

I SA / GI 1051/19 - Judgment of the Provincial Administrative Court in Gliwice

Date of the judgment	2020-10-12	<i>invalid judgment</i>
Date of receipt	2019-07-26	
Court	Provincial Administrative Court in Gliwice	
Judges	Adam Nita / chairman / Beata Machcińska / rapporteur / Monika Krywow	
Symbol with description	6110 Value-added tax 6560	
Thematic slogans	Tax interpretations	
The appealed authority	Director of the National Tax Information	
Result content	The reimbursement of the costs of proceedings was awarded. The contested individual interpretation was repealed	
Cited regulations	Journal of Laws 2018 item 2174 art. 28b paragraph. 2 <i>Act of March 11, 2004 on tax on goods and services - consolidated text</i>	

SENTENCE

Provincial Administrative Court in Gliwice composed of the following composition: Chairman Judge of the Provincial Administrative Court Adam Nita, Judge of the Provincial Administrative Court Beata Machcińska (spokesman), Deputy Judge of the Provincial Administrative Court Monika Krywow, Specialist Katarzyna Kot, after hearing at the hearing on October 12, 2020, the case from the complaint A GmbH & What. KG in O. (in Germany) on the interpretation of the Director of the National Tax Information of [...] No. [...] regarding tax on goods and services 1) repeals the challenged interpretation, 2) orders the Director of the National Tax Information to the applicant the amount of PLN 697 (six hundred and ninety-seven zlotys) for costs of the proceedings.

SUBSTANTIATION

The subject of the complaint by A GmbH & Co. KG with its seat in Germany (hereinafter the "Company", "Applicant" or "Complainant") is an individual interpretation of [...] issued by the Director of the National Tax Information (hereinafter the "Director", "interpretation body" or " ") the subject of the tax on goods and services (hereinafter " interpretation ").

1. The following future event was presented in the application for an interpretation submitted by the Company and B spółka z oo:

The company is a subject of German law registered as a VAT payer in Germany, operating in the field of industrial production and distribution [...] [...]. From June 2017, the Company is also registered as a VAT payer active in Poland. In connection with its activities, the Company established cooperation with a third party - a Polish company (hereinafter: "Subcontractor"), which it commissioned to perform two stages of industrial processing [...] [...] in Poland, i.e. the process [...] and [...] [...]. These activities are performed on the basis of a contract for production to order concluded between the parties ("toll manufacturing contract"; hereinafter: "Contract"). Starting from 2017, the Company provides the Subcontractor with free-of-charge machines for performing the tasks assigned to him related to the [...] and [...] process. The company also provides the Subcontractor with semi-finished products on

which the commissioned activities are performed, produced at earlier stages of production. The semi-finished products are moved to Poland from Germany (as the company's own goods), but the transfer does not constitute an intra-Community acquisition of goods for the company, in accordance with Art. 12 sec. 1 point 6 of the VAT Act. Currently, some of the processes commissioned by the Company take place in the production halls belonging to the Subcontractor, which under a separate agreement are leased by the Company, and some - in the halls belonging to the Company, available free of charge to the Subcontractor. All production activities are performed only by employees employed by the Subcontractor, and the Company's employees do not participate in them in any way. The subcontractor receives remuneration for performing the ordered activities, the amount of which is calculated using the "costs plus" method. The Company is the owner of the semi-finished products throughout the entire processing process. After the completion of the production stage performed by the Subcontractor, the semi-finished products produced as a result of this process are delivered to the Company's production plants in Germany, where they are subject to subsequent production stages. Then, the finished products are sold by the Company to buyers throughout Europe, including Poland. The entire sales process is carried out by the Company directly from Germany. The subcontractor does not perform any activities related to the sale of the company's products and does not provide any marketing services to it. the amount is calculated using the "costs plus" method. The Company is the owner of the semi-finished products throughout the entire processing process. 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The part of the production process carried out in Poland is supervised by the Polish company B spolka z oo (hereinafter "Interested" or "Related Company"). The owner of the Related Company is C GmbH (hereinafter: "Matka"), which holds 100% of its shares and 99.9% of the applicant's shares. One of the members of the board of the Affiliate ("Managing Director") is an employee of the Corporation, however he has been seconded by the Corporation to the Affiliate and performs work for the Affiliate, and the Company will charge the Affiliate for the Director's remuneration. Employees of the Affiliated Company, including the Managing Director, do not have any authority to act on behalf of and on behalf of the Company, and are not entitled to intervene directly in the activities performed by the Subcontractor.

The company plans to increase the scope and volume of production in Poland in the near future. In connection with the above, at the end of 2015, the Company acquired two production halls (which are currently provided free of charge to the Subcontractor). In addition, the Company also purchased a production unit (dipping unit) from a Ukrainian entrepreneur and additional [...] and [...] machines and equipment, which are currently installed in the halls purchased by the Company. Due to the planned expansion in Poland, the Company plans to expand its operations in Poland and to change the organizational structure.

A. Extending the scope of production in Poland:

The company wants to offer its customers increased amounts of processed [...], and therefore decided to expand the facilities (machines and equipment) used in the [...] and [...] process and to invest in a dipping unit, currently assembled in G .. After the installation of the immersion unit, the processing [...] will be possible entirely on the territory of Poland (in quantitative terms, however, not all [...], which will be [...]] in Poland, it will eventually also undergo the dipping process here). This means that products manufactured in Poland, intended for the markets of Eastern Europe and Poland, will no longer be shipped back to the company's plant in Germany, but will be shipped to customers from Eastern Europe directly from Poland. As a consequence, the Company will recognize VAT-taxed transactions in Poland (domestic supplies, intra-Community supplies, exports). In contrast, semi-finished products for the production of final products destined for other markets will continue to be shipped back to Germany for further processing and then sale from that country. Due to the fact that the Subcontractor does not have the necessary know-how and appropriate personnel for the implementation of the new stage of production - "immersion", the Related Company will employ additional personnel with specialist knowledge in this field in order to perform it. In addition, the Affiliated Company will employ additional employees who will be responsible for warehouse operation and logistics or, alternatively, will purchase these services from a Subcontractor or other third party. The management staff of the Related Company will consist of a Polish resident employed by the Related Company and an employee of the Company, delegated for part of the working time to the Related Company, in order to assume the functions of the Financial Director (CEO) and the Managing Director ("managing director"). All activities related to the sale of products, distribution, contacts with customers or marketing activities will continue to be carried out by the Company directly from the territory of Germany (regardless of whether the entire processing process will take place in Poland, or only part of it). The Affiliated Company will not be involved in these activities and will not have any direct contact with the Company's customers. The scope of ancillary activities performed by the Affiliated Company - apart from yarn processing - will include only "technical" processes, such as storage of finished products and logistics processes (based on shipping documents prepared by the Company in Germany). These activities will only be auxiliary, secondary to activities undertaken by the Company in Germany. Execution of orders and all other activities will be carried out in accordance with the guidelines and requirements provided from the Company's headquarters in Germany. secondary to activities undertaken by the Company in Germany. Execution of orders and all other activities will be carried out in accordance with the guidelines and requirements provided from the Company's seat in Germany. secondary to activities

undertaken by the Company in Germany. Execution of orders and all other activities will be carried out in accordance with the guidelines and requirements provided from the Company's headquarters in Germany.

