I SA / Gl 1707/19 - Judgment of the Provincial Administrative Court in Gliwice

Date of the judgment	2020-03-17 *invalid judgment*
Date of receipt	2019-12-20
Court	Provincial Administrative Court in Gliwice
referees	Dorota Kozłowska / chairman /
Symbol with description	6110 Value-added tax 6560
Thematic slogans	Tax on goods and services
The appealed authority	Director of the National Tax Information
Result content	Awarded reimbursement of proceedings costs The complaint was partially dismissed The contested act was partially repealed
Cited regulations	OJ 2018 item 2174 art. 28b paragraph. 1 and 2 *Act of March 11, 2004 on tax on goods and services - consolidated text* OJ 2019 item 900 art. 14c par. 2 *Act of August 29, 1997 Tax Ordinance - consolidated text*

SENTENCE

Provincial Administrative Court in Gliwice composed of the following composition: Chairman Judge of the Provincial Administrative Court Dorota Kozłowska, Judge of the Supreme Administrative Court Eugeniusz Christ, Assessor of the Provincial Administrative Court Katarzyna Stuła-Marcela (spokesman), Court reporter, senior specialist Anna Oklecińska, after hearing the case on March 10, 2020 a complaint by A SA in F. against the interpretation of the Director of the National Tax Information of [...] No. [...] regarding tax on goods and services 1) repeals the challenged interpretation in the part in which the applicant's position was found incorrect in terms of issuing an invoice documenting the movement of own goods from the warehouse in P to the warehouse in Portugal; 2) dismisses the complaint in the remaining scope;

SUBSTANTIATION

1. A SA in F. in Portugal (hereinafter the applicant or the company) lodged a complaint against the interpretation of the Director of the National Tax Information of [...] No. [...] in the matter of tax on goods and services.

2. Status of the case.

2.1. On August 28, 2019, the authority received a request for an individual tax ruling on value added tax in the scope of: 1) permanent place of business, 2) place of taxation of purchased services and taxation, 3) documenting the movement of own goods.

The application presents the following facts and a future event.

The applicant is a manufacturer of single-use medical devices specializing in the manufacture of [...].

The company is a value added tax payer registered in Portugal. It also has a proper and valid identification number for intra-Community transactions issued in Portugal, containing the two-letter code used for value added tax. The complainant is also registered in Poland as an active VAT payer and as an EU VAT payer.

The applicant's economic activity in Poland consists solely in selling goods that are manufactured in three industrial plants (two in Portugal and one in Ukraine). The company imports raw materials from other countries in order to transform them into products later, subcontracting warehousing and logistics services in Poland for this purpose. The company does not have a production plant in Poland and does not provide any services.

The applicant sells the goods to the Polish market only through her only distributor, i.e. the company B Sp. z o. o. The distributor's task is to acquire customers, eg through public tenders and the analysis of market information, which make it possible to place orders in A, in order to produce and sell goods.

The goods are sold to the distributor and then delivered to his warehouse. It is the responsibility of the distributor to sell the products to end customers.

In Poland, the company uses the warehouse service provided by the Polish entity C Sp. z o. o. The warehouse is located in P .. The company is not the owner or tenant of this warehouse, it is only the recipient of the warehouse service. The Polish entity that provides warehousing services (C) is an entity independent of the complainant. Agreement with C Sp. z o. o. was concluded for a specified period, ie for 24 months. It entered into force at the time of signing, i.e. from [...] and is valid until [...]. The company intends to continue cooperation until the end of the contract, i.e. [...], and is also planning the contract in its existing form extended. Ww. the contract states that its subject matter is transport and forwarding services, as well as other additional services, such as services related to insurance and storage of cargo. There are no additional agreements between the parties, which concern warehouse services. The service provider's employees, acting on behalf of and on behalf of that service provider, perform warehouse services for the company. The company has no control over the personnel and technical resources of the service provider. The company's employees are not present in the warehouse in P., do not give orders and do not control the way the service provider performs services. The company is not the sole contractor of the service provider. In the service provider's warehouse, the company does not have a designated, separate area for its own disposal and for storing only its goods. The company cannot influence the place and conditions of the storage, nor does it have any power over the way of providing the storage services, or the exclusivity. The warehouse stores goods owned and traded by the company. The goods are stored on the territory of Poland until the applicant "finds" a customer for these goods. The average stock rotation period in the warehouse in Poland is approximately 90 days.

Sales from a warehouse located in Poland are made to Polish entities, entities from European Union countries and Ukrainian entities.

With the use of the warehouse in P., the following activities are performed in particular:

- the company imports raw materials for the production of medical devices from China, Saudi Arabia and Taiwan, which are transported to P. and from there to the company's warehouse in Portugal,

- the company imports finished products from China ([...]) and sells them in Poland to the related company B Sp. z o. o., in the future, sales of these products may also be conducted to other customers in the EU,

- goods are also sent from the warehouse in P. to Ukraine by export or under the outward processing procedure (procedure 2100),

- the company's own goods (previously produced by the company) are delivered from a warehouse in Portugal to the warehouse in P.

The company's sales of products stored in a warehouse in Poland are organized analogically to the process of selling goods to customers in Portugal. Whenever products are available in the Polish warehouse, the company informs about the need to store the products and send the specified quantity of goods to the customer at the right time. The Portuguese applicant manages the entire sales process. The company coordinates this process with all interested parties. It is the responsibility of the company holding the products to ship them in accordance with the instructions provided by the complainant. This is how the sales process takes place, both to a Polish related entity and to customers from outside Poland.

Own goods (raw materials) previously imported from China, Saudi Arabia and Taiwan are transferred for production to Portugal and Ukraine, when it is necessary to deliver a given type of materials that are to be transformed into final products on the company's production lines.

The company purchases the following services from Polish entrepreneurs:

- the above-mentioned transport and forwarding services for the transport of goods in international road transport and additional services related to insurance, cargo storage, etc.,

- accounting services (in the field of preparing and submitting VAT-7 VAT-UE tax returns and JPK_VAT file on behalf of the company),

- services in the field of undertaking activities for the company before the customs authorities in order to fulfill all the activities and formalities provided for in the customs legislation related to the trade in goods with third countries,

- from an entity related to B Sp. z o. o. the company acquires consulting, marketing, translation and ongoing sales support services.

In 2017-2019, the company commissioned services to a related entity, B Sp. z o. o. The services were provided on the basis of three consecutive contracts (individual contracts were concluded for a specified period, the last of which was valid until the end of March).

The applicant commissioned the company B Sp. z o. o., first of all, providing it with market research services and services in the field of maintaining relationships with local customers. The terms and conditions of the applicant's cooperation with a related entity were each time regulated by an agreement concluded by the parties. The various contracts provided that certain types of services were to be performed by a related party depending on the applicant's current needs. The place, date and manner of performing the services were to be agreed by the parties on an ongoing basis.

On the basis of the above-mentioned contracts, B Sp. z o. o. provided the complainant with consulting, marketing, research and translation services, as well as ongoing sales support services.

A Polish related company received an order to perform a specific service, most often by telephone contact. The parties agreed on an indicative date of service performance. To perform it, B Sp. z o. o. used its own resources, partially benefited from the support of other entities (external companies), or commissioned the entire task to be performed by external entities. After the service was performed, information about its performance was usually communicated by phone, and the

material effects of the service (e.g. a copy of a catalog, brochure) were sent by post to Portugal. After accepting the performance of the task, the Polish related company issued an invoice for the provided service.

At present, B Sp. z o. o. does not provide the applicant with the above-mentioned services (no further contract was concluded) as the applicant's need in this regard had been met. However, it may happen that in the future the complainant will commission a related company to provide similar or different services.

