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Preliminary ruling (CJEU) - individual decision of the BFG of 20.12.2019, RE / 7100002/2019

Request for a preliminary ruling: permanent establishment for a leased property

law sets

No legal sentences available

decision text

To the

Court of Justice of the European Union

Registry of the Court of Justice

dergrünewald
Einstellungen
L-2925 Luxembourg

Application

for a preliminary ruling

according to Art 267 TFEU

Parties to the main proceedings at the Federal Finance Court RV / 7103840/2015:

appellant:

- ** ** BF
- represented by: Ernst & Young Steuerberatungsgesellschaft mbH, Wagramer Strasse 19, 1220 Vienna

Relevant authority:

- Tax office Vienna 1/23, Marxergasse 4, 1030 Vienna

The Federal Finance Court decides through the single judge MMag. Gerald Erwin Ehgartner in the complaint ** BF **, represented by Ernst & Young Steuerberatungsgesellschaft mbH, Wagramer Strasse 19, 1220 Vienna, against the notices of the Vienna Tax Office 1/23 regarding sales tax 2004 to 2010 (only the years of dispute are relevant for the question referred 2009 and 2010) and notices of rectification 2004 to 2008

DECISION:

I. In accordance with Art. 267 TFEU, the following question will be submitted to the Court of Justice of the European Union for a decision, which should be interpreted in accordance with the "Council Directive 2006/112 / EC of November 28, 2006 on the common VAT system" (hereinafter: VAT Directive) and of the "Council Implementing Regulation (EU) No. 282/2011 of March 15, 2011 laying down implementing rules for Directive 2006/112 / EC on the common VAT system" (hereinafter: DVO) concerns :

Is the concept of "permanent establishment" to be understood that the presence of personnel and technical equipment must always exist and that the branch must therefore have its own personnel from the service provider or, in the specific case of taxable renting, can provide evidence of a rental in Germany Property that merely represents a passive toleration allowance, can this also be regarded as a " permanent establishment" without the need for personnel ?

II. The appeal to the Administrative Court is not permitted under Section 25a (3) VwGG .

reasons

1. General meaning of the question of interpretation

1. The subject of interpretation comes in particular against the background that (at least) in Austria and Germany so far inconsistent interpretations of the term “permanent establishment” have been made by national courts or authorities, not only concrete meaning for the present one (the years 2009 and 2010), but general importance for the uniform application of Union law.

2. It is true that the Court of Justice of the European Union has dealt with the interpretation of the term “permanent establishment” several times (see e.g. ECJ 4.7.1985, 168/84 , *Berkholz* ; 20.2.1997, C-260/95, *DFDS;* 17.7. 1997, C-190/95, *ARO Lease BV* ; 28.6.2007, C-73/06, *Planzer Luxembourg*) and the interpretation made by the Court found, among other things, in (Art this is reflected, but given the still existing national interpretations, there remain reasonable doubts about the interpretation of the term in accordance with EU law.

3. According to the previous interpretation, a permanent establishment that is significant for the purposes of VAT has a sufficient degree of stability and, moreover, a structure that allows the provision of services in terms of personnel and technical equipment. However, the question of

whether the two equipment features, personnel and material, must always be available (cumulative), or whether this is only necessary if the functionality of the respective economic activity requires it, does not yet seem to have been finally clarified.

2. The main dispute and relevant facts

4. The complainant is a company with its headquarters and management in Jersey. Its business is in the real estate, wealth management, housing and settlement sectors. Since 1995 she has owned a property in Austria (building in Vienna), which she rented to two domestic entrepreneurs subject to VAT in the relevant years 2009 and 2010. The rental turnover generated was the complainant's only domestic turnover.

5. With the agendas of the property management, the complainant commissioned an Austrian property management company, which essentially deals with the brokerage of service providers and suppliers in the real estate, installation and construction sector to the settlement of rents and operating costs, the management of Business records, the preparation of sales tax reporting data, the preparation of cost and income evaluations and the like took care of. For their work, the property management company used its own office space and its own technical structures, which had no spatial and / or functional connection with the applicant's property.