B. Change in the organizational structure:

The planned reorganization assumes that the Related Company will become the main contractor for the Company in Poland, and the existing Subcontractor of the Company will become a subcontractor of the Related Company in the scope of two production stages, ie [...] and [...] [...]. In order to achieve the intended structure, the following steps will be taken:

- The mother company and the company will sign an agreement as a result of which the company will acquire all the shares of the Related Company.
- The Company will transfer to the Related Company by way of a contribution in kind all the assets (tangible and intangible) it has in Poland, including those that it currently uses for its operations in Poland (i.e. performing two production stages [...] [..] - process [...] and [...] [...]), as well as those that it acquired in order to increase the scope of production in Poland (hereinafter jointly referred to as the "Object of Contribution"). As part of the planned contribution in kind, the following will be transferred in particular: ownership of all real estate owned by the Company in Poland, ownership of all machines, devices and equipment that the Company has in Poland, contracts related to the general functioning of the real estate (including media contracts) , the contract concluded previously by the Company and the Subcontractor and the contract for the lease of the halls owned by the Subcontractor for the Company, rights and obligations related to the contributed assets. However, the liabilities will not be transferred to the Related Company. In addition, also the employees of the Company will not be transferred, but - as already indicated above - one employee of the Company will be seconded to the Related Company on a part-time basis to serve as CFO and Managing Director of that entity. This person will not be permanently resident in Poland, but will be visiting Poland periodically to perform his duties as Finance Director and Managing Director of the Related Company. The two spheres of her work will be separated in such a way that while in Germany it will perform its work for the Company, and while in Poland - for the Related Company. Consequently, during his stay in Poland, the employee will only work for the Related Company as its Financial Director and Managing Director.

The assets described above are transferred by the Company to the Related Company (Object of Contribution in kind) are not formally separated from the remaining activities of the Company, e.g. by assigning them to such a unit as a department or branch of the Company, but are separated from the remaining assets of the Company physically and functionally. These components constitute the entirety of the Company's assets used to conduct business in Poland (both now and after the reorganization). In addition, the manner in which the Company keeps relevant records of economic events enables the Applicant to assign revenues and costs to the activities carried out in the above-mentioned assets and its separation from other activities of the Company.

- The Company and the Related Company will conclude a contract of production to order covering all stages of processing (hereinafter: "Production Agreement"), which will also include additional storage and logistics services. In addition, the Company will provide certain support services, e.g. in the procurement area. Logistics services provided by the Related Company to the Company will be comprehensive and will include, inter alia, acceptance of end products from production, their storage, packing / repacking, loading etc. The agreement will not grant the Company the right to use

a specific warehouse space, including the right to manage this space or to decide on the method and place of storage of products in the warehouse. Nevertheless, the Company will have access to all real estate (both those

- The production supervision agreement concluded between the Company and the Related Company will be terminated. As a result, as a result of the planned reorganization, the Affiliated Company will become liable to the Company for the conversion [...] [...], and not the Subcontractor as before.

In response to questions from the interpretative body, the Company indicated:

The Production Agreement will be concluded for the duration of the lease agreement for the halls owned by the Subcontractor, concluded by the Applicant with the Subcontractor, ie at least until [...]. The halls lease agreement will be transferred as part of the planned in-kind contribution to the Related Company. At the same time, the production agreement will provide for the possibility of extending its term by 5 years. The Related Company intends to provide services only to the Company under the Production Agreement (it does not intend to provide services to other entities). The Company will provide the Related Company with support in connection with belonging to one capital group - it will include in particular the right to use the name of the group and organizational membership in the group. Support services, e.g. in the area of orders, they will be limited to the ability of the Related Company to use the framework conditions negotiated by the Applicant, eg for the purchase of machinery [...]. The object of the Contribution in kind that the Company plans to make by way of in-kind contribution to the Related Company will be separated financially and functionally in the enterprise of the Company.

The Company believes that the set of property and non-property components that make up the Object of the Contribution in kind has the ability to function as an independent business entity. The tangible and intangible components included in the Object of the In-kind Contribution, in the opinion of the Company, are characterized by organizational, financial and functional separateness necessary for independent functioning in the economic turnover, and thus enable the commencement and conduct of economic activity within a separate enterprise.

The subject of the Contribution in kind, after its contribution, will be used to conduct business activities subject to tax on goods and services (in Poland or Germany).

The production contract will cover all stages of processing [...]. Under the Production Agreement, the Affiliated Company will be obliged to:

- a) processing of preliminary products supplied by the Company according to technical specifications of the Company. This will include, in particular, works such as [...], [...], [...] ([...]), as well as related individual support works. The support works will include warehousing and logistics services. The Affiliated Company will be able to purchase specific works / activities from the Subcontractor. Initial products which have been improved in the [...] and [...] production stages are hereinafter referred to as "intermediate products",
- b) supervising and carrying out quality controls of the Subcontractor's work - the Related Company will control the production process and check the possibilities of its optimization in order to guarantee and improve the quality of intermediate products,
- c) overseeing and conducting quality controls aimed at improving intermediate products and final products, which the Related Company will independently conduct - in accordance with the quality guidelines of the Company.

All raw materials and intermediates that the Related Company receives from the Company for processing will remain the property of the Company.

Logistics services provided by the Related Company to the Company will be comprehensive and will include, inter alia, acceptance of end products from production, their storage, packing / repacking, loading etc. The Production Agreement will not grant the Company the right to use a specific warehouse space, including the right to manage this space, or to decide on the method and place of storage of products in the warehouse. The Company will, however, have the right to access all real estate (both those that will be transferred to the Related Company and those owned by the Subcontractor) and access to machines, mainly for the purpose of technological inspections.

2. In such a future event, the Company asked the authority with the following questions and presented its own position on:

1) Will the actions described above, which the Company intends to take in connection with the planned increase in production and reorganization, lead to the establishment of a permanent place of business for the Applicant in the territory of Poland within the meaning of Art. 11 of the Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112 / EC on the common system of value added tax (Journal of Laws of the EU, L of 2011, No. 77/1 ; hereinafter the "Implementing Regulation")?

2) In the description of a future event presented, does the group of assets (tangible and intangible) that the Applicant plans to make in kind to the Associated Company (consisting of, among others, real estate, machinery, equipment and contracts) constitute an organized part of the enterprise within the meaning of art. 2 point 27e of the VAT Act, and therefore the supply of these components will be excluded from VAT pursuant to art. 6 point 1 of the VAT Act?

3) In the case of a positive answer to point 2 above, or due to the neutrality of the transfer of the Object of In-kind in kind within the meaning of the VAT Act and the resulting principle of linking the Company's purchases with the taxable sales of the Related Company, the Applicant has the full right to deduct input VAT from purchase costs of the transferred assets, incurred by the Company prior to the transfer of the machinery / equipment to the Related Company, if they were not used by the Company for taxable activities?

The following questions were asked in addition to the proposal as regards the tax consequences for the non-party concerned:

1) Is the position correct that in the future event described in the application, the services that the Interested Party will provide to the Applicant under the Production Agreement will not be subject to VAT in Poland due to the fact that the place of their provision will be the place where the customer is has a registered office, in accordance with Art. 28b paragraph. 1 of the VAT Act?

2) In the event of a negative answer to question 2 of the Application, will the Related Company be entitled to deduct the input VAT on the acquisition of assets that the Applicant plans to make in-kind contribution to the Related Company?

