I SA / Gl 1029/19 - Judgment of the Provincial Administrative Court in Gliwice

Date of judgment	2020-03-11 *the judgment is not final*
Date of receipt	2019-07-23
Court	Provincial Administrative Court in Gliwice
referees	Anna Tyszkiewicz-Ziętek / chairman rapporteur /
Symbol with description	6110 Tax on goods and services 6560
Thematic entries	Tax Interpretations
The complained body	Director of the National Treasury Information
Content of the result	The reimbursement of the costs of the proceedings was awarded. The contested individual interpretation was repealed
Regulations cited	OJ 2018 item 2174 art. 28b *Act of 11 March 2004 on tax on goods and services - consolidated text*

SENTENCE

Provincial Administrative Court in Gliwice in the following composition: Chairman Judge of the Provincial Administrative Court Anna Tyszkiewicz-Ziętek (trial), Judges of the Provincial Administrative Court Wojciech Gapiński, Adam Nita, Reporter Senior Clerk Paulina Nowak, after examining the case on complaint A on February 19, 2020 GmbH in D. on the interpretation of the Director of National Tax Information of [...] No. [...] regarding tax on goods and services 1) annuls the contested interpretation; 2) awards the Director of the National Tax Information to the applicant for PLN 597 (five hundred and ninety-seven) for the reimbursement of costs of proceedings

SUBSTANTIATION

The contested interpretation of [...] No. [...] Director of the National Tax Information in Katowice pursuant to art. 13 § 2a, art. 14b § 1 of the Act of August 29, 1997 Tax Code (Journal of Laws of 2019, item 900, as amended, hereinafter: Op) stated that the position of A GmbH in D. (hereinafter: the Applicant, Company, party, applicant) presented in the application for an interpretation of tax law provisions regarding value added tax in the scope of:

- defining a permanent place of business - is incorrect,

- the right to deduct input tax - is correct.

The description of the facts contained in the application initiating the proceedings in this case stated that the Company having its registered office in Germany is registered as an active VAT taxpayer in Poland. The company's business is the manufacture, acquisition and resale, as well as processing, import and export, as well as research and development of technical articles, in particular electrical and electronic devices and their accessories. The company imports goods from Japan, which are subject to resale to customers in Poland and outside of Poland.

A third party with its registered office in Poland (hereinafter: Subcontractor), not related to the Applicant, provides logistics services and storage services in a customs warehouse under the Agreement for permanent logistics services (hereinafter: the Agreement). These services include the handling of incoming goods, their unloading and storage of pallets, storage, completing orders, handling outgoing goods, handling returns, and carrying out customs services if necessary. All the applicant's goods are stored in the customs warehouse. Ww. services are provided on Polish territory. The applicant remains the owner of the goods during storage. However, the subcontractor does not provide services in the field of processing of goods or marketing.

The applicant cooperates with the Subcontractor in the use of logistics services for several years and intends to continue this cooperation in the future. At present, the Agreement has been signed for a period of 3 years until [...].

The Applicant's activities are managed from its headquarters in Germany, where key actions are taken from the point of view of economic activity, such as concluding contracts, contacts with contractors, trade negotiations. Only the Applicant accepts orders placed by customers.

The Applicant's cooperation with the Subcontractor is as follows. The contract states that the Applicant uses the space specified in m2 2. Due to the need to place goods under the customs warehousing procedure, the Applicant's goods are stored in the customs warehouse. In addition, the Applicant's employees do not have free access to the Subcontractor's warehouse, they can inspect goods only with prior notice and only during warehouse hours.

Before sending the customer's order data, the Applicant carries out a product availability check based on relevant product inventory data. Planning inventory and placing orders for items is made only by the Applicant. The Applicant is obliged to inform the Subcontractor of the planned delivery and provide product data via the IT interface at the latest on the day preceding the delivery at the latest. The Subcontractor's duties include completing orders after receiving data on orders from the Applicant and preparing them for dispatch, updating the inventory list, inventory and returns handling. If orders are not picked up by couriers or agents employed by the Applicant's clients,

In addition, the Applicant indicated that he does not have and will not have a branch in Poland. The applicant has not employed, does not employ or intends to employ any employees on the territory of Poland. The Company's employees have not been, will not be or will not be permanently resident in Poland. The company has not cooperated, does not cooperate and does not intend to cooperate with natural persons conducting sole proprietorships. Subcontractor's employees do not follow the Applicant's instructions. Their cooperation with the Applicant's employees takes place within the scope strictly specified by the Agreement: forward collected supply documentation to the Applicant; remain in contact with the Applicant's employees while handling returns; print delivery notes and original invoices and stamp them using a stamp provided by the Applicant; use the Applicant's dedicated IT interface.

Therefore, Subcontractor's employees only perform technical activities in the field of sales documentation (i.e. in no case are Subcontractor's employees authorized to issue invoices on behalf of the Applicant, and their tasks are limited to technical activities related to obtaining physical printout of invoices issued by the Applicant). The Subcontractor's staff are subject only to the Subcontractor's internal regulations and are supervised by supervisors who are employees of the Subcontractor, while cooperation with the Applicant's employees is, as a rule, remotely. The contract contains a provision that, by mutual consent, selected employees of Subcontractors will participate in training programs conducted by the Applicant in order to improve their knowledge about the Applicant's products, which in turn should constantly improve their performance and minimize damage. However, in practice no such training takes place. Only in the event of

accumulation of damage due to service, the Applicant informs the Subcontractor's employees how to handle the Applicant's products, which - as the Applicant emphasized - took place once or twice during cooperation.

The applicant has not been and is not the owner of, nor has and has the right to dispose of, as owner, any space located on Polish territory, equipment or other technical resources located in Poland. The company did not own or have legal title to any real estate or part of it in Poland, which it could use freely. In addition, the Company does not own or rent any office space in Poland through which it could sell goods or any production plants for the production of technical articles, so it does not have a technical structure in the territory of the country enabling it to conduct business activity in its basic scope activity.

