I SA / Gl 1401/19 - Judgment of the Provincial Administrative Court in Gliwice

Date of the judgment	2020-10-06 *invalid judgment*
Date of receipt	2019-10-04
Court	Provincial Administrative Court in Gliwice
Judges	Anna Apollo / chairman rapporteur / Małgorzata Herman Marzanna Sałuda
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	The reimbursement of the costs of proceedings was awarded. The contested individual interpretation was repealed
Cited regulations	Journal of Laws 2019 item 900 art. 14c par. 1 and 2 *The Act of August 29, 1997 Tax Ordinance - consolidated text* Journal of Laws 2018 item 2174 art. 28b paragraph. 2 *Act of March 11, 2004 on tax on goods and services - consolidated text* Journal of Laws of the European Union of 2011 No. 77, item 1, Art. 11, art. 21 *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 EU L* 2006 No. 347 item 1 Art. 44 *Council Directive of 28 November 2006 No. 2006/112 / EC on the common system of value added tax*

SENTENCE

Provincial Administrative Court in Gliwice composed of the following composition: President Judge of the Supreme Administrative Court Anna Apollo (spokesman), Judges Judge of the Provincial Administrative Court Małgorzata Herman, Judge of the Provincial Administrative Court Marzanna Sałuda, Specialist Reporter Beata Kujawska, after hearing at the hearing on October 6, 2020, the case from the complaint A SE with its registered office in B. 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) awards the Director of the National Tax Information to the complainant the amount of PLN 697 (in words: six hundred and ninety-seven zlotys) for the reimbursement of court proceedings costs.

SUBSTANTIATION

Contested by the individual interpretation of [...] No. [...] the Director of the National Tax Information, pursuant to Art. 13 § 2a, art. 14b § 1 of the Act of August 29, 1997. Tax Ordinance (Journal of Laws of 2019, item 900, as amended, hereinafter referred to as Op) stated that the position of A SE based in B. (hereinafter referred to as as the applicant or company) presented in the application for an interpretation of the tax law regarding value added tax in terms of determining the permanent place of business and the place of taxation of purchased services - is incorrect.

The following facts are presented in the application initiating the procedure and in the supplementary letter.

The applicant operates in the legal form of a European company (Societas Europaea), the offer of which is available in various European countries. The main subject of its business activity is the sale of goods to clients (natural persons who do not conduct business activity - consumers and entrepreneurs) via a dedicated internet platform. The internet platform is available to users from various European countries, including Poland, and the economic activity consisting in the sale of goods on their behalf is carried out using warehouses located in the territory of EU Member States, i.e. at the moment in Italy, France, Germany, Sweden and Poland. These warehouses are not owned by the company.

With regard to sales in Poland and warehouses located in Poland, the applicant:

• it transfers its own goods to Poland from warehouses located on the territory of other Member States and from Poland to warehouses located on the territory of other Member States - depending on the current demand,

• provides paid deliveries of goods within the territory of the country to customers, i.e. natural persons who do not conduct business activity (consumers) and to entities conducting business activity (VAT taxpayers),

• purchases goods on the territory of Poland,

• makes intra-Community acquisitions of goods on the territory of Poland and intra-Community supplies of goods,

• does not exclude the possibility of importing goods to the territory of Poland in the future.

The company is registered as an active VAT payer in Poland. At the same time, the applicant:

- is not the owner, does not rent, lease, is not a party to a lease or other agreement of a similar nature with regard to real estate located in Poland used for business activities, including warehouses, points of sale, factories, etc.,

- it does not own any significant assets located in Poland, i.e. in particular machines, vehicles, servers, equipment, the company may own certain assets located in Poland, which are used in particular in goods return centers, such as e.g. goods,

- purchases logistics services from other entities belonging to the B capital group, i.e. currently from C sp. z oo, D sp. z oo, and also from E sp. z oo (hereinafter jointly referred to as: "service providers" or individually: "service provider"),

- does not employ any employees in Poland, and service providers use their own employees or subcontractors in the course of providing the above-mentioned logistics services to the applicant SE.

