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CJEU confirms that a subsidiary can be regarded as a fixed establishment

The CJEU confirmed in *Dong Yang* case (C-547/18) that a subsidiary can create a fixed establishment (FE) for a parent company established in another country. CJEU refers in its decision to the existing case law (e.g. *DFDS* (C-260/95) and *Welmory* (C-605/12)), where it found that a (separate) legal entity could create a FE of another (associated) legal entity. Businesses need to consider whether there is a risk (or opportunity) that another legal entity in another EU Member State could be regarded as a FE of them.

Background

The facts of this case are that a Korean company ('LG Korea') commissioned a Polish undertaking (hereafter: 'Dong Yang') to supply assembly services. Assembled (and finished) goods were owned by LG Korea, however, the Polish subsidiary of LG Korea (hereafter: 'LG Poland') was involved in the production by providing to Dong Yang necessary materials and information as well as receiving the assembled products. In addition, LG Poland provided storage and logistics services to LG Korea.

Ruling of the CJEU

The CJEU stated that a mere fact that a company from a non-EU country has a subsidiary in an EU Member State does not mean that that the subsidiary is a FE of this company. However, based on the previous CJEU decisions (e.g. DFDS, C-260/95), it is possible that a subsidiary constitutes the FE of its parent company.

Considering whether a subsidiary can be considered a FE receiving services, the substantive conditions set out in Implementing Regulation No 282/2011 (hereafter 'IR'), in particular in Article 11 and 22 thereof must be assessed in the light of economic and commercial realities.

CJEU held that the supplier of the services concerned is not required to examine contractual relationships between a company established in a non-EU Member State and its subsidiary established in an EU Member State in order to determine whether the former has a FE in that Member State. Specifically, the second subparagraph of Art 22(1) IR concerns the contract for the supply of services between the supplier and the taxable person constituting the customer of the services and not the contractual relationships between that customer and an entity which could, depending on the case, be identified as its FE.

Implications and conclusions

Unfortunately CJEU did not provide any new explanations in this decision on which conditions can a subsidiary constitute a FE of the parent. Nevertheless, this case could provide more certainty for determining the VAT treatment of similar (toll manufacturing) structures. A FE is not created merely because the parent has a subsidiary in another country.

The CJEU refers in Dong Yang case (C-547/18) to the EU VAT law provisions (IR) that "must be assessed in the light of economic and commercial realities" and states that a supplier, in determining where its customer is located, should rely on contractual relationship with its client and is not required to examine contractual relationships between its client and a parent company of its client.

Treatment of this issue in various EU Member States

In **Germany,** courts have held that existence of human and technical resources depends from the business sector and may not always be required for the existence of a FE. In **the UK**, examples where a FE exists according to HMRC include: a company with a business establishment overseas that owns a property in the UK which it leases to tenants - the property does not in itself create a FE, but, if the company has UK offices and staff or appoints a UK agent or representative (such as a subsidiary company acting on their instructions) to carry on its business, this creates a FE in the UK. Another example is when overseas business has contracts with UK customers to provide services; it has no human or technical resources in the UK and therefore sets up a UK subsidiary to act in its name to provide those services - the overseas business has a FE in the UK created by the agency of the subsidiary.

Another recent referral

The Austrian Federal Financial Court (*Bundesfinanzgericht*) recently sought a preliminary ruling from the CJEU about the term "FE" in the *Titanium Ltd* case (C-931/19, Titanium vs. Austria). The referring court asked whether the existence of human and technical resources is always necessary and therefore that the service provider's own staff must be present at the establishment and whether both personnel and technical resources must be complied with cumulatively or whether that is only necessary when the business activity is not possible without personnel and technical resources.

CJEU view in previous cases

In *Welmory* (C-605/12), the CJEU already stated that personnel and technical resources of another entity are sufficient for a FE to exist and that the resources did not need to belong to the company in order to create a FE of that company. In this case, the Cypriot company used personnel and equipment not belonging to the Cypriot company but at least partially to the Polish company. It is not required that the legal entity has its own human and technical resources if the third party's resources are used by the entity in the same way as those of the entity's own. In addition, CJEU stated in *Welmory* (C-605/12) that digital businesses may not need people in order to create a FE, thus own personnel is not required if the business model does not require it.

It is very interesting whether CJEU will provide further guidance in C-931/19 how the existence of FE should be determined and on which conditions it can exist without any physical presence of own human and/or technical resources. This could be important e.g. in cases of various ICT services or e-commerce trade. The location of the FE is very relevant for supplies where input VAT is not deductible, such as B2C supplies, but also for B2B services or even supply of goods.

Contact

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