In connection with the above description, the following questions were asked:

1. Does the Applicant have a permanent place of business in Poland for the purposes of VAT?

2. If the Company's position regarding question 1 is considered incorrect and if the Applicant has a permanent place of business in Poland, the Company pursuant to art. 86 section 1 of the VAT Act, you will have the right to deduct input VAT shown by the Subcontractor on the invoice documenting the services described in the actual state?

Presenting its own position in the case, the Company stated that it did not have a permanent place of business in Poland. In the event that the interpretative authority, however, decides that in the described facts the Applicant has a permanent place of business in Poland, it has been indicated that the Company, pursuant to art. 86 section 1 of the VAT Act, will be entitled to deduct input VAT shown by the Subcontractor on the invoice documenting the services described in the actual state.

Justifying the above position, the Company indicated at the outset that the concept of a permanent place of business was not defined in the provisions of the Act of 11 March 2004 on tax on goods and services (i.e., Journal of Laws of 2018, item 2174 as amended ., hereinafter: the VAT Act), in the implementing provisions of this Act or in the provisions of Council Directive 2006/112 / EC of 28 November 2006 on the common system of value added tax (hereinafter: the Directive). The definition of permanent establishment was introduced by Council Implementing Regulation (EU) 282/2011 of 15 March 2011 establishing implementing measures to Directive 2006/112 / EC (hereinafter: the Regulation) based largely on the line of argument developed by the CJEU. Pursuant to the wording of art. 11 and art.

1. enable the taxpayer to pick up and use the services provided for his own needs in this permanent establishment or

2. enable him to provide specific services he performs,

3. enable him to deliver goods and provide services in which he participates.

In addition, art. 11 of the Regulation in paragraph 3 indicates that the possession of a VAT identification number in a given country in itself does not constitute a permanent place of business.

The criteria cited above, which outline the concept of permanent establishment, are also confirmed and developed in the jurisprudence of the CJEU (for example in cases C-168/84, Gunter Bcrkholz; C-231/94, Faaborg-Gelting Linien; 190/95, ARO Lease BY).

Having a permanent place of business in a country other than the country of residence of the taxpayer occurs only if, in relation to a given business activity, the following conditions are jointly met:

1. there is an appropriate structure in terms of personnel,

2. there is adequate technical equipment (infrastructure),

3. the business conducted here has the hallmarks of being stable and is independent to the extent that it is possible to make decisions regarding deliveries carried out from that place / for the needs of that place.

Failure to comply with any of the above conditions results in the absence of a permanent establishment in the territory of the country.

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

The requirement to have a structure in terms of personnel and technical facilities, which should be "appropriate" narrows the framework of understanding the concept of a permanent place of business activity only to those cases in which the entity has a country other than the country of its seat - for example in Poland, an appropriate personality structure tangible, occurring in a permanent manner (i.e. repetitive and permanent), i.e. it has both human staff and technical infrastructure in the country, with the use of which it is able to organize and continuously conduct activities in which it carries out activities subject to tax on goods and services.

This structure can not only be the recipient of services provided for the needs of the taxpayer's "headquarters". These services are to be provided for the needs of this structure. If it is not possible for a given structure (due to its personnel and technical resources) to be able to consume the purchased services, then it should be considered that it is not a permanent place of business of the taxpayer. At the same time, a permanent establishment should be able to provide services sold. Only then in relation to the services sold can it be considered a permanent place of business.

In view of the above, it should be assumed that in order to recognize that the Company has a permanent place of business in the territory of the country, the Applicant should have in Poland both personnel and technical resources needed for independent operation of the business and consuming the services provided.

In the analyzed facts, these requirements are not met. The company has no human resources on Polish territory, does not employ any employees on Polish territory, does not have sales representatives, persons authorized to take any action on its behalf, whether performing such activities under an employment contract, mandate contract, work contract, or another service contract etc. The Company's employees are not permanently resident in Poland. The company does not cooperate and does not intend to cooperate with natural persons conducting sole proprietorships.

The Agreement shows that the employees of the Subcontractor are in constant cooperation with the Applicant's employees (printout of delivery notes) and original invoices and stamping them using a stamp provided by the Applicant; forwarding the collected supply documentation to the Applicant; contact with the

Applicant's employees when handling returns; use of the Applicant's dedicated IT interface). However, the Subcontractor's staff are subject only to the Subcontractor's internal regulations and are supervised by supervisors who are employees of the Subcontractor, while cooperation with the Applicant's employees is in principle remotely. Printing of the Applicant's invoices by subcontractor's employees does not in any way indicate that the Subcontractor is conducting sales activities. Printing invoices is only a technical activity, conditioned by organizational considerations, it is a widely used business practice that the invoice is printed by the entity that writes the goods that are the subject of dispatch. If the Applicant printed all invoices and sent them to the Subcontractor, where the employees of the Subcontractor would sort them and assign them to specific packages, it would significantly delay the sending process, while not bringing any benefits for either the Applicant or the Subcontractor.

The agreement stipulates that by mutual consent, selected employees of Subcontractors will participate in training programs run by the Applicant in order to improve their knowledge of the Applicant's products, which in turn should constantly improve their efficiency and minimize damage. However, in practice no such training takes place. Only in the event of accumulation of damages due to service, the Applicant informs the Subcontractor's employees how to handle the Applicant's products, which, however, took place once or twice during cooperation.

The company, as indicated earlier, does not employ any employees in Poland, does not have sales representatives, persons authorized to take any action on its behalf, whether performing such activities under a contract of employment, an urn order, a specific task, or another contract for providing services etc. All works are performed by employees of the Subcontractor from whom the Company purchases logistics services. The subcontractor is not entitled to act on behalf of the Company.

It should be noted, therefore, that the first cumulative condition of the existence of a permanent establishment was not met in the analyzed case.

Regarding the requirements related to technical facilities, it was pointed out that the Company is not the owner and has no right to dispose of as the owner any space located in Poland, equipment or other technical resources located in Poland. The company has no legal title to any real estate in Poland that it could freely use, does not own or rent any office space in Poland, through which it could sell goods or any production plants for the production of technical articles, and therefore does not own the territory of the country's technical structure enabling it to conduct business activities in the field of its basic activity.