As regards the movement of the company's goods from the company's warehouse in P. to the company's warehouse in Portugal and vice versa, the applicant stated that:

1) the company each time has documents confirming that its own goods, which are the subject of the transfer from the warehouse in P., were exported from Poland and delivered to Portugal before the deadline for submitting a tax return for a given tax period,

2) the applicant's own goods delivered from the warehouse in Portugal to the warehouse in P. are / will be used for the applicant's further economic activity,

3) the movement of the complainant's own goods between warehouses is documented by way of waybills, CMR, shipping documents and other documents deemed necessary. Goods moved from Portugal to Poland to P. are mainly documented using the CMR (international consignment note) and the so-called packing list, as well as other documents required by the International Transport Law. The complainant also generates internally journal entries in the ERP system documenting all transfers for regulatory accounting reasons,

4) the company assumes that trade in goods, after payment of customs and tax duties at the time of importing raw materials from third countries, is free between the countries of the European Union. Movements between warehouses are documented through transport documents, CMR and others. The company does not issue invoices "to itself", ie in particular it does not document the movements of its own goods with documents that would constitute an invoice within the meaning of Portuguese law.

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

1) Is the position of the complainant correct, according to which she does not have a permanent place of business in Poland within the meaning of Art. 11 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 establishing implementing measures to Directive 2006/112 / EC on the common system of value added tax (hereinafter the regulation), therefore the services purchased by the company from Polish service providers to which Art. 28b of the Act of March 11, 2004 on tax on goods and services (ie Journal of Laws of 2020, item 106 - uptu), are not subject to taxation in Poland?

2) Does the company correctly classify and document the movements of its own goods (previously imported from China, Saudi Arabia, Taiwan) from the warehouse in P. to the company's warehouse in Portugal as non-transactional intra-Community supplies of goods within the meaning of Art. 13 sec. 3 uptu?

3) Does the company correctly qualify, document and recognize the tax liability for the transfer of its own goods from the company's warehouse in Portugal to the warehouse in P., treated as non-transactional intra-Community acquisition of goods within the meaning of Art. 11 sec. 1 uptu?

According to the company, regarding question 1.

Based on Article. 28b uptu, the place of supply of services in the case of providing services to a taxpayer is, in principle, the place where the taxpayer who is the recipient of the service has his registered office. In the event that the services are provided for the taxpayer's fixed place of business, which is different from his place of business, the place of supply of these services is the fixed place of business. Therefore, establishing the existence of a permanent place of business in Poland is of significant importance for the place of taxation of the services purchased by the applicant.

In the opinion of the complainant, the above description of the facts shows that, due to the scope of its activities, there was no permanent place of business of the company in Poland within the meaning of the

In the light of the above-mentioned regulations and judgments, the company stated that the entity has a permanent place of business in a given country, if the following cumulative criteria are met:

- the criterion of the stability and independence of the conducted activity,

- the criterion of the permanent presence of human resources, i.e. the existence of human resources for running a business,

- the criterion of the permanent presence of technical resources, i.e. the existence of technical facilities for the conduct of business (such as buildings, warehouses, devices).

In the context of the criterion of business independence, it was additionally noted that the concept of a fixed place of business should be considered on the basis of the definition of economic activity resulting from Article 15 par. 2 uptu Pursuant to this provision, economic activity includes, in particular, all activities of producers, traders or service providers, including natural resource harvesters and farmers, as well as the activities of freelancers.

The establishment of a permanent place of business of an entity in a given country takes place if, using the infrastructure and personnel in that territory in an organized and continuous manner, the entity 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 VAT.

Meanwhile, the company does not have its own infrastructure in Poland in the form of human and technical resources (i.e. the company does not employ any employees in Poland, nor does it own real estate located there). The company purchases in Poland only the services described above.

The fact of acquiring the above-mentioned services does not, in the applicant's view, prejudge the creation of a permanent place of business in Poland. These services are purchased for the purposes of an activity which is only ancillary to the company's core activities carried out in the territory of its country of establishment, ie in Portugal, which is the production and sale of single-use medical devices. The activities carried out in Poland are fully subordinated to the main business objectives of the company carried out in Portugal and therefore does not have the characteristics of a business with a certain degree of independence, which is a prerequisite for establishing a permanent place of business.

In addition, it was noted that the company did not have control over the personnel and technical resources of the service provider providing the warehouse service to it. The company's employees are not present in the warehouse in P., do not give orders, and do not control the way the service provider performs services.

Similarly, the company does not exercise any control powers over the employees of other Polish service providers.

In sum, the applicant takes the view that no permanent place of business has been established as a result of her activities in Poland.

Consequently, the place of provision of services to which Art. 28b of the supplies purchased by the applicant from Polish service providers is not Polish territory. These services, in accordance with Art. 28b paragraph. 1 uptu, as they are subject to taxation in the applicant's country of residence, ie Portugal.

According to the company, regarding question 2.

The company imports raw materials for the production of medical devices from China, Saudi Arabia and Taiwan, which are transported to P. and from there to the company's warehouse in Portugal. Thus, the company exports its own goods from the Polish warehouse to Portugal, and these movements are not related to any specific delivery or order for contractors. At the same time, those goods are intended to serve the applicant's economic activities.

In the company's opinion, in such a situation, Art. 13 sec. 3 uptu

The Company is of the opinion that the above-described internal movement of goods to another Member State will be taxable as a non-transactional intra-Community supply of goods on general terms.

Moreover, in the company's opinion, non-transactional premises of own goods between Member States do not constitute events which, pursuant to Art. 106b paragraph. 1 uptu should be documented with an invoice.

According to this provision, the taxpayer is obliged to issue an invoice documenting:

- sale as well as delivery of goods and provision of services referred to in art. 106a, point 2, made by him for the benefit of another taxpayer of tax, value added tax or a tax of a similar nature or for the benefit of a non-taxable legal person,

- mail order sale from the territory of the country and mail order sale within the territory of the country to an entity other than indicated in point 1,

- intra-Community supply of goods to an entity other than indicated in point 1,

- receipt by him of all or part of the payment before performing the activities referred to in points 1 and 2, except in the case when the payment concerns an intra-Community supply of goods or activities for which the tax obligation arises in accordance with art. 19a paragraph. 5 point 4.

The described movements of a company's own goods between two Member States are operations performed by a single entity. Therefore, in this case, there is no sale (in accordance with Article 2 (22) of the Act), whenever further provisions refer to sale, it is understood as the paid delivery of goods and the paid services within the territory of the country, export of goods and intra-Community supply of goods) as well as there is no other case specified in Art. 106b (1) of the Act that requires an invoice. Therefore, the said movements of goods should not be documented by issuing VAT invoices.

The transaction consisting in the transfer of own goods from the territory of Poland to the territory of another Member State should be shown both in the VAT-7 declaration and in the summary information. The condition is that the conditions referred to in Art. 42 sec. 1 upt (i.e. the conditions for the application of the VAT rate of 0% for intra-Community supplies). In this case, these conditions should be understood as the company's possession of an identification number for intra-Community transactions issued in Portugal (which is fulfilled) and evidence of the actual export of goods from the territory of the country and delivery of them to the territory of another Member State (the CMR consignment note is the most important here). The condition for applying the 0% rate is not documenting the transaction with an invoice, because - as indicated above - the movement of own goods does not constitute an event requiring an invoice in accordance with Art. 106b paragraph. 1 uptu

In the described situation, the company has the right to apply a 0% VAT rate to the shipments of its own goods, provided that, before the deadline for submitting a tax declaration for a given tax period, the company has evidence that the goods have been exported from the territory of the country and delivered to the buyer (in in particular, the CMR consignment note). This condition is met in the case of the company.

Regarding question 3.

According to the company, if the company's own goods are moved from a warehouse in Portugal to a warehouse in Poland, Art. 11 sec. 1 uptu

The company is also of the opinion that such transfers, constituting intra-Community acquisition of goods, should be indicated both in VAT-7 declarations and in VAT-EU summary information.

The company also believes that such movements should not be documented with invoices. According to the regulations of the country of dispatch (according to the Portuguese regulations), the movements of the taxpayer's own goods, even when they are made between different Member States, do not constitute a sale of goods - because the right to dispose of the goods is not transferred to the owner (since the "supplier" and "recipient" are the same subject). From the point of view of Portuguese law, no invoice is required (although a pro forma invoice may possibly be issued). Such movements are documented by the company with an order document and a shipping document (eg CRM).