- does not have a representative operating in Poland for and on behalf of the company, in particular, in Poland, there are no persons authorized to conclude, negotiate and terminate contracts on behalf and for the benefit of the applicant.

According to the contracts for the provision of logistics services, service providers may, in particular, provide the applicant with:

- handling of incoming transports (coordination of vehicles with deliveries, vehicle unloading, goods receipt, goods collection, goods storage),

- handling outgoing shipments (receiving customer orders, collecting goods, sorting collected goods, packing goods, printing shipping documents, loading shipments, handing over packages to the carrier),

- handling returns (unloading returns, quality and quantity control of goods, assessment of the condition of goods, restoration of goods, transfer of goods for storage),

- inventory.

In addition, service providers may carry out the above activities themselves, as well as subcontract them. Currently, several dozen employees of service providers and several thousand employees of subcontractors not related to Group B are involved in the process of providing services to the applicant. The company's cooperation with service providers is based on contracts, which, as a rule, are to be valid for several years.

Service providers own the engineering and technical facilities in the warehouses, including racks and transporters, and bear all costs related to their assets and the costs of maintenance services. They are independent in organizing warehouse work and disposing of warehouse space. They are also obliged to ensure compliance with the Group's social standards to the extent that these apply to them or the subcontractors they employ.

According to the above-mentioned Under the contracts, the applicant is entitled to inspect the warehouses only to the extent that it is possible to control the compliance of the services provided by the service provider with the contract and other applicable regulations, in particular the statutory provisions, data protection, applicable collective remuneration agreements and compliance with the social standards of the group. During the inspection, the applicant's staff should be properly registered (e.g. by issuing an electronic access card) and, if possible, accompanied by the service provider's staff (employee) during the inspection.

Service providers are fully responsible for the management and control of their personnel, which are legally solely responsible to them. The applicant has no powers over the service providers' staff, nor is it entitled to issue unilateral formal instructions to the service providers, their employees or subcontractors in relation to the performance of the services. The company has the right to demand the submission of evidence and information regarding the terms and conditions of employment of subcontractors of service providers, which, according to the contract, are to meet group standards in this respect.

As agreed between the service providers, to provide services, they use the Group Warehouse Management System (hereinafter: "WMS"), which has been developed and is made available to service providers by the applicant. WMS is a set of programs used in all logistic centers operated by entities from the B Capital Group as well as their external suppliers to provide services. The WMS is used to handle the receipt of goods, warehouse management in the field of e.g. records of goods or goods flow management.

As a rule, the company is the owner of the goods until they are sold to customers. There may also be situations where the ownership of goods being the subject of services provided by Service Providers will not belong to the company, but to another entity - e.g. a business partner.

Service providers are not authorized to act for and on behalf of the company. Their remuneration for the services provided is calculated based on the costs incurred by them in connection with their provision, increased by a percentage of the mark-up. Under the contracts, the company or its appointed

auditor was granted access to the books and records of all costs incurred in the performance of the services provided, to the extent required to verify the basis for calculating service providers' remuneration.

According to the contractual arrangements between the applicant and the service providers, they are not obliged to provide services exclusively to the company. The time for which the applicant will store the goods in the service providers' warehouses before they are sold / released from the warehouse to the recipients is an individual matter and may vary depending on the demand for a given goods.

The company also works with partners. In relation to Poland, this cooperation is as follows:

- offers for the sale of goods owned by the partners are posted on the company's retail platform. In the case of purchase of such goods by the customer, the partner is informed by the company about the received order and becomes responsible for shipping the ordered goods to the buyer, or

- offers for the sale of goods owned by the partners are posted on the applicant's retail platform. If such goods are purchased by the customer, the company becomes responsible for shipping the ordered goods to the buyer.