All assets (buildings, warehouses - used solely for temporary storage of the Applicant's goods for logistical reasons prior to their dispatch, the equipment will belong to the Subcontractor. The Company purchases only customs warehouse services and logistics services provided by the Subcontractor.

The Applicant's employees are not allowed free access to the Subcontractor's premises, as it is independently managed by the Subcontractor. Persons designated by the Applicant have the right to enter the warehouse for the purpose of inspecting goods only with prior notice and only during warehouse hours.

The above provision in the contract corresponds to generally accepted business conditions for contracts for the provision of logistics services, and may not indicate the existence of any control of the Applicant over the property.

The applicant has no right to use the property in any way within the scope of conducted activity. The rented space is only for storing specific goods. It should also be noted that the Applicant is required at the latest on the day preceding the delivery each time to inform the Subcontractor about the planned delivery and to submit data about the products via the IT interface. The contract states that the Applicant uses the space specified in m2. Due to customs regulations, the

Applicant's goods are stored in a customs warehouse. The above provisions indicate that the Applicant does not have comparable control over the Subcontractor's facilities as over its own. The warehouse keeper decides how and where the products are stored in the warehouse.

In addition, the Applicant may not use the warehouse in any manner, as he is obliged to notify the Subcontractor of his intention to deliver new products to the warehouse each time, and the space that the Applicant may use is limited in the Agreement.

As regards the requirement to exercise control over the Service Provider's personal and technical facilities as over its own, the Applicant, referring to the position of the CJEU, expressed in particular in the judgment in case C-605/12 **Welmory** , argued that he had no control over the personnel and technical facilities. The fact that the Company will use the services provided to it by the Subcontractor to the extent described above does not in itself justify the claim that the Applicant will have a "permanent place of business" in Poland.

In support of the above, the judgment of the Provincial Administrative Court in Warsaw of July 12, 2017, reference number act III SA / WA 1979/16, in which the Provincial Administrative Court, analyzing the criterion, stated that although such staff does not have to be "own" (outsourcing is fully acceptable), certain authority over such staff is required.

Services are always performed by some personnel, so bypassing this requirement of authority, it would mean that this criterion is always met, regardless of the scope of the entity's powers to lead such personnel with authority, control over it or impose the manner of performing the ordered service. Subcontractor's employees cannot therefore be regarded as part of the applicant's resources. It was also correctly indicated in the complaint that the employees of the Related Company (in fact - the "employee" cannot be considered as such an element, since only one of them is to be in Poland), because they also have no rights to interfere in the yarn production process, this company is only to control the quality, and in the context of the contract with the applicant and not with the subcontractor, and cannot act against the subcontractor on behalf of the applicant.

Therefore, it is not the mere fact of using a third party's services, infrastructure or staff that creates a permanent place of business, but the terms of cooperation on which this use takes place. It is necessary to subject the service provider's staff and infrastructure to control and orders of the recipient, which is possible, for example, if the service provider provides logistics services to only one company, or when there are connections between the service provider and the recipient within the meaning of the Corporate Income Tax Act.

The same position was approved in individual interpretations of [...] No. [...], of [...] No. [...], where the Director of National Tax Information admitted that the position of taxpayers that no for them, the permanent place of business as a result of using logistic services is correct.

The applicant also emphasized that he is one of the Subcontractor's many clients, he is not in any way entitled to influence his activities, he does not control his facilities, both personal and technical. The subcontractor acts on its own behalf and on its own behalf and is not entitled to act on behalf of the Applicant.

The relationship between the Company and the Subcontractor is a standard relationship between the recipient and the service provider who are two independent entities. The subcontractor provides the Applicant with broadly understood services consisting in the storage of goods in a customs warehouse and logistic service. However, the subcontractor does not provide services in the field of processing of goods or marketing. The Applicant's activities are managed from its headquarters in Germany, where key activities from the point of view of business activity are undertaken, such as concluding contracts, contacts with contractors,

trade negotiations, and accepting orders. All tasks related to the distribution of goods are generally carried out by the Company, and the Subcontractor only prepares the relevant batches of goods for shipment and performs transport in these cases,

For the establishment of a permanent place of business, it is important that the technical and personal assets held (with the intention of stability) in a given country create an independent and independent structure to the extent that within this structure it is possible to make management decisions on issues that relate to this permanent place. The resulting structure must therefore be equipped with the ability to independently provide and "consume" benefits.

If the Applicant does not employ employees obliged to perform work on Polish territory, there is a lack of persons authorized by the Applicant in Poland to conclude contracts and make management decisions regarding his activities on Polish territory. All activities related to the applicant's main activity are carried out in Germany.

Permanent use of the services of a given contractor cannot be considered the same as the "stability" of the place of business in a situation in which the Applicant does not maintain or plan to maintain any personal and technical structures in Poland. The relationship between the Subcontractor and the Applicant does not differ in any way from the typical relationship between the recipient and the service provider.

A similar position was presented, among others Director of the National Treasury Information in an individual interpretation of [...] No. [...] and Director of the Tax Chamber in W. in individual interpretations: of [...], No. [...] and of [. ..] No. [...].

In view of the above, the Applicant stated that the Company does not have a permanent place of business in the country for VAT purposes.

Regarding the second question, the Applicant referred to Art. 86 section 1 of the VAT Act and stated that if the authority decided that the Company had, however, a permanent place of business in Poland, the party would have the right to deduct the VAT shown by the subcontractor on invoices documenting the services rendered. These services will be related to activities subject to VAT tax in Poland (sales of goods in Poland and outside of Poland).

The interpretative body recognized the above position of the party regarding:

- determining the permanent place of business to be incorrect,

- right to deduct input tax as correct.