In the company's opinion, the tax obligation related to the intra-Community acquisitions of goods should, in accordance with Art. 20 sec. 5 uptu is recognized on the 15th day of the month following the month in which the goods were moved to the warehouse in Poland. In the absence of an obligation to document the movement of goods with invoices, the second circumstance associated with the emergence of a tax obligation (issuance of an invoice by the taxpayer of value added tax) will not occur.

2.2. The challenged interpretation held that, in the light of the applicable legal status, the applicant's position on the legal assessment of the presented facts and the future event as regards:

1) having a permanent place of business in Poland and determining the place of taxation of services purchased from Polish service providers - is incorrect,

2) recognition of the movement of own goods from the warehouse in P. to the warehouse in Portugal as an intra-Community supply of goods within the meaning of art. 13 sec. 3 uptu - is correct,

3) the obligation to issue an invoice documenting the movement of own goods from the warehouse in P. to the warehouse in Portugal - it is incorrect,

4) the obligation to show in the VAT-7 declaration and information summarizing the movement of own goods from the warehouse in P. to the warehouse in Portugal - is correct,

5) recognition of the movement of own goods from the warehouse in Portugal to the warehouse in P., as an intra-Community acquisition of goods within the meaning of art. 11 sec. 1 uptu - is correct,

6) the obligation to show in the VAT-7 declaration and information summarizing the movement of own goods from the warehouse in Portugal to the warehouse in P. - is correct,

7) the obligation to issue an invoice documenting the movement of own goods from the warehouse in Portugal to the warehouse in P. - is correct,

8) the moment when the tax obligation arises for the transfer of own goods from the warehouse in Portugal to the warehouse in P. - is correct.

Justifying its position, the authority stated that in the case of the provision of services, in order to correctly settle the tax, it is necessary to determine the place of performance of a given service, which will indicate whether this service is subject to VAT in Poland.

According to the general rule expressed in Art. 28b paragraph. 1 of the taxpayer, the place of the provision of services in the case of the provision of services to the taxpayer is the place where the taxpayer who is the recipient of the service has its registered office, subject to paragraph 2-4 and art. 28e, art. 28f paragraph. lila, art. 28 g of paragraph 1. 1, art. 28i, art. 28j paragraph. 1 and 2 and article. 28n.

As provided in paragraph 2 Art. 28b uptu, if the services are provided for the taxpayer's permanent place of business, which is located in a place other than the place of business, the place of supply of these services is a fixed place of business.

The subject of doubts is, inter alia, determining whether, for the purposes of determining the place of supply (and thus taxation) of services purchased from Polish service providers, it should be assumed that the applicant has a permanent place of business in Poland.

The authority further pointed out that for the purpose of standardizing the applicable rules concerning the place of taxation of taxable transactions, the definition of "fixed place of business" was included in the Council Implementing Regulation (EU) No. 282/2011.

Pursuant to Art. 11 sec. 1 of the Regulation, for the purposes of applying Art. 44 of Directive 2006/112 / EC, "fixed place of business" shall mean any place - other than the place of business of the taxpayer as referred to in Art. 10 of this Regulation - which is characterized by a sufficient constancy and an appropriate structure in terms of human and technical resources to enable it to receive and use the services provided for its own needs at this permanent place of business.

Due to the above-mentioned the definition of a fixed place of business resulting from the regulation in question, as well as the established jurisprudence of the Court of Justice of the European Union (CJEU) and the jurisprudence of Polish administrative courts in the above scope, one can list several premises, the occurrence of which makes it possible to speak of a "permanent place of business". As the name suggests, "permanent" means permanently connected with a

given place, non-transferable, unchangeable. The above indicates that a permanent place of business must be characterized by a certain degree of commitment, which allows for the recognition that the activity is conducted in this place not on a temporary or periodic basis. Therefore, a certain minimum scale of activity is necessary, which is an external sign, that the activity in this place is carried out constantly. The involvement in question should also take on a specific personal and material dimension, allowing for the provision of services in an independent manner. In other words, in order to recognize that a given place of business is permanent, it is necessary to have technical infrastructure and human staff who can independently perform certain activities. Such a personal-material structure in a permanent place of business should be permanent, i.e. repeatable and permanent. it is necessary to have technical infrastructure and human staff that can independently perform certain activities. Such a personal-material structure in a permanent place of business should be permanent, i.e. repeatable and permanent. it is necessary to have technical infrastructure and human staff that can independently perform certain activities. Such a personal-material structure in a permanent place of business should be permanent, i.e. repeatable and permanent.

In the opinion of the authority, the concept of a permanent place of business cannot be considered in isolation from the definition of economic activity referred to in Art. 15 sec. 2 uptu According to that provision, an economic activity covers all activities of producers, traders or service providers, including natural resource harvesters and farmers, as well as the activities of freelancers. Economic activity includes in particular activities consisting in the use of goods or intangible assets on a continuous basis for commercial purposes.

On the basis of the above-mentioned premises, it can be concluded that if a given entity has its staff and structure (including technical infrastructure) in a given country, characterized by adequate stability, it has a permanent place of business in that country. However, it does not matter - which was emphasized - whether they are employees directly employed by this entity or "own" infrastructure. The case law of the CJEU shows that the use of human and technical resources of another entity may also lead to the creation of a permanent place of business in another country.

Importantly, for the adoption of a permanent place of business in a given country, it is not necessary for the taxpayer to have at his disposal the staff that he employs and the technical facilities that he owns. It is enough for the entity to use both the personnel and technical facilities of other entities so that it enables it to receive and use the services provided for its own needs of this permanent place of business. Only the organizational structure necessary to conduct a given type of activity is necessary, while the human resources necessary to perform it may be obtained from external resources. Also, technical resources do not have to be owned (i.e. owned) by the taxpayer. It is enough to hire them or provide them in any other way.

Analyzing the above-mentioned provisions of the tax law and taking into account the circumstances of the case, it was found that the applicant's activity in the territory of Poland creates a permanent place of business. The applicant meets the conditions for considering the activity described in the facts as a permanent place of business in Poland, which is characterized by sufficient stability and an appropriate structure in terms of human and technical resources.

In the present case, the criterion of having technical and human resources necessary to conduct some economic activity in the territory of the country is met. The presented circumstances show that the applicant has de facto control over the technical and personnel resources, as it is able to properly use them in the trade of goods (sale of goods, import of raw materials and goods, export of goods). The technical infrastructure and personal involvement used by the applicant are closely related to its taxable activities (sales from a warehouse located in Poland are made to Polish entities, entities from the European Union countries and Ukrainian entities). The scope of the services commissioned and used by the applicant allows to recognize

In the opinion of the authority, it is not necessary to have one's own personnel and technical base in order to adopt a permanent place of business in a given country, as long as the availability of other base is comparable to the availability of one's own base. Although the complainant does not formally have its own technical and personnel resources in Poland, it is important to use people and equipment economically. This situation is similar to the economic realities in the scope of domestic entities using the services of outsourcing companies, which also provide appropriate personnel and provide various services, without the need for the client to employ their own employees. For the purposes of commercial activities (sale of goods from a warehouse located in Poland) that the applicant conducts, the resources at its disposal allow it to receive,

In the light of the above considerations, it was therefore concluded that, in the present case, the criteria of having a minimum size of activity characterized by a certain degree of stability, in which there will be the human and technical resources necessary for the conduct of the taxpayer's business, will be met. Thus, the use of the technical infrastructure and personnel possessed in Poland to carry out some of the company's business activities, in an organized and continuous manner, qualifies the applicant's activity in the territory of the country as a permanent place of business in Poland.

Thus, the applicant's position as regards having a permanent place of business and determining the place of taxation of services purchased from Polish service providers, the authority found incorrect.

It was further pointed out that a special case of intra-Community supply of goods is the transfer of the taxpayer's own goods from a country to another Member State. Art. 13 sec. 3 of the Act extends the concept of intra-Community supply of goods to activities that are not bilateral activities, consisting in moving the company's goods from Poland to another Member State, where they are to be used for the taxpayer's business activity. In the case of this intra-Community supply of goods, the Polish supplier is also the buyer in the territory of another Member State.