In the future, the applicant also plans to implement a third cooperation model, in which the partner will sell the goods on its sales platform, and the company will provide logistics services for orders (currently this model is being tested in other countries where the applicant sells goods) .

The company, SE, in addition to making its internet platform available for sale of products belonging to partners, may also undertake customer service activities on their behalf (also with the help of other companies from group B), i.e. process orders and payments, send invoices, give discounts on damaged goods, or manage returns. The scope of the above activities may vary depending on the adopted model of cooperation.

The handling of orders placed via the online platform, including their acceptance, processing, informing about the status of implementation, settling complaints, accepting payments) takes place outside Poland. In particular, servers located outside the territory of Poland are used for this purpose.

After receiving the order from the customer, the goods are ready for delivery from a warehouse located in Poland or outside of it (depending on the place of storage of the goods at the time of ordering). There may be situations where the ordered goods are in different warehouses at the time of placing the order. In this case, the goods will first be sent to one warehouse in order to complete the order, and then after completion, sent to the buyer.

As a rule, services related to the shipment of goods purchased by buyers are performed by external courier companies acting on behalf of the applicant. In the case of the sale of goods owned by partners, depending on the adopted cooperation model, the partner may be responsible for transport (the third cooperation model, which may be introduced in Poland in the future, concerns the logistics of sales carried out using the Partners' platforms).

At present, the company acquires services related to servicing Polish-speaking clients from a related entity of Group B, which provides them with the use of an unrelated entity (which uses staff in Poland for this purpose). The applicant also allows the possibility of placing an order during a telephone conversation with a customer service consultant. Placing an order is then assisted by a consultant who deals with the technical operation of the Internet platform in accordance with the customer's instructions regarding the ordered product (s). The above option is currently available only to customers who have a personal account on the internet platform.

The company also purchases goods return services from other entities. Currently, these services are purchased from an entity related to the applicant based in Germany. In the course of providing services to the applicant, this entity acquires them, inter alia, from external service providers (not entities from the group) operating return centers located in Poland. Currently, three return centers in Poland are used in order to handle returns of goods purchased through the Internet platform. As indicated above. The applicant may, from time to time, be the owner of some of the few assets located in Poland, which are used for handling goods return centers, such as e.g. specialized printers cooperating with WMS.

After the returned goods are delivered, they are unpacked and sorted into categories according to whether the goods can be re-directly for sale, need refreshing, goods have been sent back in violation of the rules, goods are worthless. After the sorting process, the items are packed and shipped to other warehouses (or remain in the warehouse that received the returned product) as required. Return centers do not store goods, but send them back to warehouses immediately, and do not refresh or dispose of goods.

The applicant is not the owner, rent, lease and is not a party to a lease or any other agreement of a similar nature with respect to real estates located in Poland that are used to provide services to her. In the future, it will also not be the owner of the above-mentioned type of asset. Neither is it the owner of any significant movable assets located in Poland (machines, vehicles, servers, equipment or other assets of a similar nature). Certain movable assets that he owns and located in Poland, such as goods transport trucks, are not of significant importance.

All management decisions relating to the Company, in particular decisions regarding business activities, development, sales, as well as general administration (such as finance, IT services, marketing) are made outside Poland, i.e. in Germany.

Based on the above description of the facts, the applicant asked the question:

1. In the described facts and future event, should it be considered that the company has a permanent place of business in Poland within the meaning of the VAT regulations, and, consequently, will the place of providing services purchased from service providers be in Poland? (marked in application no.2)

2. Are the services purchased by the applicant from service providers described in the application subject to VAT in Poland? (marked in addition to application No. 3).

Presenting her own position, the applicant stated that she did not have a permanent place of business in Poland. As a consequence, the services it purchases from service providers will not be taxed in Poland.

