Tomasz Michalik: The judgment of the CJEU regarding subsidiaries is a missed opportunity

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The latest decision of the CJEU in the part concerning the status of the subsidiary itself does not chan
held that the mere fact of the existence of a subsidiary does not create a permanent establishment. F
can still hope that the CJEU will go one step further, " says Tomasz Michalik, tax advisor and partner a

Krzysztof Koślicki: On May 7, the Court of Justice of the European Union issued a judgm
having a subsidiary does not mean conducting business. However, the principle that
supply of a service leads to the place of its taxation cannot be omitted.

Tomasz Michalik: The legislator, following Directive 2006/112, created a general rule for determining this place. If the services are rendered to a taxpayer, i.e. an entity conducting business activity within the meaning of VAT regulations, the basic place of taxation is the place of business of the buyer. This is a simple and legible rule, from which the legislator introduces exceptions that we will ignore as irrelevant to the case.

It is important, however, that in the present case the Polish company Dong Yang Sp. z o. o. provided services to a Korean contractor.

Therefore, the application of the general rule meant that the place of supply of these services - and therefore their taxation - was Korea, which is the place of business of the buyer. This in turn means that the services provided by the Polish service provider were not, in his opinion, subject to Polish VAT. Let us add that what are the rules for taxing such services in Korea is irrelevant from the point of view of determining the place of supply by a Polish service provider.

However, the tax authorities had a different opinion.

The authorities accepted - and in this context a dispute arose that resulted in the decision of the CJEU - that given that the Korean entity has a subsidiary in Poland and that the company was involved in the process (handed over materials to the manufactured goods, etc.) in connection with this company subsidiary should be considered a permanent establishment. And it changes everything.

Why?

For the above general rule is not applied if the foreign recipient has a permanent place of business in a establishment and the services are provided for that permanent place of business. The tax authorities c were met.

What are the consequences of this?

If in the analyzed case the buyer's permanent place of business was in Poland, then Poland would be the place of rendering (and taxing) services. Consequently, this means that the Polish service provider should have taxed Polish VAT services. If he did not do this, it means that there could have been a tax arrears with all the consequences - especially the necessity of paying the arrears with interest and an administrative sanction hidden in the act under the misleading name - an additional tax liability would be possible.

See the procedure in LEX: Determining the place of providing services to non-taxable persons>

However, the Act does not create a definition of a permanent place of business.

We refer to the applicable Council Regulation (EU) 282/2011, which in Art. 10 paragraph 1 and 2 specify - somewhat simplified - a permanent place as 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 facilities to enable him to provide services or receive and use services provided for his own the needs of this permanent place of business. This definition is based on theses developed in the previous jurisprudence of the CJEU.

See the procedure in LEX: Determining the place of supply of services to taxpayers>

A special issue, however, is that in the case of Dong Yang, the issue concerned whether a subsidiary - and thus a formally independent entity - could be a permanent place of a foreign taxpayer in Poland.

And this is probably the most fascinating issue related to the permanent place of business. For the first t
260/95), the CJEU held that the nature of the relationship between the Danish parent company and the
subsidiary a permanent establishment for the Danish business in the United Kingdom. This judgment sh
seemed to reflect slightly, emphasizing the special nature of the travel agents' settlements here and the
suggesting that the DFDS judgment should be read as limited to travel agents only. Such theses appear
Advocates General.

The matter returned, however.

Yes, the CJEU first ignored this issue practically in the case in which he could refer to it (judgment in Joine
Daimler / Widex) but then in the Polish case Welmory (C-605/12) without going into details, he assumed
Cypriot entity could be a permanent place of business for Cypriots. It can be said that this ruling has co
the practice of individual EU countries. Polish authorities eagerly took this opportunity and came up with
understanding this concept, recognizing, for example, in individual interpretations that entities providing services involving the processing or

processing of goods for other entities in the group are a permanent place of business of such recipients in Poland. This is of course, in principle, a completely senseless assumption, but taxpayers had to face it. In most other EU countries, the authorities approached this decision with greater caution.

Read in LEX: Wesołowska Agnieszka, Determination of the registered office for VAT purposes. Glossary to the judgment of the Court of 16 October 2014, C-605/12>

Then came the time for Dong Yang?

It began with an excellent opinion on this matter, Advocate General J. Kokott. The Ombudsman proposed simple rules - as a rule, a formally independent entity is not a permanent place of business for another person. Things should be different for abusive activities. In the very well argued opinion, the Ombudsman relied in particular on the principle of legal certainty. She also stated explicitly that it is time for the CJEU to close these games and plays related to the permanent place, because the lack of an unambiguous resolution deepens the legal chaos.

Read in LEX: Dąbrowski Wojciech, Kołodziej Bartłomiej, Passive permanent place of business - perspective of domestic service providers>

The CJEU resolved the matter slightly differently.

The Court had a chance to go - as it has repeatedly done - beyond a simple answer to the questions asked and formulate a rule that would allow crowds of European taxpayers to breathe - and gain confidence in their situation if they perform s countries. This is a very important issue and there is no exaggeration in the thesis that the world of Europ for the resolution of the CJEU. This can be seen in the huge number of first comments on the sentence fr from across the Union.

Did the judgment meet these expectations?

No. The decision of the CJEU in the part regarding the status of a subsidiary as a permanent place of bu at all. The CJEU stated, simply answering the question, that the mere fact of the existence of a subsidiary of business. On the other hand, such a company can be such a permanent place and to determine this, status based on the provisions of art. 22 of Regulation 282/2011, and therefore determine in particular wh service means that it is intended for the permanent place of business of the buyer. Nothing changes in t

See the procedure in LEX: Determining the location of the contractor's seat>

However, the CJEU also considered that the service provider does not need to examine the relationship between a subsidiary and its parent company.

And in this respect, the judgment is important, although the above thesis seems obvious, especially in the light of the current jurisprudence of the CJEU, in which the Court has already emphasized that taxpayers cannot be expected to carry out research and analyzes that go beyond the standard adopted in business and replace in this respect tax authorities.

So the judgment is a disappointment?

I think it's really a big disappointment. It is a pity that the CJEU did not seize the opportunity and did not resolve the case in the manner proposed by the Advocate General. Further cases are pending in the CJEU, we can still hope that the CJEU will go one step further, however, in the light of Dong Yang, this is slightly less likely.

Read in LEX: Changes in VAT in intra-Community goods transactions from January 1, 2020>

What does this mean for taxpayers?

Taxpayers, especially those providing services for buyers from outside the country, should check whether their relationship does not show that their contractor has a permanent place of business in Poland and their services are provided for that place. In the case of new contracts, they should also consider obtaining confirmation from the contractor that he has no perman the absence of opposite information, and where the existence of a permanent place does not result fro service provider with a foreign contractor, such a statement would undoubtedly be helpful.