Presenting its own position in the case, the Company indicated that in its opinion:

Ad. 1 In the described facts, after the planned production increase and reorganization, the Company will not have a permanent place of business in the territory of Poland within the meaning of Art. 11 of the Implementing Regulation.

Ad. 2 The group of assets (tangible and intangible) that the Company plans to make by way of an in-kind contribution to the Related Company constitutes an organized part of the enterprise within the meaning of Art. 2 point 27e of the VAT Act, and therefore their supply will be excluded from VAT under Art. 6 point 1 of the VAT Act.

Ad. 3 The Company will have the full right to deduct VAT from invoices documenting the costs of purchasing the assets constituting the Object of the In-Kind, incurred prior to the transfer of the Object of In-kind Contribution to the Related Company. The object of the Contribution in kind is an organized part of the enterprise, which the Company will transfer to the Related Company as a non-cash contribution, and since the transfer of the organized part of the enterprise is VAT neutral, there is a direct and sufficient relationship between the purchases of the Company and the taxed activities of the Related Company, resulting from the The Related Company of VAT taxable activities using the Object of Contribution.

Moreover, the company indicated that the issue of the existence or non-existence of a permanent place of business in Poland on the part of the Company (question no. 1 of the Application) will have a direct impact on the location of the provision of services that the interested party will provide to the Company on the basis of the Production Agreement. According to Art. 28b paragraph. 2 of the VAT Act, "where 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 provision of these services is the place of business".

As a consequence, if the body recognizes the position of the Company in respect of question 1 as correct, the person concerned will specify the place of performance of the above-mentioned services based on art. 28b paragraph. 1 of the VAT Act - i.e. it considers that the place of their provision is the place where the customer - in this case the Company - has its registered office, i.e. the territory of Germany. Therefore, services will not be subject to VAT in Poland in such a situation. If the authority finds the position of the Company regarding question no. 1 incorrect and considers that the Company will have a permanent place of business in Poland, the person concerned shall specify the place of performance in accordance with Art. 28 sec. 2 of the VAT Act. In such a case, the Related Company will charge Polish VAT on the production services provided to the Company, and the Complainant, in principle,

Determining whether the assets contributed by the Company in kind to the Interested Party will constitute an organized part of the enterprise (question 2 of the Application) will, however, affect the right of the Interested Party to deduct any input VAT on the acquisition of the above-mentioned ingredients. According to Art. 88 sec. 3a point 2 of the VAT Act, invoices and customs documents do not constitute the basis for reduction of output tax in the event that "the transaction documented by an invoice is not subject to taxation or is exempt from tax". As a consequence, if the authority deems the correct position of the Company with regard to question no. 2 (i.e. it agrees with the Company that the contribution in kind constitutes an organized part of the enterprise), the Related Company will not deduct the input VAT on the acquisition of the above-mentioned ingredients,

Taking into account the regulations contained in the Implementing Regulation, as well as the theses presented in the above-mentioned jurisprudence of the CJEU, the Company stated that the taxpayer has a permanent place of business when the following conditions are met:

a) the place of business is characterized by the presence of an appropriate structure in terms of human and technical resources necessary to conduct business (i.e. employees and technical infrastructure at the sole disposal of the taxpayer),

b) the place has a certain level of stability, which means that the taxpayer intends to operate there on a permanent basis (i.e. uninterrupted, stable and essentially indefinite),

c) the activity carried out in this place is an activity independent of the main activity (which should be understood, in particular, the possibility of concluding contracts and making management decisions independently), which results from the inherent feature of economic activity, which is conducting this activity independently .

In the Company's opinion, the description of the future event shows that the above-mentioned conditions are not met. The company intends to transfer all stages of artificial [...] industrial processing for certain buyers to Poland. Due to the fact that the final products intended for the Polish and Eastern European markets will be delivered to buyers directly from the territory of Poland, the Company will recognize VAT-taxable activities in Poland (i.e. domestic and Community supplies of goods, export of goods). Despite this, the Company will still not have any technical or personnel resources in Poland that would allow it to conduct independent business activities in Poland. Employees of the Related Company, performing activities related to the provision of production, storage or logistics services for the Company, they will not have the competences necessary to run the Company's business. All activities related to the sale of products, contact with customers, and marketing will be carried out by the Company directly from Germany. Also, all decision-making (management) activities related to the activities of the Company will be performed from the seat, i.e. from Germany. In Poland, only the production and logistic service of finished products (for buyers from Poland and Eastern Europe) and the production of semi-finished products for further processing in Germany will take place. Also, all decision-making (management) activities related to the activities of the Company will be performed from the seat, i.e. from Germany. In Poland, only the production process and logistic service of finished products (for buyers from Poland and Eastern Europe) and the production of semi-finished products for further processing in Germany will take place. Also, all decision-making (management) activities related to the activities of the Company will be performed from the seat, i.e. from Germany. In Poland, only the production process and logistic service of finished products (for buyers from Poland and Eastern Europe) and the production of semi-finished products for further processing in Germany will take place.

3. In the challenged interpretation, the interpretative body stated that the Company's position on the legal assessment of the presented future event was related to:

a) the Company has a permanent place of business in Poland - incorrect,

b) recognition of the set of assets contributed by the Company by way of an in-kind contribution to the Related Company as an organized part of the enterprise correct,

c) the right to deduct input tax from invoices documenting the purchase of correct assets transferred by the Company,

d) the place of taxation of services provided to the Company by the Related Company under the Production Agreement incorrect.

The interpretative body 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 Implementing Regulation.

In the opinion of the interpretative body, a permanent place of business can be considered if there is an appropriate structure in terms of personnel and technical resources necessary to conduct business and there is a certain minimum scale of economic activity, which allows for the recognition that the taxpayer's activity is not carried out in this place periodically, as well as the activity from this place is conducted independently in relation to the activity of the company's seat. In this regard, the authority referred to the judgments of the CJEU: judgment C-168/84 Gunter BerWiolz, C-231/94 Faaborg Gelting Linien A / S, C-190/95 ARO Lease BY, C-260/95 Commissioners of Customs and Excise v. DFDS A / S, C-390/96 Lease Plan Luxembourg SA and C-605/12 **Welmory**Sp. z o. o. on the judgment of February 16, 2015, file ref. I FSK 2004/13, in which the Supreme Administrative Court stated that 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 "create" the required structure, relying on rent, lease and other similar forms.

The interpretative body listed several premises, the occurrence of which makes it possible to speak of a "permanent place of business". Namely, it must be characterized by a certain degree of commitment, which allows to recognize that the activity is conducted in this place not in a temporary or periodic manner. A certain minimum scale of activity is necessary, which is an external indication that the activity on this site is ongoing. 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 consider that a given place of business is permanent, it is necessary to have technical infrastructure and human staff there, who can independently perform certain activities. Such a personal and material structure in a permanent place of business should be permanent, i.e. repeatable and permanent. 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* The interpretative body concluded that the entity has a permanent place of business in the territory of the country, if, using its infrastructure and personnel, in an organized and continuous manner, it conducts activities in which it carries out activities subject to tax on goods and services. He pointed out that the technical infrastructure and personal involvement must be closely related to the performance of taxable activities. Therefore, it is necessary for the recognition as a permanent place of business that this place not only uses the goods and services, but also itself can carry out taxable activities in accordance with Art. 5 sec. 1 of the act. At the same time, it is not necessary for the entity's activity to be considered a permanent place of business in Poland for the entity itself to provide services or deliver goods using sufficient resources. It is also important that the created structure of the entity's activity should be able to receive and use the services provided for its own needs. At the same time, to adopt a permanent place of business in a given country, it is not necessary to have your own personal and technical background,

In the opinion of the interpretative body, if a given entity has its staff and structure (including technical infrastructure) in a given country, which is sufficiently stable, it has a permanent place of business in that country. However, it is irrelevant - which should be emphasized - whether they are employees directly employed by this entity or their "own" infrastructure. The case law of the CJEU indicates 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, in order to adopt 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. Enough that the entity uses both the personnel and technical facilities of other entities, so that it allows it to receive and use the services provided for its own needs of this permanent place of business. Only the organizational structure necessary to carry out a given type of activity is necessary, while the human resources necessary for its performance 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. Only the organizational structure necessary to conduct a given type of activity is necessary, while the human resources necessary for its performance 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. Only the

organizational structure necessary to conduct a given type of activity is necessary, while the human resources necessary for its performance 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.