6. The power to decide on the establishment and termination of tenancies as well as on their economic and legal conditions, on the implementation of investments and repair measures as well as their financing, on the selection and commissioning in connection with other advance payments and the selection, commissioning and monitoring of the property management itself remained with the complainant and was not with the domestic property management.

7. In legal terms, the complainant assumed that the lack of staffing, represented by her rented property no permanent establishment and thus under Article 196 VAT Directive or to the national provision of § 19 para 1 Value Added Tax Act 1994 to reverse charge on the domestic beneficiaries come. Accordingly, she showed no VAT on her invoices.

8. According to an assessment by the Austrian tax authorities, however, a property rented out domestically does indeed establish a permanent establishment in Germany, which is why the appellant has set the VAT accordingly.

3. Relevant legislation

3.1 Applicable national regulations and relevant case law

3.1.1 Value Added Tax Act 1994, StF BGBl 1994/663 as amended by BGBl 1994/819

9. The Austrian Value Added Tax Act 1994 (hereinafter: UStG) regulates the transfer of tax liability to the service recipient in § 19 Paragraph 1. As a prerequisite for this, it is stipulated, among other things, that the performing entrepreneur does not have any permanent establishment (involved in the provision of services) in Germany.

10. The term “permanent establishment” used in the sales tax law is given the understanding of the “permanent establishment” within the meaning of the VAT Directive or DVO in accordance with the directive's interpretation of the national regulation.

a) Legal situation from 1.1.2005

Section 19 (1) UStG as amended by BGBl I 180/2004, to be applied from January 1, 2005 in accordance with Section 28 (25) Z 3 UStG:

The taxpayer is the entrepreneur in the cases of Section 1 (1) 1 and 2, and in the cases of Section 11 (14) the issuer of the invoice.

In the case of other services (except for the tolerated payment for the use of federal highways) and for deliveries of works, the tax is owed by the recipient of the service if

- *the performing entrepreneur has neither a domicile (registered office) nor his habitual residence or a permanent establishment in Germany and*
- *the recipient of the service is an entrepreneur or a legal person under public law.*

The performing entrepreneur is liable for this tax.

b) Legal situation from 1.1.2010

Section 19 (1) UStG as amended by BGBl I 52/2009, to be applied from January 1, 2010 in accordance with Section 28 (33) Z 1 UStG:

The taxpayer is the entrepreneur in the cases of Section 1 (1) 1 and 2, and in the cases of Section 11 (14) the issuer of the invoice.

In the case of other services (except for the tolerated payment for the use of federal highways) and for deliveries of works, the tax is owed by the recipient of the service if

- *the performing entrepreneur has neither a domicile (domicile) nor his habitual residence or an establishment involved in the provision of the service in Germany and*
- *the recipient of the service is an entrepreneur within the meaning of Section 3a (5) lines 1 and 2 or is a legal person under public law who is a non-entrepreneur within the meaning of Section 3a (5) line 3.*

The performing entrepreneur is liable for this tax.

c) Legal situation since December 15, 2012

Section 19 (1) UStG as amended by BGBl I 112/2012, effective from 15.12.2012 (the day following the announcement of the AbgÄG in the BGBl), reads:

The taxpayer is the entrepreneur in the cases of Section 1 (1) 1 and 2, and in the cases of Section 11 (14) the issuer of the invoice.

In the case of other services (except for the tolerated payment for the use of federal highways and the services specified in Section 3a (11a)) and for deliveries of works, the tax is owed by the recipient of the service if

- *the performing entrepreneur in Germany neither operates his company nor has a permanent establishment involved in the provision of the service and*
- *the recipient of the service is an entrepreneur within the meaning of Section 3a (5) lines 1 and 2 or is a legal person under public law who is a non-entrepreneur within the meaning of Section 3a (5) line 3.*

The performing entrepreneur is liable for this tax.

3.1.2 Jurisprudence of the Administrative Court

11. With the knowledge of 29.4.2003, 2001/14/0226, the Austrian term of permanent establishment was interpreted by the Austrian Administrative Court (in the following: VwGH) in conformity with EU law: It was characteristic that there was a sufficient minimum number of personnel and material resources necessary for the provision of the Service are required, as well as a sufficient degree of stability in terms of a constant interaction of personnel and material.