The justification for this assessment was started by citing Art. 5 paragraph 1 of the VAT Act stating the so-called the principle of territoriality, according to which tax on goods and services tax is subject to, among others the provision of services for a fee, but only if the place of their performance (determined on the basis of the provisions of the Act) is the territory of the country through which - as defined in art. 2 point 1 of the Act - it is understood as the territory of the Republic of Poland. Art. 7 item 1, art. 8 clause 1, art. 28b paragraph 1 and item 2 of this Act, in the light of which the interpretative body stated that, in principle, the service provided to the taxpayer other than indicated in art. 28e, art. 28f paragraph 1 and la, art. 28g paragraph 1, art. 28i, art. 28j paragraph 1 and 2 and art. 28n of the Act is subject to taxation at the place of business of the service recipient,

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

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

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

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

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

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

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

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

Based on Article. 53 section 1 of the Regulation, for the purposes of applying Art. 192a of Directive 2006 / l 12 / EC, the permanent place of business of a taxpayer shall be taken into account only if it has sufficient stability and an appropriate structure in terms of personnel and technical resources to enable it to carry out, supply goods or provide services in which participates.

Further, when interpreting the concept of "permanent place of business", the authority, referring to the CJEU rulings, pointed out that the place can be said if there is an appropriate structure in terms of personnel and technical facilities necessary to conduct business activity and there is a certain minimum scale of business activity that allows it to be considered that the taxpayer's activity in this place is not carried out periodically, as well as activities from this the place is run independently of the business headquarters. In this regard, the case law of the CJEU is valid, including judgment C-168/84 Gunter Berkholz, C-231/94 Faaborg - Gelting Linien A / S, C-190/95 ARO Lease By, C-260/95 Commissioners of Customs and Excise v. DFDS A / S, C- 390/96 Lease Plan Luxembourg SA,**Welmory** Sp. z oo

The need to refer to the CJEU judgments when determining a permanent place of business in Poland has been repeatedly emphasized by Polish administrative courts. For example, the Supreme Administrative Court in its judgment of 16 February 2015, reference number Act I FSK 2004/13, referring to the judgment of the CJEU C-260/95, stated that all resources used by a potential permanent place of business, including technical resources, do not have to be the property of the

taxpayer. Thus, the taxpayer can "create" the required structure based on renting, leasing and other similar forms. In turn, the Provincial Administrative Court in Olsztyn in its judgment of 30 September 2009, reference number act I SA / Ol 563/09 stated that the entity has a permanent place of business in the territory of the country, if using infrastructure and personnel within the territory of the country, in an organized and continuous manner, it carries out activities in which it carries out activities subject to value added tax. Technical infrastructure and personal involvement must be closely related to the performance of activities subject to value added tax.

Having regard to the definition resulting from the said Regulation, the definition of economic activity contained in art. 15 paragraph 2 of the VAT Act, as well as the settled case law of the CJEU and the case law of Polish administrative courts, the interpretative body stated that a permanent place of business requires the existence of technical infrastructure and human staff in a given place, who can independently perform specific activities. This personal and business structure in a permanent place of business should occur in a permanent way, i.e. repeatable and lasting. To be considered a permanent place of business, it is necessary for that place not only to use goods and services, but also to be able to carry out taxable activities in accordance with Article 5 paragraph 1 of the Act. Wherein, it is not necessary for the entity's activity to be considered as a permanent place of business in Poland that the entity itself provides services or supplies of goods with sufficient funds. It is also important that the created business structure of the entity be able to receive and use services provided for its own needs.

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

According to the interpretative body, if a given entity has its staff in a given country and its structure (including technical infrastructure), which is characterized by appropriate stability, then it has a permanent place of business in that country. However, it is irrelevant whether these are employees employed directly by this entity or "own" infrastructure. The case law of the CJEU indicates that also the use of human and technical resources of another entity may lead to the creation of a permanent place of business in another country.

Referring to the above to the actual state (future event) analyzed in the present case, the authority stated that the Applicant's described activity constitutes a permanent place of business.

In the present case, in the created structure of the Applicant's activity in Poland, the criterion of stability (understood as the fact that the entity having such a place intends to conduct business from this place permanently) results from the commitment to the task of selling goods with sufficient personal and technical resources.

Recalling the description of the Company's activities presented by the website, the authority stated that the Applicant has actual power over technical and personnel facilities, because it is able to properly use them in the sale of goods (electrical and electronic devices and their accessories). Technical infrastructure and personal involvement of the Subcontractor used by the Applicant are closely related to the performance of his taxable activities.

According to the authority, in the case under analysis, the fact raised by the party that the Applicant's activities are directed from the headquarters in Germany, where key activities from the point of view of economic activity are undertaken, such as concluding contracts, contacts with contractors, trade negotiations, as the place of business conduct is irrelevant economic activity cannot be equated with the intensity and frequency of actions taken as part of business operations, as

well as with management decisions that do not take place in the country. The place of the function of the main management board of enterprises is decisive for determining the place of the seat of business activity. However, these functions do not determine a permanent place of business. At the same time, the time frame of the contract does not determine the stability of the place of business. The decisive fact is that the structure (facility) operating for a certain period of time is characterized by sufficient stability and was not established for transient needs.

In the light of the above, the authority concluded that in the present case the criteria were met for having a minimum size of activity characterized by a certain level of stability, in which the presence of human and technical resources necessary for conducting the economic activity of the taxpayer in the field of importation and supply of goods within the territory of the country. Thus, the use of technical infrastructure in Poland and personnel to perform part of the Company's business operations in an organized and continuous manner qualifies the Applicant's activity on the territory of the country as a permanent place of business in Poland.

Regarding the second question, the authority quoting art. 86 section 1 and item 2 point 1 of the VAT Act, stated that the right to reduce the amount of tax due by the amount of input tax is granted when the taxpayer makes the tax on goods and services and when the goods and services from which the tax was calculated, are used to perform taxable transactions, i.e. those resulting in the determination of tax due (tax liability arising).

The general rule of tax deduction thus presented excludes the possibility of reducing the amount of tax due by the amount of input tax related to goods and services that are not used to perform taxable activities, for which the amount of tax is not shown on the invoice - in the part concerning these activities.

Bearing in mind the information indicated by the Applicant regarding the services provided by the Subcontractor, the authority concluded that the rules for determining the place of supply of services under Article 28e, art. 28f paragraph 1 and 1a, art. 28g paragraph 1, art. 28i, art. 28j paragraph 1 and 2 and art. 28n of the VAT Act. Therefore, the general principles resulting from art. 28b of the Act. The place of rendering and taxation of these services should therefore be determined in accordance with the principle expressed in art. 28b paragraph 2 of the Act.