The interpretative body stated that the Company meets the conditions for recognizing the Company's operations described in the future event 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. The authority argued that in the created structure of the Company's operations, the stability criterion (understood as the fact that the entity having such a place intends to conduct business from this place on a permanent basis) results from involvement in tasks related to the processing and distribution [...] ([...] [...]). The description of the future event shows that the Company and the Related Company will conclude a contract for production to order (Production Agreement). The production contract will cover all processing steps [...]. On the basis of the production agreement, the Affiliated Company will be obliged to process preliminary products provided by the Applicant according to the technical specifications of the Applicant. The contract will cover works such as [...], [...] and [...] [...] as well as the respective individual support works. The support works will include warehousing and logistics services. The Affiliated Company will be able to purchase specific works / activities from the Subcontractor. The Affiliated Company will control the production process and investigate its optimization possibilities to guarantee and improve the quality of the intermediate products (pre-products which have been improved in the twisting and weaving stages). The Affiliated Company will also be obliged to supervise and carry out quality controls to improve intermediate products and end products, which the Affiliated Company will independently conduct in accordance with the quality guidelines of the Applicant. All preliminary and intermediate products that the Related Company receives for processing from the Applicant will remain the property of the Applicant. Logistics services provided by the Related Company to the Applicant will be comprehensive and will include, inter alia, acceptance of end products from production, their storage, packing / repacking, loading. The above description of the case shows that that the activities of the Company in Poland will include activities related to the yarn processing and distribution of products manufactured in Poland, performed on a continuous basis for the Company's profit. When carrying out activities related to the processing of yarn, the Company will have an appropriate structure in terms of personnel and technical resources, proving that the Applicant has a permanent place of business in Poland. The production agreement concluded between the Applicant and the Related Company will cover all stages of processing [...]. In addition, the contract in question will also include warehousing and logistics services. As a result of the planned reorganization, the Affiliated Company will become liable to the Applicant for the conversion [...] [...]. Applicant, deciding to increase the scope and volume of production in Poland (products manufactured in Poland intended for Eastern European markets will be sent to customers from Eastern Europe directly from Poland), they will commission a Related Company to perform specific activities on the basis of the Production Agreement (the production contract will include its scope of all processing steps). The Affiliated Company will use its technical resources and personal [...] to carry out the ordered activities related to the processing [...] The Related Company will provide services to the Company on the basis of the Production Agreement, inter alia, based on the assets contributed by the Applicant to the Related Company (components previously used by the Applicant for the activities conducted in Poland - two production stages [...] [...] and ingredients purchased to expand production). Moreover, the Company will have the right to access all real estate (both those that will be transferred to a Related Company and those owned by the Subcontractor) and access to machines, mainly for the purpose of technological inspections. Importantly, in the case at hand, the Related Company will provide services only to the Company under the production contract. At the same time, as indicated in the application, The Company will provide the Related Company with support in connection with belonging to one capital group (it will include in particular the right to use the name of the group and organizational belonging to the group). In addition, the

Company will provide Support Services, e.g. in the area of orders (the ability by the Related Company to use the framework conditions negotiated by the Applicant, e.g. for the purchase of machinery [...]).

In the opinion of the interpreting body, it follows from all the circumstances of the case that the Related Company was established only for the purpose of conducting business activities for and in the scope strictly determined by the Company. The authority emphasized that the Company, due to the planned expansion and expansion of its operations in Poland, intends to increase the amount processed [...]. Products manufactured in Poland, intended for the markets of Eastern Europe and Poland, will be sent to customers directly from Poland. The company will recognize activities subject to VAT in Poland (domestic supplies, intra-Community supplies, exports). Therefore, in the case at hand, the Company intends to conduct activities related to the processing of yarns in an organized and continuous manner, under which it will carry out activities subject to VAT. In the opinion of the interpreting body, despite the fact that the Company will not have its own technical or personnel facilities in Poland, as all activities under the Production Agreement will be performed by employees of the Related Company, the Company will have a permanent place of business in Poland economic, as the technical and human resources necessary to conduct some business activities in the territory of the country will be ensured by using the services of the Related Company. Use of the technical infrastructure and personnel in Poland to perform part of the Applicant's business activities, in an organized and continuous manner,

Thus, the position of the Applicant with regard to having a permanent place of business in Poland should be considered incorrect.

Justifying the position regarding the question regarding the place of taxation of services provided to the Company by the Related Company, the interpretative body indicated that the place of provision of services provided by the Related Company under the Production Agreement will be the Company's permanent place of business, i.e. the territory of Poland pursuant to Art. 28b paragraph. 2 up to The services in question will not be taxable pursuant to Art. 28b paragraph. 1 of the Act at the seat of the Company. Thus, services provided by the Related Company under the Production Agreement will be subject to tax on goods and services in Poland.

4. In the complaint to the Provincial Administrative Court in Gliwice, the Company applied for: 1) revocation of the challenged interpretation in the part in which the Director considered the applicant's position incorrect in the scope of:

- lack of a permanent place of business in Poland after the planned increase in the scope of production and reorganization, and
- place of taxation of services provided to the Company by a related company under the Production Agreement.

2) awarding the complainant the costs of the proceedings together with the costs of legal representation according to the prescribed standards.

The contested interpretation alleged a violation of:

1) provisions of substantive law, i.e.:

- Art. 11 of the Implementing Regulation by its erroneous interpretation leading to the unjustified assumption that, after the planned increase in the scope of production and reorganization, the Complainant will have the resources resulting in the creation of a permanent place of business in Poland, despite the failure of the Company to meet the conditions set out in this provision;

- Art. 28b paragraph. 2 of the Act of March 11, 2004 on tax on goods and services (i.e. Journal of Laws of 2018, item 2174, as amended, hereinafter: "VAT Act" or "Upt") due to its improper application resulting from from misinterpretation of Art. 11 of the Implementing Regulation and, consequently, assuming that the place of providing services provided by the Related Company to the Company under the Production Agreement will be the territory of Poland and that they will be subject to tax on goods and services.

2) breach of the provisions of the procedure, to a degree significantly affecting the outcome of the case, ie art. 14 h in connection with Art. 121 § 1 of the Act of August 29, 1997 - Tax Ordinance (i.e. Journal of Laws of 2017, item 201; hereinafter: "Tax Ordinance" or "Op") by issuing an interpretation, disregarding the principle of conducting proceedings in a manner that trust in tax authorities.