3.2 Provisions of EU law

3.2.1 Council Directive 2006/112 / EC of November 28, 2006 on the common VAT system; VAT Directive

12. Under Union law, the regulations on the transfer of tax liability are laid down in Title XI, Chapter 1, Section 1 of the VAT Directive " *Taxpayer to the Treasury* ".

13. While according to the basic rule of Art. 193 of the VAT Directive, the taxpayer, who supplies goods subject to tax or provides a service subject to tax, in principle owes VAT, in accordance with Art. 194 ff on the domestic recipient of the service.

14. In the version of the VAT Directive amended by Directive 2008/8 / EC (Council Directive of 12.2.2008) (not yet applicable in the case at hand in the present case), Art 192a was added, with which the concept of non-resident taxpayer has been redefined for the purpose of applying the tax liability rules. With regard to the permanent establishment, the requirement was set that it is not involved in the delivery or service.

15. However, even before Art 192a (or already in the area of the 6th EC Directive) was inserted for the transfer of tax liability, it was important that the service provider was generally not domiciled in Germany (cf. the section 3.2.4 Jurisprudence of the Court). It was therefore taken to ensure that there was neither the registered office nor a permanent branch (no longer involved in the delivery or service from Art 192a VAT Directive).

Article 192a of the VAT Directive reads:

For the purposes of this section, a taxable person who has a permanent establishment in the territory of the Member State where the tax is due is deemed not to be resident in that Member State if the following conditions are met:

(a) supplies goods subject to tax or provides a service in the territory of that Member State subject to tax;

(b) an establishment of the supplier or service provider in the territory of that Member State is not involved in the delivery or service.

Article 196 of the VAT Directive reads:

Value added tax is owed to the taxable person or the non-taxable legal person with a VAT identification number for whom a service is provided in accordance with Article 44 if the service is provided by a taxable person not resident in that Member State.

16. It should be pointed out that even before that, Article 21 paragraph 1 letter b of the 6th EC Directive (RL 77/388 / EEC) required that the service from a “ *resident taxpayer* ” be transferred to

the beneficiary in order to transfer the tax *liability* is provided.

3.2.2 COUNCIL IMPLEMENTING REGULATION (EU) 282/2011 of 15.3.2011 laying down implementing provisions for Directive 2006/112 / EC on the common VAT system; DVO

17. The term “permanent establishment” used in the VAT Directive is not further defined in the directive itself. However, the term has been comprehensively interpreted by the case law of the Court of Justice of the European Union (see point 3.2.4); this interpretation was incorporated into the DVO (in the present case not yet applicable in terms of time) (in Art 11 and for the implementation of Art 192a VAT Directive in Art 53).

Art 53 DVO reads:

***Tax* debtors to the tax authorities (*Articles 192a* to *205 of Directive 2006/112 / EC*)**

(1) For the implementation of Article 192a of Directive 2006/112 / EC, a permanent establishment of a taxpayer will only be taken into account if this permanent establishment has a sufficient degree of stability and a structure that it has in terms of personnel and technical equipment allowed to carry out the delivery of objects or the provision of services in which it is involved.

(2) If a taxable person has a permanent establishment in the territory of the Member State in which the VAT is due, that fixed establishment shall not count as the supply of goods or the provision of services within the meaning of Article 192a (b) of Directive 2006 / 112 / EC, unless the taxpayer uses the technical and personnel equipment of this branch for sales that are necessary for the execution of the taxable delivery of these objects or the taxable provision of these services before or during the execution in this Member State.

Is the equipment of the permanent branch only used for supporting administrative tasks such as B. Accounting, invoicing and collection of claims used, this is not considered as use in the execution of the delivery or the service.

However, if an invoice is issued under the VAT identification number assigned by the member state of the fixed establishment, this fixed establishment is deemed to be involved in the delivery or service until proven otherwise.

3.2.3 Explanations to the “ EU VAT regulations on the place of service in connection with land” from October 26, 2015

18. Concretely, in the case of property leasing relating to the question referred, the explanations on the “ *EU VAT provisions on the place of service in connection with land* ” that came into force in 2017 are dealt *with* .

