trading, depends primarily on the circumstances of the case under consideration. If there are premises to suspect irregularities or violation of law, the prudent entrepreneur should, depending on the circumstances of the particular case, obtain information about the entity from which he intends to purchase goods or services in order to ensure its credibility. that his transactions do not involve an offense by an entity operating at an earlier stage of trading depends primarily on the circumstances of the case in point. If there are premises to suspect irregularities or violation of law, the prudent entrepreneur should, depending on the circumstances of the particular case, obtain information about the entity from which he intends to purchase goods or services in order to ensure its credibility. that his transactions do not involve an offense by an entity operating at an earlier stage of trading depends primarily on the circumstances of the case in point. If there are premises to suspect irregularities or violation of law, the prudent entrepreneur should, depending on the circumstances of the particular case, obtain information about the entity from which he intends to purchase goods or services in order to ensure its credibility.

However, tax authorities cannot generally require a taxable person intending to exercise his right to deduct VAT to check whether the issuer of the invoice for the goods or services to be deducted is a taxable person, whether he has the goods subject to the transaction and is able to supply them and whether he fulfills his obligation to submit a declaration and pay VAT to ensure that entities operating at earlier stages of trade do not commit irregularities or crimes, or that the taxpayer has documents confirming this. Thus, by imposing such obligations on taxpayers under the threat of refusing the right to deduct, tax authorities would pass on their taxpayers, in a manner contrary to the provisions indicated, their own control tasks.

Therefore, in the Court's opinion, the key is to establish a certain pattern of taxpayer behavior, according to which the disputed transactions will be examined. This pattern should be derived from the overall activities of the entity, and if all transactions are negated, it is reasonable to look for patterns of behavior of other entities whose transactions are not negated.

In this context, the reference by tax authorities to the fact that the Party should suspect that the place of establishment is not located abroad but in Poland, because the managing entity is a Pole, the company has an account in Poland and the services are ultimately performed here, according to the court little.

The applicant is right that she obtained the necessary documents confirming the registration of this entity abroad, she was given the correct EU VAT number and the bank's verification. They gave her the basis to believe that this is an entity based abroad.

In order to undermine these facts and assume that the Party did not exercise due diligence in the verification of the contractor, it should be indicated how this fact should be verified. The lack of diligence must be referred to a certain pattern or an indication that with these specific transactions the applicant departed from the usual diligence, omitted something, settled transactions differently than usual, set prices, or deviated from the market, did not, for example, insure them, as usually does in relations with other contractors. The Website's conduct in relation to other entities operating in this industry may also be laid-back and bears carelessness,

which may translate into the thesis about the lack of diligence in verification of the contractor. These findings were lacking, which should be supplemented in the re-conducted proceedings,

Referring to the objections of the complaint, the court complied with the comments regarding the violation of the indicated provisions of procedural law. At this point, it is also necessary to point out the accuracy of the claims, which increase the omission of circumstances relevant for the party, such as the use of British telephone numbers by the contractor of the Website. This is confirmed by both AJ and DW, and the tax authority claims, without indicating the reasons for negating these testimonies, that Polish telephone numbers were used.

As regards further allegations alleging the failure to take into account documents using the presumption of authenticity concerning the applicant's contractor, it should be pointed out, as has already been stated, that merely having a VAT identification number (registration of a registered office) may, in the circumstances of a specific case, prove insufficient to determine whether the entity is resident in country and you will need to take additional action. Therefore, this complaint - formulated in the same way as in the complaint - cannot be considered as well founded.

In each case, it is necessary to examine whether there were grounds for the taxpayer not to stop at just the content of the abovementioned documents, but has further verified and even withdrew from the transaction if it turns out to be too risky for him due to the environment of the case giving rise to the presumption that the contractor's registered office (place of permanent business) is different from what results from official documentation .

In view of doubts as to the facts arising from the abovementioned documents, the tax authority reasonably initiated the proceedings by not merely content. Hence the mere fact that the applicant had the abovementioned documents can't protect her. In this context, the evidence submitted by the party in the procedural letter of 27 March 2019 (admitted by the Court as evidence in the ongoing proceedings) regarding the indication whether its contractor has its registered office in Poland is not significant for the direction of the decision. The evidence indicated by the party in the form of a control report carried out by the Head of the Tax Office W. [...] of [...] December 2015, also does not change the view of the case, as its content shows that the findings of the tax authority do not include information obtained from the United Kingdom.

As a side note, it should only be added that from the point of view of certainty of economic turnover, the issue of updating the data included in official registers should be treated as a priority. The reality of this case proves that, despite the knowledge in this area, no actions were taken to remove (or confirm the correct registration) the contracting parties of the party from the abovementioned registers, although the first information providing grounds for such verification activities comes from 2014.

Undoubtedly, the diligence of the contractor's audit should be included in the business conduct scheme, however, cannot be the sole means of investigating and verifying the activities of entities abusing rights or evading the payment of due tax liabilities and transferring all responsibility to other entrepreneurs.

The Party's allegations, partly discussed, regarding the lack of proper verification of the decision of the first instance body by the appeal body are correct. Already mentioned issues of phone calls, or employee and people who communicated with the site. All this indicates the carelessness of the appeal body when analyzing the evidence, in addition to the assessment of information from the British tax authorities and the evidence described on that occasion.

The deficiencies found exclude the possibility of analyzing the merits of the substantive provisions applied, hence the complaint alleging breach of the principle of proportionality or neutrality must be assessed as premature.

Considering that the contested decision violates the said provisions of procedural law, the Court acting pursuant to art. 145 § 1 point 1 lit. c of the Act of 30 August 2002 Law on proceedings before administrative courts (Journal of Laws of 2018, item 1302, hereinafter ppsa) set aside the contested decision. Costs were decided on the basis of art. 200 in from art. 205 § 2 ppsa in connection from § 14 para. 1 point 1 letter a) in connection from § 2 point 7 of the Regulation of the Minister of Justice of October 3, 2016 on fees for attorney's activities (Journal of Laws of 2016 item 1688).

In the re-conducted proceeding, the tax authority should supplement the evidence with elements indicated in the content of the Court's considerations regarding the place of registered office or permanent place of business, or the issue of the applicant maintaining due diligence in selecting a contractor and concluding disputed transactions. In this regard, it is important to analyze the circumstances of the transactions concluded between the applicant and its suppliers, to determine the pattern of party behavior in the context of other non-negated transactions or market conditions. These circumstances should constitute a reference point when assessing whether, in carrying out the disputed transactions, the applicant behaved in a way that differed from the standards adopted in relations with other contractors, or whether it went beyond the limits adopted in the realities of a given market. So it may be important to determine