In the present case, the applicant imports raw materials for the production of medical devices from China, Saudi Arabia and Taiwan from China, Saudi Arabia and Taiwan using the warehouse in P., which are then shipped to P. The raw materials are then sent to the applicant's warehouse in Portugal. The own goods (raw materials) previously imported from China, Saudi Arabia and Taiwan are sent for production to Portugal (the raw materials are to be converted into final products on the applicant's production lines).

It was therefore concluded that, in the case at hand, the movement of the applicant's own goods (raw materials) from the warehouse in P to the warehouse in Portugal constituted an intra-Community supply of goods within the meaning of Art. 13 sec. 3 uptu

Thus, the applicant's position as regards the movement of its own goods from the warehouse in P to the warehouse in Portugal as an intra-Community supply of goods within the meaning of Article 13 sec. 3 uptu, considered correct.

As regards the applicant's doubts as to the obligation to issue an invoice documenting the movements of its own goods from the warehouse in P to the warehouse in Portugal, reference was made to the wording of Art. 106b paragraph. 1 uptu, as well as art. 2 pt. 22 of the act It is further stated that, in the present case, the applicant moves its own goods (raw materials) from the warehouse in P. to the warehouse in Portugal. The said movements constitute an intra-Community supply of goods within the meaning of Art. 13 sec. 3 uptu However, in this case the applicant plays a double role, since it is also the buyer of goods moved to the territory of another Member State in which it is a registered value added tax payer.

Therefore, the applicant must document the movement of its own goods (raw materials) from the warehouse in P to the warehouse in Portugal by issuing an invoice pursuant to Article 106b (2) 1 point 1 of the UPT Act, because according to this provision, the taxpayer is obliged to issue an invoice documenting the sale, and pursuant to Art. 2 point 22 of the Act, the sale shall mean, inter alia, the intra-Community supply of goods. Thus, the complainant making an intra-Community supply of goods referred to in Art. 13 sec. 3 uptu, should document the activity in question by issuing an invoice.

Accordingly, the applicant's position regarding the obligation to issue an invoice documenting the movements of its own goods from the warehouse in P to the warehouse in Portugal was held to be incorrect.

The authority then stated that the applicant's position as regards the obligation to indicate in the VAT-7 return and the summary information relating to the movements of its own goods from the warehouse in P. to the warehouse in Portugal had to be considered correct.

In addition, the movements of the applicant's own goods from the warehouse in Portugal to the warehouse in P. constitute an intra-Community acquisition of goods referred to in Art. 11 sec. 1 uptu

Accordingly, the applicant's position regarding the movement of its own goods from a warehouse in Portugal to a warehouse in P. as an intra-Community acquisition of goods within the meaning of Article 11 sec. 1 uptu was found to be correct.

In the case at hand, the applicant is also required to demonstrate the movement of its own goods from the warehouse in Portugal to the warehouse in P. constituting an intra-Community acquisition of goods within the meaning of Art. 11 sec. 1 of the tax return in the tax declaration pursuant to art. 99 sec. 1 upt and summary information pursuant to art. 100 sec. 1 point 2 uptu

Accordingly, the applicant's position as regards the obligation to indicate in the VAT-7 return and information summarizing the movements of its own goods from the warehouse in Portugal to the warehouse in P. was considered correct.

As regards the applicant's doubts as to the obligation to issue an invoice documenting the movement of its own goods from the warehouse in Portugal to the warehouse in P., it is stated that, under Art. 106b paragraph. 1 point 1 of the taxpayer making an intra-Community acquisition of goods in accordance with art. 11 sec. 1 of the UPT, is not obliged to document this activity with an invoice within the meaning of the Act.

Thus, in the present case, the applicant, by moving its own goods from the warehouse in Portugal to the warehouse in P., which is an intra-Community acquisition of goods, pursuant to Art. 11 sec. 1 of the UPT, there is no obligation to issue an invoice pursuant to Art. 106b paragraph. 1 uptu The applicant is required to document the said movement of its own goods in accordance with the legal provisions in force in Portugal.

At the same time, the authority pointed out that this interpretation does not determine whether the applicant is required to document the movement of its own goods from the warehouse in Portugal to the warehouse in P. by invoice within the meaning of the law in force in Portugal.

Accordingly, the applicant's position as regards the obligation to issue an invoice documenting the movement of its own goods from the warehouse in Portugal to the warehouse in P. was held to be correct.

Moreover, the applicant's position as to the tax point in time for the transfer of its own goods from the warehouse in Portugal to the warehouse in P. was also held to be correct.

3.1. The above interpretation was appealed against to the Provincial Administrative Court in Gliwice.

She was accused of:

1) violation of the provisions of substantive law through incorrect interpretation, that is:

- Art. 28b paragraph. 1 and 2 uptu in connection with with art. 11 of the regulation, through their incorrect interpretation, resulting in the recognition that the company has a permanent place of business in Poland, and therefore the place of taxation of services provided to it will be Poland;

- Art. 1 clause 2 of the Council Directive 2006/112 / EC of 28 November 2005 on the common system of value added tax (i.e. the EU Journal of Laws of 2006, No. L 347 p. 1 and following, as amended; hereinafter: VAT Directive) and the principle of neutrality expressed therein by leading to a situation of double VAT taxation in Poland and Portugal;

- Art. 106b paragraph. 1 upt in relation to with art. 13 sec. 3 uptu by recognizing that the movement of own goods from the warehouse in P. to the warehouse in Portugal is subject to the obligation to document the invoice.

2) Breach of the rules of procedure, that is:

- Art. 2a of the Act of August 29, 1997, Tax Ordinance (ie Journal of Laws of 2019, item 900, as amended) by not resolving doubts as to the content of tax law provisions regarding the possession of a permanent place of business by the taxpayer;

- Art. 14c § 1 and 2 of the Act by drawing up insufficient legal justification of the individual interpretation and assessment of the position of the party that does not allow the complainant to identify the reasons for which the tax authority considered that the company has a permanent place of business in Poland, and therefore the place of taxation of services provided in her thing will be Poland;

- Art. 121 § 1 and article. 120 in connection with with art. 14h of the op through the use of arguments that are not supported by the content of the law, and thus failure to respect the principle of trust in tax authorities, which are obliged to act on the basis and within the limits of the law.

Considering the above, it was requested to revoke the challenged interpretation and recognize the correct position presented by the applicant in the application for an individual interpretation as regards the applicant's lack of a permanent place of business in Poland and determination of the place of taxation of services purchased from Polish service providers and the lack of obligation issuing an invoice documenting the shipment of own goods from the warehouse in P. to the warehouse in Portugal and ordering the opponent to reimburse the costs of the proceedings, including the costs of legal representation, according to the prescribed standards.

The justification stated that the complainant did not agree with the position presented by the authority. In the judgment of 28 June 2007, Planzer Luxemburg Sari v. Bundeszentralamt fur Steuren (reference number C-73/06), the CJEU drew attention to the necessity of the constant presence of material resources and personnel kept in the minimum sizes necessary to provide services.

Similarly, in the judgment of 17 July 1997 in the case ARO Lease BV v Inspecteur van de Belastingdienst Grota Ondernemingen te Amsterdam (reference number C-190/95), the CJEU, when defining the place of permanent establishment, referred to the criteria of having permanent staff and facilities technical. In this judgment, the CJEU stated that if a company does not have its own staff in a Member State or a stable organizational structure sufficient to enable contracting or management decisions, it cannot be assumed that the company has a permanent place of business in that country. .

Importantly, in these judgments it was emphasized that for the existence of a permanent place of business it is necessary to have both technical and personnel facilities and independence - and these conditions should be met cumulatively.

Moreover, the complainant pointed out that even if it were assumed that the possessed personnel and technical resources did not have to be own, although this is contradicted by the systemic and purposeful interpretation of Art. 11 of the Regulation and Art. 28b paragraph. 2 of the Tax Act and the judgments already cited above, it should be assumed that the technical infrastructure and personnel owned by the taxpayer must be closely related to the performance of activities subject to VAT, and in addition, the taxpayer must, however, be entitled - on the basis of the requirement of sufficient permanence of the place of business - to a comparable control over personnel and technical facilities. Accepting the thesis that a permanent place of business is also determined by a non-own base would lead to an absurd conclusion, as Art. 28b upt

As the justification of its position, the authority points out that the complainant has real power over the technical and personnel resources, as it is able to properly use them when trading goods (sale of goods, import of raw materials and goods, export of goods).