RN 28 reads:

If a service is provided in connection with land, VAT is payable in the Member State in which the land is located (see also explanations on tax liability in point 1.9.) It is therefore irrelevant when determining the location of the service whether the provider has a permanent establishment in that Member State. The mere fact that a company owns land in a Member State does not mean that it has a permanent establishment in that country.

19. Although these explanations are not legally binding and were only made public after the dispute in question - it should nevertheless be noted that in view of the fact that all EU Member States have agreed to the publication of such an interpretation, it must also be given appropriate weight ,

3.2.4 Case law of the Court of Justice of the European Union

20. The Court of Justice of the European Union has dealt with the interpretation of the concept of permanent establishment several times:

- ECJ 4.7.1985, 168/84 , *Berkholz*
- ECJ July 17, 1997, C-190/95 , *ARO Lease BV*
- ECJ 7.5.1998, C-390/96 , *Lease Plan Luxembourg SA*
- ECJ 16.10.2014, C-605/12 , *Welmory*
- ECJ 28.6.2007, C-73/06 , *Planzer Luxembourg*

4. Justification of the template

4.1 Doubts about the interpretation of a provision of EU law

21. The question referred relates to the interpretation of the term " permanent establishment" used in the VAT Directive or in the DVO (which is not yet applicable in terms of time in the present case) . The term has been comprehensively interpreted and found by the case law of the Court of Justice the interpretation of receipt in the DVO, however, does not yet seem to be conclusively clarified whether the equipment features personnel and material must always be available (together) or whether this only has to be the case if the functionality of the respective economic activity requires it.

22. According to the national regulation of Section 19 (1) of the Austrian Value Added Tax Act 1994 (UStG), the tax liability is transferred to the recipient of the service in more detailed cases if the performing entrepreneur neither operates his company domestically nor has a permanent establishment involved in the provision of the service , The term "permanent establishment" should be interpreted in accordance with the directive in accordance with the understanding of the term "permanent establishment" in the sense of the VAT Directive or DVO.

23. The underlying EU law provision of Art. 196 VAT Directive is based on the fact that the service is provided by a taxpayer who is not resident in this Member State. With regard to the question of residency, Art 192a VAT Directive focuses, among other things, on the existence of a “permanent establishment” that is involved in the service.

24. In accordance with the previous interpretation by the Court of Justice or the definition entered into the DVO, a structure must exist for a permanent establishment that allows personnel and technical equipment to perform services. It is about a constant interaction of personnel and material resources, which are necessary for the provision of the service.

25. It follows from the judgments in *ARO Lease BV* (RN 19) and *Lease Plan Luxembourg SA* (RN 27) that specific personnel must be available and that personnel from another contracted company (such as a property manager) is not sufficient. This applies even more if, as in the case at hand, the staff of the contracted property management company only carries out supportive, administrative tasks.

26. In the case at hand, the complainant, who has her business activity abroad and merely rents out a property in Austria, assumes that she has no permanent establishment in Austria within the meaning of the VAT Directive or DVO, in particular because of the criterion the staffing is not fulfilled - which is why the tax liability is transferred to the beneficiary.

27. The relevant authority (tax office), on the other hand, takes the view that in the event of the leasing of a domestic property, there is always residency in Germany and therefore there is no transfer of tax liability to the recipient of the service.

4.2 Circumstances that speak against the existence of a permanent establishment

28. Both from the case law of the Court of Justice and from the definition in Article 53 of the DVO, the existence of a permanent establishment means that personnel (and technical) equipment is required. The Court speaks of a constant interaction of human and material resources necessary for the provision of the services in question.

29. Since only a domestic property is rented and there is no dedicated staff at the property, the staffing requirements would not be met, which is why a permanent domestic establishment would not be assumed.

30. For the provision of such rental services, essentially only a landlord who makes decisions, signs contracts or, for example, hires a property manager would be required in terms of human resources. This personnel component is not located at the location of the rented property.

31. The activity of the commissioned domestic property management company would accordingly not lead to any other result, since on the one hand the staff employed are not the complainant's own staff and on the other hand the administrative staff only perform supporting administrative tasks anyway.

4.3 Circumstances that speak for the existence of a permanent establishment

a) Interpretation by the Austrian tax authorities

32. On the part of the Austrian financial administration, the "Sales Tax Guidelines 2000" (hereinafter: UStR 2000) were issued as a means of interpretation in the sense of a uniform procedure. In the case at hand, the relevant authority refers to the relevant statements in the guidelines.