In the analyzed case, the conditions entitling to deduct input tax, referred to in art. 86 section 1 of the Act, because the services purchased by the party are related to taxable activities carried out by the Applicant, and the negative premises referred to in art. 88 clause 3a item 7 of the Act do not occur. Applicants pursuant to art. 86 section 1 of the Act has the right to deduct the amount of tax indicated by the Subcontractor on the invoice documenting the described services.

Referring to individual interpretations and judgments cited by the Applicant, it was noted that the understanding of the concept of a permanent place of business activity evolved in subsequent judgments of the CJEU and the judgments of Polish administrative courts. It is currently assumed that all resources used by a potential permanent establishment, including technical resources, do not have to be the taxpayer's property. The taxpayer can "create" the required infrastructure based on renting, leasing and other similar forms. The criterion of possessing adequate human and technical resources for the purposes of the existence of a permanent place of business is also met if the taxpayer does not employ employees in a given country and does not own real estate.

At the same time, it was noted that individual interpretations are issued in individual cases and do not bind in cases of other taxpayers, which is understandable given the diversity and difference of factual circumstances occurring in each individual case to be resolved. Interpretations and judgments cited by the Applicant shall decide in the actual state / future event different from the description of the future event presented in the application by the party. Having a permanent place

of business should be assessed from the perspective of a specific case, because due to the industry in which the entity operates, the required / used technical and organizational facilities will be different. When deciding on having a permanent establishment, the "organizational structure" necessary varies depending on the economic sector concerned. Technical and organizational support is different, e.g. for the provision of services, and different for the distribution of goods, including various types of goods.

In the complaint about the above individual interpretation, brought to the Provincial Administrative Court in Gliwice, she was accused of:

1. incorrect assessment as to the application of substantive law, i.e.

- art. 11 paragraph 1 and 2 and art. 53 section 1 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 establishing implementing measures for Directive 2006/112 / EC on the common system of value added tax (recast) (Journal of Laws of the EU. 2011 No. 77, p. 1, as amended; hereinafter: Regulation 282/2011) by recognizing the purchase by the Company of services from a Polish service provider as a form of direct disposal of technical and personal resources of this Polish service provider, which consequently leads to a position, that the company has a permanent place of business in Poland, and therefore Poland will be the place of taxation of services rendered to it;

2. incorrect interpretation of substantive law, i.e.

- art. 11 paragraph 1 and 2 and art. 53 section 1 of Regulation 282/2011 by recognizing that the criterion of sufficient stability results from involvement in the tasks related to the sale of goods, sufficient personal and technical resources, regardless of the degree of control over them, when the correct interpretation of these provisions should lead to the conclusion that having the appropriate structure in personnel and technical facilities and being sufficiently stable and independent to the extent that it is possible to make decisions regarding deliveries carried out from a given place / for the needs of that place as part of the operations carried out, these are separate conditions;

- art. 28b paragraph 1 and 2 of the VAT Act in connection with art. 44 and art. 1 clause 2 Council Directive 2006/112 / EC of 28 November 2006 on a common system of value added tax (Journal of Laws of the EU. L. of 2006 No. 347, p. 1, as amended; hereinafter referred to as : Council Directive 2006/112 / EC) by incorrectly specifying the place of supply of services and breach of the principle of VAT neutrality by bringing about a situation of double VAT taxation in Poland and Germany.

In view of the allegations formulated in such a way, it was asked to repeal the written interpretation of tax law provisions and award the costs of proceedings, including the costs of legal representation, according to prescribed norms.

In the justification of the complaint, the previous course of the proceedings and the positions of the parties were described at the beginning. Next, the applicant's lawyer upheld in full the Company's extensive argumentation in the application for issuing the contested interpretation, which it would be superfluous to repeat here.

Arguing with the position of the interpretative body, as part of an allegation of violation of Art. 11 paragraph 1 and 2 and art. 53 section 1 of Council Implementing Regulation (EU) No 282/2011, he emphasized in particular that in order to recognize that the applicant had a permanent place of business in the

territory of the country, she should have in Poland both staff and technical resources needed for independent operation and the consumption of services provided, and both should be met jointly.

The interpretative body stated that in the present case the criteria were met for having a minimum size of activity characterized by a certain level of constancy in which the presence of human and technical resources necessary for conducting the economic activity of the taxpayer in the field of importing and supplying goods within the territory of the country took place. Thus, the use of technical infrastructure and staff owned in Poland to perform part of the Company's business operations, in an organized and continuous manner, qualifies the Applicant's activity on the territory of the country as a permanent place of business in Poland.

According to the applicant, that assertion is erroneous and results from the unauthorized and unjustified extension of the definition of a fixed establishment.

The applicant does not have human resources on the territory of Poland, as she does not employ any employees on the territory of Poland, she has no sales representatives, persons authorized to take any action on her behalf, whether performing such activities on the basis of a contract of employment, a mandate contract, a specific task, or other contract for the provision of services etc, the applicant's employees are not permanently resident in Poland, the party does not cooperate and does not intend to cooperate with natural persons conducting sole proprietorship.

The applicant also has no technical resources on Polish territory, as it is not the owner and has no right to dispose of as owner any space located on Polish territory, equipment or other technical resources located in Poland.

All assets in the form of buildings, a warehouse (used solely for temporary storage of the applicant's goods prior to shipment), devices belong to the Subcontractor. The company acquires only customs warehouse services and logistics services provided by the Subcontractor.

The applicant also denied the interpretation authority's claim that the Applicant has actual power over the technical and personnel base, as it is able to properly use them in the sale of goods, and the technical infrastructure and personal involvement of the Subcontractor used by the Applicant are closely related to the performance of his activities taxation. She argued that the fact that the applicant uses the services provided to her by the Subcontractor to the extent described above cannot by itself justify the claim that she has a permanent establishment in Poland. Assumption that the same people and equipment (assigned to the Subcontractor) simultaneously provide services for themselves (i.e.