Referring to the above, the complainant pointed out that in the description of the facts, she emphasized that the personnel and technical infrastructure located in Poland, nor was it owned by the taxpayer - the Company does not own it, does not employ employees, does not exercise control over them, does not rent real estate / movable property, etc., and even less does it constitute a back-up facility which enables the company to receive and use the services provided for the needs of its permanent place of business in Poland.

In the report of the 11th meeting of the VAT Expert Group of September 11, 2015 (the sub-group discussing the subject of case C-605/12 **Welmory**), it was indicated - following the opinion of the Advocate General JK in this case - that the condition of having adequate personnel resources in one of the Member States may also be met in the case of using employees who are not employed by this company. Nevertheless, the company should have "comparable control" over them in order to be able to say that the condition of having adequate human resources in a given Member State is met. Such comparable control implies a level of control similar to that which a company has over its own employees. The complainant emphasized that the service provider's employees, acting in the name and on behalf of that service provider, perform activities for the company in the scope of provided services. The company has no control over the personnel and technical resources of the service provider.

In addition, the company does not have a designated, separate area only for its own disposal and for storing only its goods. The company cannot influence the place and conditions of the storage, nor does it have any power over the way of providing the storage services, or the exclusivity. It is incomprehensible to indicate by the authority that the appropriate use of the services offered by service providers shows that the company has actual control over the service provider's technical and personnel resources. It is known that every recipient of the service, when purchasing any type of service, strives to use them in the best possible way in his business activity, which, however, cannot be sufficient to determine that a permanent place of business will be created.

The complainant emphasized that the activities performed in Poland were fully subordinated to the main business objectives of the company implemented in Portugal and therefore did not have the characteristics of an activity with a certain degree of independence, which was a necessary condition for establishing a permanent place of business. The company does not plan to conduct business activity in Poland through a permanent place of business in Poland, neither periodically nor continuously. The company's main activity, consisting in the production of single-use medical devices, will be carried out in Portugal. In particular, the complainant will not have any personnel or technical background in Poland,

Moreover, the applicant pointed out that, under the tax law, company and C were unrelated entities to each other. Additionally, what is important, the service provider concludes similar agreements with other contractors, thus the company is not the only entity for which C provides services. It was found that the position of the authority in this case leads to a curious conclusion that all entities based outside Poland, which would conclude an agreement with C, would have a permanent place of business in Poland, i.e. Art. 28b uptu would never apply to them.

At this point, the applicant pointed out that the authority did not take into account the fact that the services provided to the company are services of less importance than the very object of the company's economic activity.

In terms of the obligation to document the non-transactional movement of own goods within the meaning of Art. 13 sec. 3 of uptu, the company maintained its position expressed in the application for an individual interpretation, according to which these events should not be in accordance with Art. 106b paragraph. 1 uptu documented by an invoice.

According to Art. 2 point 22 of the UPT, sale shall mean the supply of goods for consideration and the provision of services against payment within the territory of the country, the export of goods and the intra-Community supply of goods. The described movements of a company's own goods between two Member States are operations performed by a single entity. Thus, there is no sale in this case. As well, there are no other cases specified in Art. 106b paragraph. 1 upt, which requires an invoice.

Referring to the infringement of the provisions of the procedure, it was pointed out that the authority failed to adduce convincing arguments and did not prove that the criteria of a permanent place of business were met by the company.

The authority acted similarly in the case of an attempt to justify its position regarding the obligation to document the non-transactional movement of own goods, within the meaning of Art. 13 sec. 3 of uptu The authority referred only to the provisions of the law, without interpreting them and without presenting any arguments for the adopted position.

Taking this into account, according to the complainant, the authority failed to meet the requirements resulting from Art. 14c § 1 and 2 of the Opportunity to properly present the legal justification and assessment of the position of the tax authority in the event of a negative assessment of the company's position.

3.2. In response to the complaint, the authority applied for its dismissal, maintaining its current position in the case.

The Provincial Administrative Court in Gliwice considered the following.

4. It is first necessary to consider the extent to which the interpretation in question was challenged before the Court, and thus its scope, which may be reviewed by the Court from the point of view of lawfulness. It should be noted that the assessment of the applicant's position by the authority varies. In six points, the authority stated that the company's position was correct. Only two of them were incorrect.

The jurisprudence presents the view that the adjudicating court shares that the voivodship administrative court may not reverse the interpretation in the part in which the complainant's position was found correct, as this would exceed the limits of the appeal that the party outlined when submitting the complaint (judgments of the Supreme Administrative Court of: May 17, 2012, II FSK 2114/10; January 8, 2014, I FSK 176/13; February 25, 2014, I FSK 575/13. Thus, already this observation leads to the conclusion that Considering the considerations in this justification, there can be only two issues included in the interpretation in question, i.e. the ones regarding which the authority found that the company's position was incorrect.

This concept is also supported by Art. Pursuant to this provision, a complaint against a written interpretation of tax law provisions issued in an individual case may be based solely on the allegation of infringement of procedural provisions, committing an error of interpretation or incorrect assessment of the application of a provision of substantive law. The administrative court is bound by the allegations of the complaint and the legal basis cited.

This regulation corresponds to Art. 134 § 1 of the PPSA, providing that the court decides within the limits of a given case, however, not being bound by the charges and conclusions of the complaint and the legal basis provided, subject to Art. 57a.

The doctrine emphasizes that in the light of the cited provisions, the court examines the correctness of the contested individual interpretation only from the point of view of the allegations in the complaint and the legal basis indicated therein. In particular, the court may not take any steps to identify other violations of law, apart from those indicated in the complaint. However, if such defects are found in the course of an inspection carried out within the limits set by the complaint, they cannot be taken into account when formulating a decision in the case (cf. A. Kabat, Commentary to Art. 57 (a) of the Act - Law on Proceedings Before Administrative Courts, in: B. Dauter, A. Kabat, M. Niezgódka-Medek, Law on proceedings before administrative courts. Commentary, Edition VI Wolters Kluwer, electronic edition; see also S. Babiarz (ed.), K. Aromiński, Proceedings of the administrative court in practice, publ. Lex 2015).

The above remarks should have been made because the complaint nominally stated that the interpretation in question was challenged "in its entirety". However, given that:

- firstly, only in two points the authority found the company's position to be incorrect

- secondly, only with regard to these two points, arguments challenging the position of the interpreting body were presented in the complaint (taking into account its allegations and justification),

The court accepted that the limits of the appeal in this case are indeed narrower than it would appear in nominal terms only from the declaration included in the introductory part of the complaint.

Thus, the Court made the subject of review the challenged interpretation only to the extent to which the authority found the company's position to be incorrect and to which the company included in the complaint allegations of infringement of substantive or procedural law.

5. Bearing in mind the last remarks, it should be stated that the scope of the appeal and the dispute in the case are reduced to two issues.

First, will the applicant company, established in Portugal, have a permanent establishment in Poland in the field of trade in medical devices.

Second: is he required to issue an invoice documenting the movements of his own goods from the warehouse in P to the warehouse in Portugal.

6. The part of the action in which it considers the applicant's position to be incorrect with regard to the obligation to issue an invoice documenting the movements of its own goods from the warehouse in P to the warehouse in Portugal must be upheld. The challenged interpretation had to be repealed in this part, because when answering the question asked in the application regarding this issue, the authority did not refer to the entire position of the company and did not comprehensively analyze the relevant regulation of substantive law (Article 106b (1) of the Act), violating the same art. 121 § 1 in connection with with art. 14h op and art. 14c § 2 op

In that regard, it should be noted that, in support of the interpretation, with regard to the applicant's doubts as to the obligation to issue an invoice documenting the movements of its own goods from the warehouse in P. to the warehouse in Portugal, the authority stated that the applicant's movement of its own goods (raw materials) from the warehouse in P. to the warehouse in Portugal is obliged to document by issuing an invoice in accordance with Art. 106b paragraph. 1 pt. 1 uptu In the opinion of the authority, in the analyzed situation, Art. 106b paragraph. 1 point 1 obliges the taxpayer to issue an invoice documenting the sale, and by sale pursuant to art. 22 point 22 of the Act is understood, inter alia, the intra-Community supply of goods. Consequently, the company, when making an intra-Community supply of goods, should document this activity by issuing an invoice.