VATR 2000 margin number 2601, "Legal position January 1, 2004 to December 31, 2009", reads in part:

Entrepreneurs who own a property located in Germany and rent it for tax purposes are to be treated as domestic entrepreneurs. You have to explain these sales in the assessment procedure. The beneficiary does not owe the tax on these sales.

VATR 2000 margin number 2601b, “Legal situation from 1.1.2012”, reads in extracts:

Entrepreneurs who own a property located in Germany and rent it for tax purposes are to be treated as domestic entrepreneurs (ie with regard to rental turnover). You have to explain these sales in the assessment procedure.

The beneficiary does not owe the tax on these sales.

33. The statements quoted in the UStR 2000 are based on a protocol on the sales tax conference 2004 from June 14 to 16, 2004 in Salzburg, BMF October 6, 2004, Z 01 0219/38-IV / 9/04. The statement says:

It seems appropriate to treat entrepreneurs who own a property located in Germany and rent them taxable as domestic entrepreneurs (no transfer of tax liability, invoice with tax identification). You therefore have to explain these sales in the assessment procedure. The beneficiary does not owe the tax on these sales.

34. The Austrian tax authorities therefore always imply the existence of a permanent establishment or a place of residence at the location of the property in the case of a rented property, so that there is no transfer of tax liability in the context of renting a property.

b. National German case law and interpretation of the German financial administration

35.According to the jurisprudence of German financial courts regarding the operation of wind turbines by a company based in an economic activity abroad, mere wind turbines would establish a domestic business establishment, even though they do not use their own personnel (cf. FG Münster 5.9.2013, 5 K 1768/10 U; FG Cologne 14.3.2017, 2 K 920/14; FG Schleswig-Holstein 17.5.2018, 4 K 47/17).

36. According to that case-law, such wind turbines are fixed installations of considerable value which have the highest possible degree of durability. Given the overall circumstances, the fact that there is no dedicated staff at the wind turbines does not prevent the assumption of a permanent establishment. In principle, staffing is also one of the essential elements of the permanent establishment, but this does not mean that the criteria for staffing and technical equipment must always be met to the same extent. Rather, a low level - or in exceptional cases even a lack - of staffing can be compensated for by an above-average level of technical equipment.

37. As far as can be seen, no case law of the German Federal Fiscal Court (hereinafter: BFH) has been issued on this specific question. In the decision BFH November 19, 2014, VR 41/13 this question was left open.

38. Also in the decision of May 9, 2017, XI B 13/17, the BFH left open the clarification of the question of the same legal question as to whether, in the case of a taxable rental, the property located in Germany should be regarded as a permanent establishment of the entrepreneur (since already the seat of economic activity was in Germany).

39. Finally, reference can also be made to the German sales tax application decree on section 13b of the German sales tax law, according to which staffing is negligible for passive services in the form of toleration services.

5. Requirements of the submission

40. Courts have the power to make requests for a preliminary ruling in the sense of Union law, provided that these questions concern the interpretation of the treaties, the validity and interpretation of the acts of the institutions or bodies and bodies of the Union. The Federal Finance Court is such a court and is therefore entitled to refer.

41. All Member States' authorities and courts are obliged to interpret VAT law in accordance with the directive so that the aim of the VAT Directive is not jeopardized by the interpretation of national law. In the case at hand, however, the correct application of EU law does not seem to be so obvious that there would be no room for reasonable doubt. An interpretation of national law in accordance with the

directive therefore does not appear to be assured, which is why the question referred under Article 267 TFEU is referred to the Court of Justice with a request for a preliminary ruling.

Vienna, December 20, 2019

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Further information

Published in Findok on:
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affected standards:
Art. 267 TFEU, OJ. C 83 of 30.03.2010 p. 47
Matter:
tax
ECLI:
ECLI: AT: BFG: 2019: RE.7100002.2019
System specifications:
Findok No: 126629.1, Date: 01/14/2020 16:35:10, Document ID: 0276a041-b135-4345-9f57-b31064793fa8, Segment ID: 1b22db61-a770-4379-b689-49203505b722

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