The complainant argued that the wording of the Implementing Regulation and the jurisprudence of the CJEU implied the obligation to take into account the independent nature of the activity in relation to the activity carried out at the taxpayer's seat as one of the criteria that must be met in order to be considered a permanent place of business, which was confirmed by also the authority in the issued interpretation on page 37. However, despite this, the authority in the further part of its considerations completely ignored this condition, not assessing at all whether, in the case of the Company, the activities conducted in Poland would be independent of the activities carried out in Germany. The complainant indicated in the application that the Company would not have any structure in Poland that could participate in making management decisions, in the process of concluding contracts, etc. In particular, no employee of the Company or other person authorized to conclude contracts on behalf of the Company will permanently reside in Poland. All key decisions regarding operations in Poland will be made at the Company's headquarters in Germany. As a consequence, in a given future event, the condition of operating independently of the Company's operations in Germany will not be met.

In the opinion of the Company, also the criterion of having an appropriate structure in terms of personnel and technical resources necessary to conduct business activities will not be met by the Company in the presented future event. As the complainant indicated in the application, in Poland it will not have infrastructure sufficient to conduct independent economic activity. All the assets (including real estate, machinery and equipment) currently owned by the Company in Poland will be contributed to the Related Company. As a consequence, the Company will not have any tangible or intangible assets in Poland.

The company will also not have human resources in Poland. It is true that in Poland there will be one of the employees of the Company, seconded by the Applicant (part-time) to perform the function of the Financial Director and Managing Director of the Related Company, nevertheless, during his stay in the territory of the country, he will perform work only for the Related Company. This person will also not be authorized to act in the name and on behalf of the Complainant, in particular in relation to actions taken by the Company in Poland. In addition, the employee will not be permanently on the territory of Poland, but only periodically (part-time), to the extent required by his / her functions.

As is clear from the case-law, in order to recognize the existence of a fixed establishment when using the service provider's resources, the availability of other facilities must be comparable to the availability of own facilities. As it is emphasized in the jurisprudence, in such a situation the taxpayer - service recipient should exercise certain sovereignty, control over this human and technical base. The complainant will not be entitled to freely use the production or storage space of the Related Company. It will also not be able to freely dispose of machinery and other production equipment owned by the Related Company. It should be noted that the Related Company will not make the resources in question available to the Company, e.g. based on a

lease or loan agreement, but it will only use them for the purpose of providing services to the Company. The applicant will therefore in no way be able to use the technical facilities in question in order to conduct business activities. It will only purchase services provided to it by the Related Company.

Nor can it be considered that the employees currently employed by the Related Company, as well as the employees who are to be hired for the purpose of handling the warehouse, logistics and the new stage of production, can be considered as human resources of the Company in Poland. These persons will perform work for the Company only as part of the services provided to the Company by the Related Company. In this respect, they will act for their employer and not for the benefit of the Company. The sovereignty over these persons will be exercised entirely by the Related Company. The applicant will not have any control over them. In particular, the employees of the Related Company will not be authorized to negotiate and conclude contracts on behalf of the Company or to act in any way on behalf of and on behalf of the Company. Consequently, they will not be able to be considered the Company's human resources. The Company added that the activities of the Associated Company employees, which will be undertaken in Poland, will not serve to carry out activities subject to VAT in Poland (sale of processed industrial artificial [...]), but will only be auxiliary (support for the production process, warehousing, logistics). All activities related to the sale of products, contact with customers, and marketing will still be carried out by the Company directly from Germany. Also, all decision-making (management) activities related to the activities of the Company will be performed from the seat of the Company, i.e. from Germany, which also excludes the possibility that the Company will have a permanent place of business in Poland. At the same time managing the sale of products, which will be performed on the territory of Poland, will also take place from the seat of the Company, i.e. from Germany. The company will not have sufficient resources in Poland to be able to conduct independent activities in this area. Also, the fact that goods are stored in the warehouse of the Associated Company and the shipment of goods to buyers from this warehouse, aimed at reducing the costs related to the logistics service of the manufactured goods, will not affect the processes related to the sale of the Company's goods, which will continue to be undertaken in the country of its seat. Companies.

Consequently, in the opinion of the Company, its use of the technical and human resources of the Related Company will not be able to determine the establishment of a permanent place of business for the Company in Poland.

The Director's erroneous recognition that the complainant had a permanent place of business in Poland, led to the incorrect application of Art. 28b paragraph. 2 of the VAT Act, as a result of which the authority incorrectly concluded that the place of services provided by the Related Company on the basis of the Production Agreement for the Company is the territory of Poland.

In the facts described in the Application, the Complainant indicated that both the Company and the Interested Party are VAT taxpayers who conduct business activities related to the production and distribution of high-quality industrial [...] [...]. The company has its seat of business in Germany, while the interested party has its seat in Poland. Taking into account that - in the opinion of the Complainant - the actions that the Company intends to undertake in connection with the planned increase in the scope of production and reorganization will not lead to the establishment of a permanent place of business for the Complainant in Poland (as indicated in point 1 above) in the light of the general rule (Article 28b paragraph 1 and paragraph 2 of the VAT Act), the place of the provision of services by the interested party to the Company should be the place, in which the complainant, as the recipient, has its registered office in Germany. Even if it were assumed that the Company has a permanent place of business in Poland - which, however, the Complainant does not agree - it would still be considered that the place of the provision of services performed under the Production Agreement by the Related Company would be the place where the Complainant has its registered office. As it follows from Art. 28b (2) of the VAT Act, only if the

taxpayer has a fixed place of business in Poland and the services are provided for this permanent place of business, it should be considered that the place of their provision is a permanent place of business, i.e. in the discussed case - the territory of Poland. These conditions must be met cumulatively, that Art. 28b paragraph. 2 of the VAT Act could apply. However, in the analyzed case, even if the Complainant had a permanent place of business in Poland, the services performed by the Related Company under the Production Agreement would not be provided for that place, but for the activities conducted in Germany. As the Company indicated in the Application, the processing, storage and logistics services to be provided by the Related Company will be collected at the Company's headquarters in Germany and will be used for sale by the Company from Germany. All activities necessary to carry out the sale of products, contact with customers, and marketing will be performed at the Company's headquarters in Germany. Also, all decision-making (management) activities related to the Company's operations will be performed from the seat of the Company. 28b paragraph. 2 of the VAT Act could apply. Meanwhile, in the analyzed case, even if the Complainant had a permanent place of business in Poland, the services performed by the Related Company under the Production Agreement would not be provided for that place, but for the activities conducted in Germany. As the Company indicated in the Application, the processing, storage and logistics services to be provided by the Related Company will be collected at the Company's headquarters in Germany and will be used for sale by the Company from Germany. 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However, in the analyzed case, even if the Complainant had a permanent place of business in Poland, the services performed by the Related Company under the Production Agreement would not be provided for that place, but for the activities conducted in Germany. As the Company indicated in the Application, the processing, storage and logistics services to be provided by the Related Company will be collected at the Company's headquarters in Germany and will be used for sale by the Company from Germany. All activities necessary to carry out the sale of products, contact with customers, and marketing