The court notes that pursuant to this provision, the taxpayer is required to issue an invoice documenting the sale, as well as the delivery of goods and the provision of services referred to in Art. 106a, point 2, made by him for the benefit of another taxpayer of tax, value added tax or a tax of a similar nature or for the benefit of a non-taxable legal person.

On the other hand, pursuant to Art. 2 point 22 of the Act, this Act means, inter alia, the intra-Community supply of goods by sale.

Besides, as provided for in Art. 13 sec. 3 of the taxpayer, an intra-Community supply of goods is also considered to be a transfer by the taxpayer referred to in art. 15, or for him goods belonging to his enterprise from the territory of the country in the territory of a Member State other than the territory of the country, which

have been by the taxpayer within the territory of the country within the framework of his enterprise, produced, extracted, acquired, including as part of intra-Community acquisition goods, or brought into the territory of the country under the import of goods, if they are to serve the taxpayer's business activity.

It should be emphasized that the applicant, in the application for a tax ruling, clearly indicated that the described movements of the company's own goods between two Member States are activities carried out within a single entity. The company does not issue invoices "to itself", ie in particular it does not document the movements of its own goods with documents that would constitute an invoice.

In view of the above, in the context of the wording of Art. 106b paragraph. 1 point 1 of the UPTU, the Court states that the authority did not refer to the issue of this activity, i.e. the sale understood as an intra-Community supply of goods, but performed within one entity. Meanwhile, this issue seems to be confronted with the burden of Art. 106b paragraph. 1 point 1 of the essentials. It should be recalled that, according to the content of this provision, the taxpayer is obliged to issue an invoice documenting the sale, as well as the delivery of goods and the provision of services referred to in art. 106a, point 2, made by him for the benefit of another taxpayer (...).

When interpreting Art. 106b uptu, the authority only indicated that this provision applies to sales, which should also be understood as intra-Community supplies of goods. However, it has not analyzed whether it also applies in a situation where the movements of own goods between two Member States are operations performed within a single entity. It is therefore an analysis of the final part of point 1 of Art. 106b uptu, it is a refund "made by him to another taxpayer".

Thus, the allegations of violation of Art. 121 § 1 in connection with with art. 14h op and art. 14c § 2 op - in the context currently analyzed. In this respect, it was rightly alleged that the authority applied the arguments that were not supported by the provisions of the law, there was a failure to respect the principle of trusting the tax authorities. It was rightly argued in the complaint that the authority, in the event of justifying its position on this issue, referred only to the provisions of law, without making an exhaustive interpretation of them and without presenting arguments for the adopted position. As a result, he did not meet the requirements resulting also from Art. 14c § 2 of the Act requiring the proper presentation of the legal justification and assessment of the authority's position in the event of a negative assessment of the applicant's position.

According to the Court, that failure could have had a significant impact on the outcome of the case, by the authority's assumption, without sufficient consideration of all the facts, that the applicant should have documented the act of moving her own goods from the warehouse in P. to the warehouse in Portugal by issuing an invoice.

It should be clarified that it is not the role of the Court to replace administrative bodies in the act of applying the law, but to control this act. The administrative court may not prepare an interpretation of tax law, including supplementing the deficiencies in the justification of such an interpretation. In this respect, the right is vested solely in the tax interpretation body, and the court judgment does not replace an individual interpretation of tax law. The role of the court is only to review the legality of the interpretation issued by the authority, and in the event of its lack of correctness, repeal such an interpretation and make recommendations to the interpretation authority.

The non-exhaustive justification of the challenged interpretation necessitates its repeal, and thus the complaint must be granted, in this case in part. No legal justification within the meaning of Art. 14c § 2 of the Op. Act may consist not only in the complete lack of legal argumentation, but also in referring only to

certain issues relevant for issuing an interpretation. The legal justification referred to in Art. 14c § 2 of the Act, must provide reliable information for the applicant why in his case the above-mentioned the provisions apply, and why the view he expressed does not deserve consideration.

Reconsidering the case, the authority will interpret the relevant provisions of the tax law (in particular Article 106b (1) (1) of the Act), taking into account all relevant facts of the facts.

In view of the above, it turns out to be premature to refer to the complaint alleging infringement of Art. 106b paragraph. 1 uptu The court's obligation to refer to the issue of infringement of this regulation will be updated only after the authority presents its position in this part of the case, which will be comprehensive and in accordance with the requirements of Art. 14c § 2 op

For these reasons, the Court, pursuant to Art. 146 § 1 in connection with with art. 145 § 1 point 1 lit. c) ppsa repealed the challenged interpretation in the part in which the authority found the company's position incorrect with regard to the obligation to issue an invoice.

For the sake of order, it can also be indicated that in the further course of the case, only in this respect the interpretation should be considered by the authority. As for the remaining seven issues - understood as separate positions of the authority expressed in the interpretation - it was not raised by the Court. As regards six issues, which the authority found to be correct, the interpretation was not appealed to the Court in general. As regards one issue, the complaint was lodged, but - as discussed immediately below - the Court dismissed it.

7. The dismissal of the action therefore concerns the issue of the company's permanent establishment in Poland and the determination of the place of taxation of services purchased from Polish service providers.

In this respect, the Court notes that the concept of a fixed place of business is an EU concept, as it is used by Council Directive 2006/112 / EC of 28 November 2006 on the common system of value added tax (Journal of Laws of the EU. L. 06. 347.1).

At the same time, it should be pointed out that the provisions of the UPU do not define the term "fixed place of business". Therefore, the authority rightly referred in this respect to the provisions of European Union law and the jurisprudence of the CJEU.

According to Art. 11 sec. 1 of Regulation 282/11 for the purposes of applying Art. 44 of Directive 2006/112 / EC (concerning the place of supply of services), "fixed place of business" means any place - other than the place of business of the taxpayer (...), which is characterized by sufficient stability and an appropriate structure in terms of human resources and technical to enable him to receive and use the services provided for his own needs at that fixed place of business.

Notwithstanding the foregoing, pursuant to Art. 53 of Regulation 282/11, for the purposes of applying Art. 192a of Directive 2006/112 / EC, the taxpayer's permanent place of business is taken into account only if it is characterized by sufficient stability and an appropriate structure in terms of human and technical resources to enable it to supply goods or provide services.

The definitions in Regulation 282/11 largely take into account the existing case law of the Court of Justice. These judgments, in particular, provide guidance on how to understand the criterion of human and technical resources, or the criterion of stability.

The review of such judgments was carried out by the Supreme Administrative Court in the justification of the judgment issued in the case no. Act I FSK 2004/13 (all decisions of administrative courts are available on the website http://orzeczenia.nsa.gov.pl), indicating that one of the first decisions concerning the concept of a permanent place of business was the judgment of July 4, 1985, Gunter Berkholz 168/84 (ECR 1995, p. 02251), in which the European Court of Justice found that a permanent place of business is a place characterized by a certain minimum of stability resulting from permanent the presence of both people and technical facilities. The ruling noted that the presence of people "servicing" the place of business was necessary. If there is no permanent staff,

In another judgment of Faaborg-Gelting Linien A / S vs Finanzamt Flensburg C-231/94 (ECR 1996, p. I-02395), the Tribunal also found that in order to adopt a permanent place of business it is necessary to be in this a place of permanent staff and technical equipment necessary to provide the services in question, and a certain minimum scale of activity is required. In a further ruling, the Tribunal stated that when the taxpayer does not have its own employees or organizational structure in a given territory that would allow it to conduct business there, there is no fixed place of business ARO Lease BV vs Inspecteur van de Belastingdienst Grote Ondernemingen te Amsterdam C- 190/95 (ECR 1997, pp. I-04383).