If the contract concluded by the party with the Subcontractor does not show that the recipient exercises any control over the back office of the service provider, then the relationship between the service recipient and the service provider is the ordinary provision of services. Consequently, the use of the provider's resources is not equivalent to the use of own resources.

The contract with the Subcontractor shows that the employees of the Subcontractor are in contact with the applicant's employees in the performance of the services, which includes forwarding the collected supply documentation to the applicant; contact with the applicant's employees in handling returns; using the applicant's dedicated IT interface, printing transport documents, delivery notes and original invoices and stamping them using the stamp provided by the applicant). Such cooperation should not, however, be equated with personal subordination and control over employees. Basically, the customer always determines how the services are to be performed, and their implementation usually requires contact between employees of both contractors.

The applicant also has no comparable control over the Subcontractor's technical resources. It follows from the contract that the applicant's employees are not allowed free access to the Subcontractor's premises, as this facility is fully independently managed by the Subcontractor. The persons designated by the applicant have only the right to enter the warehouse for the purpose of inspecting the goods, but this cannot be done at any time, but only with prior notification and only during the warehouse's working hours. The above provision in the contract corresponds to the generally accepted business conditions for contracts for the provision of logistics services and cannot prove the existence of any applicant's control over the property, as confirmed by the Provincial Administrative Court in Gliwice in the judgment of 15 January 2019, reference number act III SA / Gl 909/18.

The applicant also has no possibility of exercising actual influence over the Subcontractor, which could have been the case, for example, if the service provider were providing logistics services to only one company, or when there were connections between the service provider and the recipient within the meaning of the Corporate Income Tax Act.

At this point, the applicant argued that the majority of the services purchased by economic operators are directly or indirectly related to their business activities, including sales activities. This should not be equated with having comparable control over the technical and personnel resources of each service provider and, consequently, the creation of permanent places of business.

According to the applicant, in the described facts, the requirement of sufficient stability and independence was not met to the extent that it is possible as part of her activities in Poland to make decisions in Poland regarding deliveries made from a specific place / for the needs of that place. Therefore, in the Company's opinion, the allegation of incorrect assessment as to the application of substantive law provisions is justified.

As part of the allegation of misinterpretation of substantive law, i.e. 11 paragraph 1 and 2 and art. 53 section 1 of Regulation 282/2011, the applicant's representative claimed that having the appropriate structure in terms of personnel and technical facilities, and having sufficient stability constituted separate conditions, as the conjunction used in the provision "and" means a conjunction.

In accordance with art. 53 section 1 of Regulation 282/2011, a permanent place of business of a taxpayer shall be taken into account only if it is characterized by sufficient stability and an appropriate structure in terms of personnel and technical facilities to enable it to deliver goods or provide services in which it participates.

The activity conducted here must bear the hallmarks of stability and be independent to the extent that it is possible to make decisions regarding deliveries made from this place / for the needs of this place.

The resulting structure must therefore be equipped with the ability to independently provide and "consume" benefits. Therefore, this structure cannot be only the recipient of services provided for the needs of the taxpayer's "central". These services are to be provided for the needs of this structure. If it is not possible for a given structure (due to its personnel and technical resources) to be able to consume the purchased services, then it should be considered that it is not a permanent place of business of the taxpayer. At the same time, a permanent establishment should be able to provide services sold. Only then in relation to the services sold can it be considered a permanent place of business.

The decisive factor is that the place of business should be able to receive and use the purchased services for its own needs. The applicant cannot be considered to be purchasing logistic and storage services for its permanent place of business in Poland. This is impossible due to the fact that the structure located in Poland does not perform any activities related to sales, and therefore does not need and cannot consume logistics and warehouse services, e.g. order picking and shipping. These services are acquired only for the needs of the Company's headquarters, in which general management activities are performed and its central administrative tasks are performed.

In this context, it was emphasized that in the facts as the subject of the **Welmory** judgmentC-605/12, a Cypriot company, towards which the Supreme Administrative Court later ruled that it had a permanent place of business in Poland, not only purchased services from a recipient (a Polish related company), but also provided services to consumers in Poland. Consequently, her permanent place of business in Poland was not only the recipient of services provided for the needs of the "head office" in Cyprus, but also had the option of providing the services sold, which cannot be said of the applicant's activities in Poland. The applicant's business structure in Poland, due to the lack of personnel and technical resources, is unable to consume the services purchased, and as a consequence it must be considered that it is not a permanent establishment. The fact that**Welmory**.

Further claims of the complaint referred to the authority's statement that "the fact raised by the Applicant that the activities of the Applicant is directed in Germany, where key activities from the point of view of economic activity are undertaken, such as concluding contracts, contacts with contractors, trade negotiations, is irrelevant , because the stability of a place of business cannot be equated with the intensity and frequency of actions taken as part of business operations, as well as with management decisions that do not take place in the country. " According to the applicant, this circumstance is relevant and "may be relevant in that the applicant does not employ employees on Polish territory".

It was further argued that the permanent use of the services of a given contractor (the party has been cooperating with the Subcontractor for several years and intends to continue this cooperation in the future) cannot be considered to be the same as the "stability" of the place of business, given that the relationship between the Subcontractor and the applicant does not differ like a typical relationship between a recipient and a service provider.

As part of the allegation of misinterpretation of Art. 28b paragraph 1 and 2 of the Act on VAT in connection with from art. 1 clause 2 of Council Directive 2006 / 112AVE, the applicant's representative indicated the content of art. 44 and argued that it should be understood in the manner indicated by the Provincial Administrative Court in Gliwice in the judgment reference number Act SA / Gl 913/18 that "the seat of business is in the first place and only in the second place the permanent establishment, which is a departure from the general rule". The extension of the scope of this concept violates the requirement of strict interpretation of the provisions establishing exceptions, and also violates the principle of VAT neutrality.

The authority's claim that the Applicant has actual power over the technical and personnel base, because it is able to properly use them in the sale of goods, and the technical infrastructure and personal involvement of the Subcontractor, used by the Applicant are closely related to the performance of his taxable activities undoubtedly proves unauthorized extension of the criterion of authority over personnel and technical facilities.