will be performed at the Company's headquarters in Germany. Also, all decision-making (management) activities related to the Company's operations will be performed from the seat of the Company. However, in the analyzed case, even if the Complainant had a permanent place of business in Poland, the services performed by the Related Company under the Production Agreement would not be provided for that place, but for the activities conducted in Germany. As the Company indicated in the Application, the processing, storage and logistics services to be provided by the Related Company will be collected at the Company's headquarters in Germany and will be used for sale by the Company from Germany. All activities necessary to carry out the sale of products, contact with customers, and marketing will be performed at the Company's headquarters in Germany. Also, all decision-making (management) activities related to the activities of the Company will be performed from the seat of the Company. even if the Complainant had a fixed place of business in Poland, the services performed by the Related Company under the Production Agreement would not be provided for that place but for the activities carried out in Germany. As the Company indicated in the Application, the processing, storage and logistics services that will be provided by the Related Company will be collected at the Company's headquarters in Germany and will be used for sale by the Company from Germany. All activities necessary to carry out the sale of products, contact with customers, and marketing will be performed at the Company's headquarters in Germany. Also, all decision-making (management) activities related to the Company's operations will be performed from the seat of the Company. even if the Complainant had a fixed place of business in Poland, the services performed by the Related Company under the Production Agreement would not be provided for that place but for the activities carried out in Germany. As the Company indicated in the Application, the processing, storage and logistics services to be provided by the Related Company will be collected at the Company's headquarters in Germany and will be used for sale by the Company from Germany. All activities necessary to carry out the sale of products, contact with customers, and marketing will be performed at the Company's headquarters in Germany. Also, all decision-making (management) activities related to the Company's operations will be performed from the seat of the Company. the services performed by the Related Company under the Production Agreement would not be provided for that site, but for activities carried out in Germany. As the Company indicated in the Application, the processing, storage and logistics services to be provided by the Related Company will be collected at the Company's headquarters in Germany and will be used for sale by the Company from Germany. All activities necessary to carry out the sale of products, contact with customers, and marketing will be performed at the Company's headquarters in Germany. Also, all decision-making (management) activities related to the Company's operations will be performed from the seat of the Company. the services performed by the Related Company under the Production Agreement would not be provided for that site, but for the activities carried out in Germany. As the Company indicated in the Application, the processing, storage and logistics services to be provided by the Related Company will be collected at the Company's headquarters in Germany and will be used for sale by the Company from Germany. All activities necessary to carry out the sale of products, contact with customers, and marketing will be performed at the Company's headquarters in Germany. Also, all decision-making (management) activities related to the Company's operations will be performed from the seat of the Company. storage and logistics services to be provided by the Related Company will be collected at the Company's headquarters in Germany and will be used for sale by the Company from Germany. All activities necessary to carry out the sale of products, contact with customers, and marketing will be performed at the Company's headquarters in Germany. Also, all decision-making (management) activities related to the Company's operations will be performed from the seat of the Company. storage and logistics services to be provided by the Related Company will be collected at the Company's headquarters in Germany and will be used for sale by the Company from Germany. All activities necessary to carry out the sale of products, contact with customers, and marketing will be performed at the Company's headquarters in Germany. Also, all decision-making (management) activities related to the activities of the Company will be performed from the seat of the Company.

To sum up, in the opinion of the Complainant, the place of providing services that the interested party will provide to her under the Production Agreement should be determined in accordance with the general rule expressed in Art 28b paragraph. 1 of the VAT Act.

The violations shown above, committed by the tax authority when issuing an individual interpretation, result in a violation of Art. 14h of the Act, which requires the use in cases concerning individual interpretations, including art. 120 and Article 121 § 1 of the Tax Act, imposing an obligation on tax authorities to act on the basis of legal provisions and in a manner that inspires confidence. The company is of the opinion that by applying an incorrect interpretation of Art. 11 of the Implementing Regulation and incorrect application of Art. 28b paragraph. 2 of the VAT Act, the authority issued an Interpretation that is inconsistent with generally applicable law, and thus violates the principle of trust in tax authorities. In particular, the Company cited in its application the judgment of the Supreme Administrative Court of March 20, 2017, file ref. I FSK 1884/14, taking into account the guidelines of the CJEU in relation to the issue considered by the Polish court (case C-605/12) on the fixed place of business and the question of the possibility of recognizing whether the technical and personal resources of another entity can be considered sufficient to create a permanent place of business. If the Authority does not share the Applicant's arguments, including the arguments contained in the cited jurisprudence, it should refer in detail to the justification of the court judgment and respond to the views expressed there, explaining in detail why it rejects them. whether the technical and personal resources of another entity can be considered sufficient to create a permanent place of business. If the Authority does not share the Applicant's arguments, including the arguments contained in the cited jurisprudence, it should refer in detail to the justification of the court judgment and respond to the views expressed there, explaining in detail why it rejects them.

The Provincial Administrative Court in Gliwice considered the following:

The complaint deserves to be upheld.

Court control - pursuant to art. 3 § 1 and § 2 point 4a of the Act of August 30, 2002, Law on proceedings before administrative courts (i.e. Journal of Laws of 2019, item 2325 hereinafter: "PPSA"), the individual interpretation of the tax law of [...] on tax on goods and services. The dispute in the present case revolves around the question whether, in the described future event (in connection with the planned reorganization and expansion of production), which under Article 14c of the Act is binding on both the interpreting body and the Court, the applicant will have a permanent place of business in Poland business activity within the meaning of Art. 28b paragraph. 2 of the VAT Act and Art. 11 of the Implementing Regulation and Art. 44 of Council Directive 2006/112 / EC of 28 November 2006 on the common system of value added tax (Dz.

The second issue to be resolved is the location of the provision of services that the Related Company will provide to the Company under the Production Agreement.

On the other hand, with regard to recognizing the set of assets contributed by the Company by way of a contribution in kind to the Associated Company as an organized part of the enterprise and the right to deduct input tax from invoices documenting the purchase of the assets transferred by the Company, the authority considered the Company's position to be correct (questions 2 and 3). This means that the above-mentioned legal issue remains

beyond the scope of the case, as in this part the position of the interpretative body has not been challenged. It should be emphasized that the position of the interpreting body in this respect is consistent with the opinion of the complainant, therefore the authority should take the above into account when re-examining the case.

The court fully shares the arguments presented in the judgments of the Provincial Administrative Court in Gliwice: of January 7, 2019, file ref. III SA / GI 908/18 and dated February 27, 2019, file ref. III SA / GI 913/18, dated November 20, 2019, file ref. no.I SA / GI 737/19, of March 11, 2020, file ref. no.I SA / GI 1029/19, of July 28, 2020, file ref. act I SA / GI 141/20 (all the cited rulings of administrative courts are available in the internet database of judgments of the Supreme Administrative Court at: <http://orzeczenia.nsa.gov.pl>), therefore it will be used in the further part of the justification.

According to Art. 15 of the VAT Act, taxpayers are legal persons, organizational units without legal personality and natural persons who independently conduct business activities referred to in paragraph 2, regardless of the purpose or result of such activity.

Based on Article. 28b paragraph. 1 of the VAT Act, the place of providing services in the case of providing 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. 1 and 1a, art. 28 g of paragraph 1. 1, art. 28i, art. 28j paragraph. 1 and 2 and article. 28n.

In the event that 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 provision of these services is the fixed place of business (Article 28b (2) of the VAT Act).

With art. 11 sec. 1 of the Implementing Regulation, it follows that a permanent place of business means any place that is characterized by sufficient stability 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 of this permanent place of business.