In the case Planzer Luxembourg C-73/06 (ECR 2007, p. I-05655), referring to the previous jurisprudence of the Court, it stated that "the existence of a permanent enterprise requires minimal sustainability through the accumulation of permanent human and technical resources necessary for the provision of certain services (see Case 168/84 Berkholz [1985] ECR 2251, paragraph 18; DFDS, paragraph 20, and judgment of 17 July 1997 in C (190/95 ARO Lease [ARO Lease] ECR I-4383, paragraph 15) That minimum durability therefore implies a sufficient degree of durability and a structure which, from the standpoint of human and technical resources, is capable of enabling the services in question to be provided independently (see ARO Lease, paragraph 16) '(paragraph 54 of the judgment).

The Court further explained that, in relation to a transport activity, a fixed place of business means "at least an office space in which contracts may be drawn up and from which decisions relating to day-to-day management may be made, and a place where vehicles used for that activity may be parked (see, similarly, judgment in ARO Lease, paragraphs 19 and 27, and judgment in Case C-390/96 Lease Plan [1998] ECR I-2553, paragraph 26). the Member State concerned is not necessarily a sign of having a permanent establishment in that Member State (see, to that effect, Lease Plan, paragraphs 21 and 27) '(paragraph 55 of the judgment).

Thus, the Court's judgments show that a fixed place of business (other than the place of the taxpayer's place of business) is a place where minimum human and technical resources are constantly present in that place, which enable the provision of a given service in an independent manner, as well as there is a minimum scale of activity.

Thus, the first condition that should be considered in order to establish that an entity has a fixed place of business is sufficient permanence (of this structure). Only a structure which is sufficiently permanent can be considered a permanent place of business.

The Court is characterized by "sufficient constancy" in the first place by reference to a sufficient degree of that constancy (ARO Lease, C-190/95).

In Planzer Luxembourg, C-73/06, it was stated that "this minimum durability therefore implies a sufficient degree of durability and a structure which, from a human and technical point of view, is capable of enabling the services in question to be provided independently".

Therefore, sufficient durability should be assessed on a case-by-case basis. A different degree of durability will be sufficient, for example, when purchasing services for the purpose of running an office (whether operating within a branch or as part of a representative office), while another will be required, for example, when providing gas trading services.

The Tribunal has not clarified so far whether the decisive criterion (for the assumption of permanence) should be the time or the intention of the entity assessed in terms of the fixed place of business. In other words, will the facility (structure) functioning for a certain period of time be sufficiently constant, or will the structure which was established not for transient needs, but "permanently" characterized, be sufficiently permanent.

Advocate General PM in his opinion on the case of RAL (Channel Islands) et al. C-452/03 (Zb. Orz. Z 2005, p. I-03947) stated, inter alia, that the organizational structure should be sustainable enough to provide a framework within which contracts and management decisions can be made. He also pointed out that the constant presence of staff in the premises of the enterprise gives a given structure the features of durability.

The second premise that should be taken into account when qualifying a permanent place of business is an appropriate structure in terms of personnel and technical resources.

The minimum scale of activity, both in terms of personnel and technical facilities, was indicated as the basic criterion required for the existence of a permanent establishment in the judgment of 2 May 1996 in the case of Faaborg-Gelting Linien A / S v. Finanzamt Flemburg C-231 / 94 (1996 Collection of Judgments, pp. I-02395). The judgment stated that the mere provision of restaurant services on board ships would not meet the conditions of having permanent personnel and technical resources, which should be characteristic of a permanent place of business.

In order to recognize a given place as a permanent place of business, two conditions must be met - the presence of staff and technical facilities. A permanent place of business is a structure equipped with both technical means and the human factor. Without the human factor, a structure is not a permanent place of business.

In its judgment in ARO Lease C-190/95, the Court found that there was no fixed place of business for a vehicle leasing company. In the opinion of the Tribunal, it is not possible to speak of a permanent place of business, when the taxpayer does not have its own employees in a given country, or an appropriate organizational structure (in the form of technical facilities) that would allow to conduct business in this place. The Tribunal identified a permanent organizational structure with such a technical and personal structure that sufficiently allows for the drawing up of contracts or for making management decisions, thus enabling the independent provision of services. In this case, the Court found that Due to the fact that the lack of separate offices in the country where services are provided and services are provided with the help of intermediaries running their own business, the entity will in fact not have its own employees or organizational structure in a given country that would allow it to conduct business there. In the above-mentioned ruling, the CJEU therefore supported the view that people who act independently, i.e. are not employees of a given entity, and in particular conduct economic activity and act only as intermediaries, are not considered permanent staff.

This view has evolved in successive judgments of the Court. The issue of acting through third parties was, inter alia, subject to considerations of the Advocate General in the judgment of 12 May 2005 in the case RAL C-452/03. As it results from the opinion of the Advocate General of the PM on the case, the necessary personnel base may also be ensured by using external resources, i.e. through the so-called outsourcing.

On the other hand, in the judgment in the case Commissioners of Customs and Excise v DFDS A / S C-260/95 (ECR 1997, p. I-01005), the Court stated that the Danish company, as such, did not have in the United Kingdom neither employees nor their own premises. However, the Danish company obtained through contracts with an English subsidiary, acting as its agent, the human and technical resources necessary to provide its tourism services in the territory of the United Kingdom. The Court has held in that context that "a company located in the United Kingdom functions merely as a branch of its parent undertaking".

On the basis of this judgment, it can be taken the position that any resources used by a potential permanent establishment, including technical resources, do not have to be owned by the taxpayer. The taxpayer can then "create" the required infrastructure based on renting, leasing and other similar forms. Moreover, as pointed out by the Ombudsman, "the necessary organizational structure will inevitably vary according to the sector concerned".

In the light of the above judgments, the literature on the subject presents the thesis that "the criterion of having appropriate human resources for the purpose of the existence of a permanent place of business will also be met if the taxpayer does not employ any employees in a given country. The essential seems to be the existence of an appropriate organizational structure, which is necessary and sufficient for the provision of services, while the method of obtaining the human resources necessary to provide these services is a secondary issue "(see Skorupa P. Wróblewska K." Fixed place of business and VAT - comments under the provisions of Council Regulation (EU) No. 282/2011 and the jurisprudence of the CJEU "(Tax Review No. 7 of 2003, p. 23 ff.).

It should also be noted that in the written comments on the RAL case, the Commission stressed that the necessary "organizational structure" would inevitably differ according to the sector concerned. Therefore, the technical and organizational facilities necessary for the collection and use of office services will be different, and different - for the collection and use of ship repair services or gas trading.

The above structure is also to have appropriate technical facilities. Whether the forces and resources available in a given place are appropriate should be assessed each time in the context of specific services.

In the context of the services provided, a structure has been considered appropriate, in which there is at least an office room in which contracts can be drawn up and from which decisions regarding day-to-day management can be made, and measures that help to actually perform the activities in question (see Planzer Luxembourg, C-73/06).

It follows that in order to determine whether an entity has a permanent place of business in a given state, it is not necessary that the technical means (constituting the appropriate technical facilities) be the property of this entity. It is important, however, that he has actual control over them, so that he can use them appropriately when purchasing and using (consuming) services, or when providing them.

When analyzing the first premise, i.e. sufficient durability, it should be remembered that this premise should be assessed each time depending on a specific case.

In the present case, the request for interpretations stated that in 2017-2019 the company commissioned the service to a related entity, B Sp. z o. o. The basis for the provision of these services were three consecutive contracts (individual contracts were concluded for a definite period, the last of which was valid until the end of March). The application also indicated that at present B Sp. z o. o. does not provide the applicant with services (no further agreement has been concluded), because the applicant's needs in this respect have been met. Importantly, however, it is an indication that the company plans to commission the Polish company to perform similar or different services in the future.

As for the contract with company C, which performs warehouse services for the applicant, the contract with this entity was also concluded for a definite period, i.e. for 24 months and is valid from June 1, 2018 to May 31, 2020. The company is planning the contract extend in its existing form.