The above interpretation leads to the conclusion that the proper use of the service and technical facilities of the service provider when selling, generally always leads to the statement that the customer has actual power over those facilities.

The above interpretation is also inconsistent with the principle of pro-EU interpretation and violates the principle of VAT neutrality, leading to a situation in which the same services are subject to VAT both in Poland and Germany, as the place of the recipient's seat.

In addition, the applicant's representative claimed that even if it were considered that the Company had a permanent place of business in the territory of the country, the place of consumption of logistics and storage services, which have the character of ancillary services, is the seat of the Company. These services are acquired only for the needs of the Company's headquarters, in which general management activities are performed and its central administrative tasks are performed.

The principle of taxation of consumption follows from the principle of VAT neutrality. Tax regulations regarding the determination of the place of supply of services are based on this principle. In cases where a foreign company has a permanent place of business in Poland and a registered office outside the country, when purchasing services, you should always consider who is the beneficiary of the purchased service - the foreign seat of the taxpayer or the permanent place of business in Poland. Accordingly, if services are consumed in the country of residence of the taxpayer, they are taxed on the reverse charge basis, and if they are consumed in a permanent place of business, they are taxed with Polish VAT.

Even if it were considered that the applicant had a permanent place of business in the territory of the country, logistics and storage services are purchased for its headquarters (headquarters) in Germany, which carries out sales activities using the subcontractor's logistics and storage services. However, this reasoning leads to a logical error, because if we consider that the place of consumption of logistics and storage services is the state of the taxpayer's seat, then a permanent place of business in Poland cannot be established.

In support of his position, the party's representative cited

judgments of the Provincial Administrative Court in Gliwice: of 27 February 2019, reference number act III SA / Gl 913/18, of 15 January 2019, reference number act III SA / Gl 909/18, of 10 December 2018, reference number act III SA / Gl 800/18.

In addition, pointing out to the interpretative authority the inconsistency, it was pointed out that in other specific cases concerning logistics and warehouse services (which consist essentially in the performance of similar or comparable activities by the service provider), he stated that as a result of using these services no permanent place of business for the taxpayer was created. .

In its response to the complaint, the interpretative body fully upheld its position and requested that the complaint be dismissed.

The Provincial Administrative Court considered the following.

The complaint deserved to be upheld.

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

The dispute in the present case revolves around the question of whether, in the facts described, which, under Article 14c Op, binds both the interpretative body and the Court, the applicant has a permanent place of business in Poland within the meaning of Article 28b paragraph 2 of the VAT Act and art. 11 of EU Council Regulation No. 282/2011 (implementing regulation) and art. 44 of Directive 2006/112 / EC, and thus whether the services purchased by the Company will be taxed in Poland and whether the applicant will have the right to deduct input tax on those services on the basis of art. 86 section 1 of the VAT Act.

The facts described in the application initiating the proceedings in the present case show that the applicant is based in Germany. The company's business is the manufacture, acquisition and resale, as well as processing, import and export, as well as research and development of technical articles, in particular electrical and electronic devices and their accessories. The company imports goods from Japan, which are subject to resale to customers in Poland and outside of Poland. On the other hand, a third party based in Poland, not related in any way to the Applicant, has been providing logistics services and storage services in customs warehouses for many years under the Agreement on permanent logistic service. The applicant remains the owner of the goods during storage. The service consists of handling incoming goods, their unloading and storage of pallets, storage, completing orders, handling outgoing goods, handling returns, and carrying out customs services if necessary. All the applicant's goods are stored in the customs warehouse.

The Applicant uses the space specified in m2, the Applicant's employees do not have free access to the Subcontractor's warehouse, they can inspect goods only with prior notice and only during the warehouse's working hours.

Before sending the customer's order data, the Applicant carries out a product availability check based on relevant product inventory data. Planning inventory and placing orders for items is made only by the Applicant. The Applicant is obliged to inform the Subcontractor of the planned delivery and provide product data via the IT interface at the latest the day before the delivery at the latest.

The Subcontractor's duties include completing orders after receiving data on orders from the Applicant and preparing them for dispatch, updating the inventory list, inventory and returns handling. If the orders are not received by couriers or agents, employed by the Applicant's clients, the Subcontractor also provides transport services to the Applicant.

The applicant does not have a branch in Poland, does not employ any employees or cooperate with natural persons conducting sole proprietorship. The Company's employees are not permanently resident in Poland. Subcontractor's employees do not follow the Applicant's instructions. Their cooperation with the Applicant's employees takes place within the scope strictly defined by the contract: forward collected supply documentation to the Applicant; remain in contact with the Applicant's employees while handling returns; print delivery notes and original invoices and stamp them using a stamp provided by the Applicant; use the Applicant's dedicated IT interface.

Therefore, Subcontractor's employees only perform technical activities in the field of sales documentation (Subcontractor's employees are not authorized to issue invoices on behalf of the Applicant, and their tasks are limited to technical activities related to obtaining physical printout of invoices issued by the Applicant). The Subcontractor's staff are subject only to the Subcontractor's internal regulations and are supervised by supervisors who are employees of the Subcontractor, while cooperation with the Applicant's employees is, as a rule, remotely. The contract contains a provision that, by mutual consent, selected employees of Subcontractors will participate in training programs conducted by the Applicant in order to improve their knowledge about the Applicant's products,

The applicant is not the owner, nor has the right to dispose of as the owner any space located on the territory of Poland, equipment or other technical resources located in Poland. The company has no legal title to any real estate or part of it in Poland, which it could use freely, and it does not rent office space.

In the applicant's opinion, she does not have a permanent place of business in Poland, since she has neither human resources nor technical resources necessary for the independent conduct of business and consumption of the services provided. Nor can the applicant be considered to be using a third party's infrastructure or staff, since it does not have "comparable control" over the Subcontractor's resources as over its own resources, as it is one of the Subcontractor's many clients and is not affiliated with A subcontractor within the meaning of the Corporate Income Tax Act and, as a consequence, is not in any way entitled to influence his activities, nor does he exercise control over his personal and technical facilities.