The issue of the conditions for recognizing what should be understood as a permanent place of business has been the subject of many judgments of national and EU courts, which have evolved in subsequent judgments, taking into account the conditions and mechanisms of economic trading.

In one of the last judgments - the judgment of 7 May 2020 in case C-547/18, the CJEU ruled that Article 44 of Council Directive 2006/112 / EC of 28 November 2006 on the common system of value added tax, amended by Council Directive 2008/8 / EC of 12 February 2008 and Art. 11 sec. 1 and art. 22 sec. 1 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112 should be interpreted as meaning that the service provider cannot infer the existence in the territory of a Member State of a permanent place of business of a company with its registered office in a third country by the mere fact that that company has a subsidiary in that Member State and that that service provider is not required to conduct an audit to make such an assessment,

In turn, in the judgment of October 16, 2014 in the **Welmory** case C-605/12, EU: C: 2014: 2298 The CJEU stated that the first taxpayer established in one Member State and who uses the services provided by the second taxpayer established in another Member State should be considered as having another Member State has a "fixed place of business" within the meaning of Art. 44 of Directive 2006/12 / EC, in order to determine the place of taxation of these services, if that fixed location is characterized by sufficient stability and an appropriate structure in terms of human and technical resources to enable him to receive the services and use them for the purposes of his business, which will be examined belongs to the referring court.

The ruling concerned a Cypriot company that organizes auctions on an online sales platform. It sells packages of "BIDÓW" (rates), ie the right to submit offers for the purchase of goods put up for auction by offering a price higher than the last proposed price. This company concluded a cooperation agreement with a Polish company consisting in providing it with an exclusive auction website under the appropriate domain along with accompanying services (advertising, handling, information provision and data processing services). The Polish company generated revenues from online auctions on the website of the Cypriot company and a part of the profit of the Cypriot company from the sale of BIDs, which are used by customers in Poland to submit an offer at the auction on this website. The Tribunal emphasized that the question concerns the interpretation of Art. 44 of Directive 2006/112 from the point of view of the recipient, and the previous case law has taken into account the point of view of the service provider, which means that when interpreting, one should take into account the wording of the provision, its context and the objectives of the regulation which this provision constitutes a part of (avoidance of double taxation or non-taxation of revenues). As pointed out by the Court, the most useful link for determining the place of supply of services from a tax point of view, and therefore the main link, is the place where the taxpayer is established. The inclusion of another place comes into play only where considering that seat as a connecting factor does not lead to a reasonable solution or creates a conflict with regard to another Member State. The Tribunal also pointed out that in Art. 44 of the Directive, the seat of business comes first, and the permanent place of business only second, which is an exception to the general rule. Hence, the indication of own personnel and technical facilities, or the availability of other facilities comparable to the availability of own facilities (personnel, technical), control over these facilities, the possibility of receiving and using the purchased services for their own needs - conducting business activity of the contractor. The services provided by a Polish company to the Cypriot company should be distinguished from the services provided by the latter to consumers in Poland.

In the opinion of the Court, the above judgment of the CJEU, although it does not correspond to the facts of the case at hand, contains important guidelines regarding the definition of the concept of a fixed place of business.

Following the above indications, also resulting from other judgments of the CJEU, regarding the determination of a permanent place of business, it should be pointed out that a certain minimum scale of activity is necessary, which is an external feature that activity in this place is conducted continuously (judgment C-231/94), i.e. in a permanent, repetitive and permanent manner (judgment 168/84), a minimum durability is also required by pooling the permanent human and technical resources necessary to provide certain services independently (judgment C-73/06 or C-260 / 95).

In the description of the facts / future event, the complainant indicated that its seat was in Germany and that, as part of the change in the organizational structure, it would acquire all shares of the Related Company from the Mother Company, and would transfer to the Related Company by way of a contribution in kind all the assets (tangible and intangible) it had in Poland, will delegate one employee to the Related Company part-time to perform the function of the Financial Director and Managing Director of this entity (while during his stay in Poland, the employee will work only for the Related Company) and will conclude a Production Agreement with the Related Company covering his the scope of all stages of yarn processing and ancillary services - warehousing and logistics. She added that the Related Company intends to provide services only to the Company. Consequently, as a result of the planned reorganization, the Related Company will become the main contractor for the Company in Poland, and the existing Subcontractor of the Company will become the Company's subcontractor. The final products intended for the Polish and Eastern European markets will be delivered to buyers directly from the territory of Poland and the Company will recognize VAT-taxed transactions in Poland (i.e. domestic and Community supplies of goods, export of goods).

it is not necessary for the entity's activity to be considered a permanent place of business in Poland for the entity itself to provide services or deliver goods using sufficient resources. It is also important that the created structure of the entity's activity should be able to receive and use the services provided for its own needs. At the same time, it is not necessary to have one's own personnel and technical resources to adopt a permanent place of business in a given country. However, the taxpayer must have - based on the requirement of sufficient permanence of the place of business - comparable control over the staff and technical resources. " that the entity itself provides services or supplies of goods using sufficient resources. It is also important that the created structure of the entity's activity should be able to receive and use the services provided for its own needs. At the same time, it is not necessary to have one's own personnel and technical resources to adopt a permanent place of business in a given country. However, the taxpayer must have - based on the requirement of sufficient permanence of the place of business - comparable control over the staff and technical resources. " that the entity itself provides services or supplies of goods using sufficient resources. It is also important that the created structure of the entity's activity should be able to receive and use the services provided for its own needs. At the same time, it is not necessary to have one's own personnel and technical resources to adopt a permanent place of business in a given country. However, the taxpayer must have - based on the requirement of sufficient stability of the place of business - comparable control over the staff and technical resources. " At the same time, it is not necessary to have one's own personnel and technical resources to adopt a permanent place of business in a given country. However, the taxpayer must have - based on the requirement of sufficient stability of the place of business - comparable control over the staff and technical resources. " At the same time, it is not necessary to have one's own personnel and technical resources to adopt a permanent place of business in a given country. However, the taxpayer must have - based on the requirement of sufficient stability of the place of business - comparable control over the staff and technical resources. "

In the opinion of the interpreting body, the Company meets the conditions for recognizing the Company's operations described in the future event as a permanent place of business in Poland, which is characterized by sufficient stability and an appropriate structure in terms of personnel and technical resources. In the opinion of the interpreting body, it follows from all the circumstances of the case that the Related Company was established only for the purpose of conducting business activities for and in the scope strictly determined by the Company. Due to the planned expansion and expansion of its operations in Poland, the company intends to increase the amount [...] processed, and the products manufactured in Poland, intended for the markets of Eastern Europe and Poland, will be sent to customers directly from Poland. The authority stated that that the Company intends to conduct activities related to processing [...] in an organized and continuous manner, under which it will perform activities subject to VAT (domestic supplies, intra-Community supplies, exports). Despite the fact that the Company will not have its own technical or personnel facilities on the territory of Poland, as all activities under the services provided under the Production Agreement will be performed by employees of the Related Company, the Company will have a permanent place of business in Poland, because the resources technical and personal services necessary to conduct part of the economic activity in the territory of the country will be ensured by using the services of the Related Company. under which it will perform activities subject to VAT (domestic supplies, intra-community supplies, exports). Despite the fact that the Company will not have its own technical or personnel facilities on the territory of Poland, because all activities under the services provided under the Production Agreement will be performed by employees of the Related Company, the Company will have a permanent place of business in Poland, because resources technical and personal necessary to conduct some business activity in the territory of the country will be ensured by using the services of the Related Company. under which it will perform activities subject to VAT (domestic supplies, intra-community supplies, exports). Despite the fact that the Company will not have its own technical or personnel facilities on the territory of Poland, as all activities under the services provided under the Production Agreement will be performed by employees of the

Related Company, the Company will have a permanent place of business in Poland, because the resources technical and personal necessary to conduct some business activity in the territory of the country will be ensured by using the services of the Related Company.