In turn, justifying the above position, the applicant indicated at the beginning that the concept of a permanent place of business was not defined in the provisions 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: the VAT Act), in the regulations implementing this Act or in the provisions of Directive 2006/112 / EC of the Council of 28 November 2006 on the common system of value added tax (hereinafter: Directive 112). This definition was introduced by the Council Implementing Regulation (EU) 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112 / EC (hereinafter: Regulation 282/2011), largely based on the line of argumentation developed by the Court of Justice of the European Union. Pursuant to art. 11 and art. 53 of Regulation No 282/2011, for the purposes of applying Art.

44 of Directive 112, a permanent place of business means a place which is not the place of the taxpayer's business seat, but it is characterized by sufficient stability and an appropriate structure in terms of personnel and technical resources to:

1. enable the taxpayer to receive and use the services provided for his own needs of that fixed place of business or

2. enable him to provide certain services that he performs,

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

Moreover, Art. 11 of Regulation 282.2011 in paragraph 3 indicates that having a VAT identification number in a given country does not in itself constitute a permanent place of business.

The above-mentioned criteria, which define the concept of a permanent place of business, are also confirmed and developed in the jurisprudence of the CJEU (for example in cases: C-168/84, Gunter Bcrkholz; C-231/94, Faaborg-Gelting Linien; 190/95, ARO Lease BY), as well as in the jurisprudence of administrative courts (e.g. the judgment of the Provincial Administrative Court in Warsaw of February 25, 2015, file reference number III SA / Wa 3741/14).

Having a permanent place of business in a country other than the country of the taxpayer's seat occurs only if the following conditions are jointly met with regard to a given economic activity:

1. there is an appropriate structure of human and technical resources necessary to conduct business activity,

2. economic activity is carried out, including concluding contracts and making decisions, at least to some extent independently, with regard to the main activity of the foreign entity,

3. there is a certain degree of stability understood as the intention to lead

business activity on a continuous basis.

At the same time, it is not necessary to have its own personnel and technical resources to adopt a permanent place of business in a given country, but the taxpayer must be entitled - under the requirement of sufficient permanence of the place of business - to have comparable control over the personnel and technical resources.

The requirement to have a structure in terms of personnel and technical resources, which should be "appropriate", narrows the framework for understanding the concept of a fixed place of business only to those cases in which the entity has an appropriate structure in a country other than the country of its registered office - for example in Poland, material, permanent (i.e. repetitive and permanent), i.e. it has both human staff and technical infrastructure in the country, using which it is able to conduct activities in an organized and continuous manner, under which it carries out activities subject to tax on goods and services.

Referring to the facts written in the application, the applicant stated that she did not have technical and human resources in the territory of Poland. It does not have a legal title to any facility located in Poland and does not actually have any facility located in Poland or any significant business infrastructure therein. The few individual assets that the company or another entity from the group may own in Poland (e.g. transport carts for goods) cannot by themselves be used to conduct the company's main activity, which is the sale of goods via an online platform. Moreover, the company is not entitled to manage the work of warehouses or to interfere in their functioning on an ongoing basis,

The applicant also does not have human resources in Poland, because service providers provide services through employees or subcontractors employed by them. It has a limited influence on the organization of the service provider's work, in particular on the organization of the work of their subcontractors. Return centers are operated by third parties not belonging to Group B. The company itself does not employ any employees in Poland, does not have sales representatives acting on behalf of and for its benefit, in particular it has no persons authorized to conclude, negotiate and terminate contracts in on behalf of and on behalf of the applicant. All business decisions regarding the company's business activities are made outside Poland.

In the light of the description of the activities undertaken by the applicant on the territory of Poland, it is not possible to use the services purchased from service providers for the purposes of the activity conducted in that country. The company does not have infrastructure in Poland that would enable it to conduct business consisting in the sale of goods to customers in this country through a dedicated online platform. The infrastructure used by contractors is used only for the logistic handling of placed orders and returns. On the other hand, the Company does not have servers in Poland, personnel who would perform decision-making functions in Poland with regard to the purchase and sale of goods, or persons who would have formal authorization to conclude contracts on behalf of and for the benefit of the Company, including contracts for the purchase and sale of goods. Consequently, in her opinion,