According to the interpretative body, the applicant has actual power over technical and personnel resources, as she is able to properly use them in the sale of goods. In the opinion of the authority, the criteria for having a minimum size of activity characterized by a certain level of stability, in which the presence of human and technical resources necessary to conduct the business of the taxpayer in the field of import and supply of goods within the territory of the country, are met. Thus, the use of technical infrastructure located in Poland and staff to perform part of the applicant's business in an organized and continuous manner qualifies the applicant's activity on the territory of the country as a permanent place of business in Poland.

In resolving the dispute thus outlined, in which the applicant must be right, the Court will use, inter alia reasoning presented in the verdicts of the Provincial Administrative Court in Gliwice: of January 7, 2019, reference number act III SA / Gl 908/18 and dated 27 February 2019, reference number act III SA / Gl 913/18, as well as in the judgment of November 20, 2019, reference number no. I SA / Gl 737/19, all the judgments of administrative courts cited are available in the NSA online database of judgments on the website: http://orzeczenia.nsa.gov.pl), which it fully shares.

In accordance with art. 15 of the VAT Act, taxpayers are legal persons, organizational units without legal personality and natural persons who independently carry out business activities referred to in paragraph 2, regardless of the purpose or result of such activity. Taxpayers are also legal persons, organizational units without legal personality and natural persons purchasing goods, if the taxpayer who does not have their registered office or permanent place of business in the territory of the country is performing their supply in the territory of the country (Article 17 (1) (5) of this Act) .

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

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

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

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

The issue of the conditions for recognition of what should be understood as a permanent place of business has been the subject of many judgments of national and EU courts, which have evolved in subsequent judgments, taking into account the conditions and mechanisms of economic trading. However, there are still many doubts in this respect, as evidenced by the preliminary question of the Provincial Administrative Court in Wrocław of June 6, 2018, reference number file I SA / Wr 286/18. It includes the question: can the existence of a permanent place of business in Poland within the meaning of art. be derived from the mere fact that a company having its registered office outside the European Union has a subsidiary in Poland? 44 of Council Directive 2006/112 / EC of November 28, 2006 on the common system of value added tax (Journal of Laws of the EU of December 11, 2006 No. L 347, p. 1 et seq.) and art. 11 paragraph 1 of the implementing regulation? It therefore undoubtedly concerns the interpretation of art. 28b paragraph 2 of the VAT Act.

It should also be noted that the Provincial Administrative Court in Olsztyn in its judgment of September 30, 2009, reference number act I SA / Ol 563/09 expressed the view that an entity has a permanent place of business in the territory of the country, if, using the infrastructure and personnel in the territory of the country in an organized and continuous manner, it carries out activities in which it carries out activities subject to tax on goods and services. Technical infrastructure and personal involvement must be closely related to the performance of activities subject to value added tax.

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

contractor's business. A distinction should be made between services rendered by a Polish company to Cyprus and services provided by the latter to consumers in Poland.

In the opinion of the Court, the abovementioned judgment of the CJEU, although it does not correspond to the facts of the case, provides important guidance on the definition of the concept of permanent establishment.

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

It is not disputed that the applicant's headquarters are in Germany and that it is its principal place of business, which includes in particular the manufacture, acquisition and resale, as well as the processing, import and export of electrical and electronic equipment and accessories. The company imports goods from Japan, which are subject to resale to customers in Poland and outside of Poland.

Services provided in Poland by the Subcontractor include, above all, handling incoming goods, unloading and storing pallets, storage, completing orders, handling outgoing goods, handling returns, performing customs services if necessary, and in some cases transporting goods.

The Subcontractor's activities for the applicant are therefore only part of its business, without being able to supervise the services purchased, without having the staff or the necessary infrastructure. The applicant does not employ employees on Polish territory, does not delegate her employees to perform tasks on Polish territory, nor does she outsource them. Does not exercise any control over the Subcontractor's personnel. The Subcontractor's staff performing (technical) activities constituting the provision of the services purchased by the applicant does not act on behalf of the applicant or on her behalf, the persons employed by the subcontractor carry out his instructions. The same applies to infrastructure that is not shared in any way, it is not subject to the applicant's supervision and is also used to provide services by a subcontractor to other entities. That disclosure cannot be inferred from the fact that the applicant's representatives may inspect the goods during warehouse hours after prior notification to the Subcontractor. A distinction must be made between the provision of goods storage and handling services and the provision of access to the applicant's storage infrastructure, which is not the case in the facts at issue.

It must be emphasized that this necessary control of the applicant over the personnel and technical facilities in Poland cannot be derived from the rules for the provision of services between the applicant and the Subcontractor, which - obviously - are determined between the parties to each such type of contract and the party's rights to demand that the conditions set by contractors.

The interpretation body's assertion that the applicant has de facto power over the technical and personnel base must also be denied because it is able to properly use them in the sale of goods (electrical and electronic devices and their accessories). In support of this thesis, the authority stated that the technical infrastructure and personal involvement of the Subcontractor used by the Applicant are closely related to the performance of his taxable activities.

Without questioning this relationship, it should be noted that in the case under consideration the Company has no power over technical and personnel facilities, which has already been shown above, emphasizing important aspects of the facts.

The applicant's assertion deserves full approval. view expressed in the judgment of the Provincial Administrative Court in Warsaw of 12 July 2017, reference number act III SA / WA 1979/16, in which the Provincial Administrative Court ruled that omitting the requirement of "authority" (which was also committed by the authority in the present case) would mean that this criterion is met in principle whenever the entity purchases services provided in a country other than his headquarters. irrespective of the scope of the entity's powers to command such personnel, control it or impose the manner of performing the ordered service.

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

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

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

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

The consequence of the above is that in the light of art. 86 section 1 of the VAT Act, the Company will not be entitled to deduct the input tax shown by the Subcontractor on the invoice documenting the services described in the actual state.

In view of the above, the Court pursuant to art. 146 Ppsa overruled the contested interpretation, obliging the interpretative body to take account of the arguments put forward.

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