In the opinion of the interpreting body, the use of the technical infrastructure and personnel available in Poland to carry out part of the Applicant's business activity, in an organized and continuous manner, qualifies the Applicant's planned activity in the territory of the country as a permanent place of business in Poland.

The court shares the complainant's allegation that the interpretative body violated Art. 28b paragraph. 2 of the VAT Act and Art. 11 of the Implementing Regulation in the manner specified in the petitum of the complaint.

The description of the future event, which is related to both the interpreting body and the Court (art.14c of the Act), shows that the condition of establishing a permanent establishment in the form of gathering permanent human and technical resources necessary for the provision of certain services in an independent manner has not been met. .

The complainant pointed out that the employees of the Related Company, including the Managing Director, did not have any powers to act on behalf and for the benefit of the Company. During his stay in Poland, the Managing Director will perform work only for the Related Company and will not be authorized to act in the name and on behalf of the Complainant, in particular with regard to activities undertaken by the Company in Poland. Employees of the Related Company, carrying out activities related to the provision of production, storage or logistics services for the Company, will not have the competences necessary to conduct the Company's business. All activities related to the sale of products, distribution, contacts with customers, whether the marketing activities will continue to be carried out by the Company directly from the territory of Germany (regardless of whether the entire processing process will take place in Poland or only part of it). The Affiliated Company will not be involved in these activities and will not have any direct contact with the Company's customers. Also management activities - related to the activities of the Company will be performed from the seat of the Company, i.e. from Germany.

The scope of auxiliary activities performed by the Affiliated Company will include only technical processes, such as storage of finished products and logistic processes (based on shipping documents prepared by the Company in Germany). These activities will only be auxiliary, secondary to activities undertaken by the Company in Germany. Execution of orders and all other activities will be carried out in accordance with the guidelines and requirements provided from the Company's headquarters in Germany.

In the description of the future event, the complainant indicated that all the assets (including real estate, machines and equipment) currently owned by the Company in Poland will be contributed to the Related Company, and consequently the Company will not have any tangible or intangible assets in Poland. . The Production Agreement will not grant the Company the right to use a specific warehouse space, including the right to manage this space, or to decide on the method and place of storage of products in the warehouse. The company will have the right to access all real estate (both those that will be transferred to the Related Company and those owned by the Subcontractor) and the right to access machines, mainly for the purpose of technological inspections.

Summing up, the description of the future event (the actual state of affairs) shows that the complainant will not have the required structure in terms of technical and human resources, necessary to establish a permanent place of business. As already indicated, the employee seconded by the Company (part-time) to perform the function of the Financial Director and Managing Director of the Related Company during his stay in the territory of the country will work exclusively for the Related Company and will not be authorized to act in any way on behalf and for the benefit of the Complainant. The Company does not employ (and will not employ) other employees in Poland, nor does it outsource them, and it does not exercise any control over the personnel of the Related Company. The infrastructure is also not subject to the applicant's supervision. The applicant will only have access to the property for the purposes of technological checks. Provision of services based on a Production Agreement should be distinguished, including: storage of goods, from providing the complainant with the storage infrastructure, which does not take place in the analyzed future event. It should be emphasized that this necessary control of the complainant over the personnel and technical facilities in Poland cannot be derived from the rules for the provision of services established between the complainant and the Related Company, which - obviously - are determined between the parties to any such agreement and the party's right to demand fulfillment of the conditions set by contractors. including, among others storage of goods, from providing the complainant with the storage infrastructure, which does not take place in the analyzed future event. It should be emphasized that this necessary control of the complainant over the personnel and technical facilities in Poland cannot be derived from the rules for the provision of services established between the complainant and the Related Company, which - obviously - are determined between the parties to any such agreement and the party's right to demand fulfillment of the conditions set by contractors. including, among others storage of goods, from providing the complainant with the storage infrastructure, which does not take place in the analyzed future event. It should be emphasized that this necessary control of the complainant over the personnel and technical facilities in Poland cannot be derived from the rules for the provision of services established between the complainant and the Related Company, which - obviously - are determined between the parties to any such agreement and the party's right to demand fulfillment of the conditions set by contractors.

The view expressed in the judgment of the Provincial Administrative Court in Warsaw of July 12, 2017, ref. No. III SA / WA 1979/16, in which the Provincial Administrative Court ruled that the omission of the requirement of "sovereignty" (which was also committed by the authority in the present case) would mean that this criterion is generally met when the entity purchases services provided in a country other than its seat, irrespective of the scope of the entity's powers to manage such personnel, exercise control over them or impose the manner of performing the ordered service.

The existence of the applicant's permanent place of business in Poland cannot be deduced from the mere fact that the Related Company is a subsidiary of the applicant (the above-mentioned judgment of the CJEU in case C-547/18).

The availability of personnel and technical facilities comparable to the availability of own facilities is not determined by the economic use of people and equipment. Undoubtedly, the purchase of each service purchased by an economic entity is aimed at specific economic benefits, which, however, does not automatically create a place of permanent activity in the country where the service provider provides services.

It should be noted that management decisions regarding the functioning of the complainant are made outside of Poland (in Germany), and the Affiliated Company (its employees) does not have the power to make decisions, incur liabilities on behalf of the complainant, including concluding contracts on her behalf and for her thing. Activities related to the sale of products, contact with customers, and marketing will still be carried out by the Company

directly from the territory of Germany. Also, all decision-making (management) activities related to the Company's operations will be performed from the seat of the Company, i.e. from Germany,

In the opinion of the Court, the interpretative body therefore wrongly assumed that the applicant had sufficient technical and personnel resources in Poland to consider that she had a permanent place of business here.

The Court agrees with the complainant that the Director's erroneous recognition that the complainant has a permanent place of business in the territory of Poland also led to the erroneous finding that the place of the provision of services performed by the Related Company under the Production Agreement for the Company was the territory of Poland.

However, the Court did not agree with the allegation of infringement of the above-mentioned provisions of the procedure. It is not possible to infer a breach of the principle of trust in tax authorities from the fact that the legal provisions were interpreted differently from the complainant (in the case of improper), or the views of the judiciary were not taken into account. The interpreting body is not obliged to respond to all arguments of the applicant contained in the application, including decisions issued in various factual situations and in relation to other parties.

Due to the above, the Court, pursuant to Art. 146 of the PPSA, repealed the challenged interpretation. Indications for the authority in the course of reconsidering the case result from the above considerations of the Court.

The costs of the proceedings were determined pursuant to Art. 200 and art. 205 § 2 and 4 of the Commercial Companies Code, awarding the complainant the amount including the fee paid for the complaint, the costs of legal representation specified in § 2 sec. 1 point 2 of the Regulation of the Minister of Justice of 16 August 2018 on remuneration for activities of a tax advisor in proceedings before administrative courts (Journal of Laws of 2018, item 1687) and a stamp duty on the power of attorney, i.e. PLN 697