In view of the above, according to the Court, the structure created by the applicant in Poland is characterized by an appropriate level of stability. This activity is conducted in a continuous (repetitive) manner. This is evidenced by the fact that with company B, the applicant concluded three consecutive contracts, moreover, the applicant plans to conclude such an agreement in the future with this company and extend the contract lasting until [...] with C.

The second condition that should be taken into account when qualifying a permanent place of business is an appropriate structure in terms of personnel and technical resources. However, it is not necessary for the taxpayer to have at his disposal the staff and technical facilities that he owns. As is clear from the case law of the CJEU, all resources used by a potential permanent place of business, including technical resources, do not have to be owned by the taxpayer. The taxpayer can then "create" the required infrastructure based on renting, leasing and other similar forms. Thus, the use of warehousing goods (raw materials) proves that the applicant has the technical facilities necessary for a permanent place of business.

Moreover, the taxpayer must have comparable control over the personnel and technical resources. Therefore, in particular, service contracts or lease agreements regarding personnel and technical facilities are necessary, which are at the taxpayer's disposal as their own and which are not subject to termination in a short time (see: CJEU judgment of 16 October 2014 in case C-605/12, **Welmory**).

In the present case, such service contracts were concluded (possibly they may be concluded) with company B, under which the applicant acquires advisory, marketing, translation and ongoing sales support services, and with company C, the subject of which is transport, shipping, related to insurance, warehousing, accounting services, services in the field of taking actions before the customs authorities.

Moreover, according to the last-mentioned judgment of the CJEU, in order for the place of business to be permanent within the meaning of Art. 44, second sentence of the VAT Directive, it must be able to use the services for its own purposes.

In the present case, the criterion of having technical and human resources necessary to conduct some economic activity in the territory of the country is met. The circumstances presented in the application show that the applicant has de facto control over the technical and personnel resources, as it is able to properly use them in the trade of goods (sale of goods, import of raw materials and goods, export of goods).

Moreover, as the applicant states in its application, its sales of products stored in a warehouse in Poland are organized in a similar way to the process of selling goods to customers in Portugal. Whenever products are available in the Polish warehouse, the company informs about the need to store the products and send the specified quantity of goods to the customer at the right time. The Portuguese applicant manages the entire sales process. the company coordinates this process with all interested parties. In turn, it is the responsibility of the company that stores the products to ship them in accordance with the instructions provided by the applicant. This is how the sales process takes place, both to a Polish related entity and to customers from outside Poland.

The technical infrastructure and personal involvement used by the applicant are closely related to its taxable activities (sales from a warehouse located in Poland are made to Polish entities, entities from the European Union countries and Ukrainian entities).

A permanent place of business must be characterized by a certain degree of commitment, which allows for the recognition that the activity is conducted in this place not on a temporary or temporary basis.

In the presented case, in the facts of the case, the applicant's activities are clearly dominated by involvement in activities in Poland. A number of activities carried out in Poland indicate that in Poland the applicant's strategy and direction of activities was defined and implemented, and therefore a permanent place of business should be assigned to it. It does not matter that the services provided to the Company are services of less importance in relation to the subject of the Company's business activity.

With the use of the warehouse in P., such activities as the import of raw materials for the production of medical devices from China, Saudi Arabia, Taiwan, which are transported to P., and from there to the company's warehouse in Portugal, are carried out; import of finished products from China (medical clothing) and their sale in Poland; goods are also sent from the warehouse in P. to Ukraine in the form of export or outward processing; the company's own goods (previously manufactured by the company) are delivered from a warehouse in Portugal to the warehouse in P.

In turn, B Sp. z o. o. provided the applicant with consulting, marketing, research, translation and ongoing sales support services, in particular in the scope of: translation of documents necessary to apply for public procurement; translation of the content of other documents relating to public procurement procedures; collecting and processing market information in Poland; market analysis; searching for announced tenders, I verify and analyze them; market research, including preparation and organization of meetings with potential clients and other market participants; processing orders, maintaining customer relations; product development; providing distribution facilities in Poland, both technical and personal; other services not specified in the contract, but ordered by A SA

The scope of the services ordered and used by the applicant allows the conclusion that it has established a permanent place of business in Poland.

In the light of the above considerations, it must therefore be concluded that, in the present case, the criteria of having a minimum size of activity characterized by a certain level of stability, in which the human and technical resources necessary for the conduct of the taxpayer's business will be present. Thus, the use of the technical infrastructure and personnel available in Poland to carry out part of the Company's business activities, in an organized and continuous manner, qualifies the applicant's activity in the territory of the country as a permanent place of business in Poland.

Consequently, referring to the applicant's doubts as to the place of taxation of services purchased from Polish service providers, to which Art. 28b uptu, it should be stated that these services are taxable on the territory of Poland. In the present case, the applicant is established in Portugal. At the same time, as stated above, the applicant has a permanent place of business in Poland. Thus, in the analyzed case, the place of provision of services purchased by the complainant is the territory of Poland pursuant to Art. 28b paragraph. 2 uptu Thus, the services in question are subject to tax on goods and services in Poland.

In these circumstances, the allegations of the complaint relating to the infringement of the provisions of Art. 28b paragraph. 1 and 2 of the UPT in connection with Art. 11 of Regulation No. 282/2011. In the opinion of the Court, in the described facts, the applicant will meet the criteria of having a minimum size of activity characterized by a certain level of stability, in which there will be the presence of human and technical resources necessary for the conduct of economic activity. The criterion of the existence of a close link between the personnel and the technical infrastructure and the performance of activities subject to VAT, which determines the applicant's permanent place of business, will also be satisfied.

8. With regard to the allegation of breach of the principle of VAT neutrality by leading to a situation of double VAT taxation in Poland and Portugal, it should be noted that the challenged interpretation did not resolve VAT taxation in Portugal. The contested interpretation does not contain an assessment that the services acquired by the applicant are taxed in Portuguese territory. Thus, the authority did not breach Art. 1 clause 2 of the Council Directive and the legitimate neutrality expressed therein by leading to double taxation in Poland and Portugal.

9. The court also found no breach - in the scope relating to the issue of a permanent place of business and determination of the place of taxation of services purchased from Polish service providers - of the provisions of the Tax Ordinance, in particular the provisions of Article 14c § 1 and § 2 referred to in the allegations, and art. 121 § 1, art. 120 in connection with Art. 14h op. In the opinion of the Court, the authority, contrary to the allegations in the complaint, exhaustively, logically and consistently justified why the position presented by the applicant with regard to having a permanent place of business in Poland is incorrect.

10. As for the alleged failure to apply the provision of Art. 2a op, it should be pointed out that the above provision applies to situations where, in the legal status existing in a given case, there are doubts as to its interpretation and application, which may be stated that they cannot be removed (cf. judgment of the Supreme Administrative Court in on December 19, 2018, file reference number II FSK 1350/18). In the present case, such doubts did not arise. The fact of a dispute between the taxpayer and the authority does not create doubts as to the current legal status (issues of factual circumstances remain outside the scope of Art. 2a of the Tax Ordinance Act).

11. The complaint, therefore, in relation to the issue of the company's having a permanent place of business and determining the place of taxation of services purchased from Polish service providers, pursuant to Art. 151 pps - had to be dismissed.

12. Acting pursuant to Art. 206 of the PPSA, the court refrained from awarding the reimbursement of part of the costs of court proceedings, i.e. in the scope of the court fee on the complaint and the costs of acting of the attorney of a tax advisor in excess of PLN 240, considering that this case was a particularly justified case within the meaning of the provision cited. Only the allegation of violation of Art. 121 § 1 in connection with with art. 14h op and art. 14c § 2 of the Act with regard to one of the positions of the applicant covered by the dispute, regarding the obligation to issue a VAT invoice. In the opinion of the Court, the above circumstances provide grounds for measuring the costs of the proceedings. The awarded costs include: the cost of legal representation in the amount of ½ the amount provided for in § 2 section 1 point 2) of the Regulation of the Minister of Justice of August 16, 2018.