Summarizing, the applicant stated that:

1. it does not have technical and human resources infrastructure on the territory of Poland, and in particular it does not have a legal title to any facility located on the territory of Poland, it does not actually have any facility located in Poland or any significant business infrastructure located therein, and does not have in Poland, representatives acting on behalf of and on behalf of the company, in particular, they do not have persons authorized to conclude, negotiate and terminate contracts on behalf of and for the benefit of the company;

2. does not operate independently on the territory of Poland, because all business decisions regarding its business activities are made in Germany, and its presence on the territory of Poland resulting from, inter alia, from the purchase of logistics services, it is only ancillary (accessory) to the main activity conducted in Germany;

3.the activities performed by it in the territory of Poland, in particular due to the lack of appropriate personnel and technical resources, are not permanent and are intended to support business activities consisting in the sale of goods via the platform, which is performed mainly outside the territory of Poland .

As a result, the applicant does not consume services in Poland and they cannot be taxed in Poland.

The authority found the above position incorrect in its entirety.

Like the applicant, at the beginning he referred to Art. 11 sec. 2 and 3 of Regulation No 282/2011 and the case law of the CJEU

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

Due to the criteria indicated in the above-mentioned provision, it should be stated 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 under which it carries out activities subject to tax on goods and services. Therefore, it should be assumed 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. Wherein, 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.

In the case in question, in the structure of the applicant's activity in Poland created and described in the application, the stability criterion (understood as the fact that the entity having such a place intends to operate from this place on a permanent basis) results from involvement in tasks related to logistics services and sale of goods sufficient personal and technical resources. Despite the sale of goods via the internet platform, the Company uses three warehouses in Poland, where Service Providers handle incoming shipments, handle outgoing shipments, handle returns, inventory and other related services for the benefit of the Company. Moreover, the Company acquires other services for the delivery of goods stored in warehouses located in Poland. At the same time, the Applicant is the owner of certain movable assets located in Poland, such as transport carts for goods, specialized printers cooperating with WMS, as well as the applicant provides WMS service providers, which is used to handle the receipt of goods, warehouse management in the field of, among others goods records or goods flow management. In addition, the Company is entitled to inspect the warehouses to the extent that allows for the control of compliance of the services provided by the Service Provider with the contract and other applicable regulations. At the same time, the Service Providers currently provide logistic services only to the Applicant. Therefore, in the present case, the fifth criterion of having technical and human resources necessary to conduct some economic activity in the territory of the country is met. The presented circumstances indicate that the applicant has real power over the technical and personnel facilities, as she is able to properly use them in the storage, handling and sale of goods. Own resources and purchased services, as well as personal involvement and infrastructure of other entities both within the capital group and from outside the group used by the applicant, are closely related to her taxable activities in Poland, consisting in the sale of goods. The scope of the services ordered and used by the company allows to conclude that it will create a permanent place of business in Poland. it is able to properly use them in its activities in the field of storage, handling and sale of goods. Own resources and purchased services, as well as personal involvement and infrastructure of other entities both within the capital group and from outside the group used by the applicant, are closely related to her taxable activities in Poland, consisting in the sale of goods. The scope of the services ordered and used by the company allows to conclude that it will create a permanent place of business in Poland. it is able to properly use them in its activities in the field of storage, handling and sale of goods. Own resources and purchased services, as well as personal involvement and infrastructure of other entities both within the capital group and from outside the group used by the applicant, are closely related to her taxable activities in Poland, consisting in the sale of goods. The scope of the services ordered and used by the company allows to

conclude that it will create a permanent place of business in Poland. as well as personal involvement and the infrastructure of other entities, both within the capital group and outside the group, used by the applicant, are closely related to her taxable activities in Poland, consisting in the sale of goods. The scope of the services ordered and used by the company allows to conclude that it will create a permanent place of business in Poland. as well as personal involvement and the infrastructure of other entities, both within the capital group and outside the group, used by the applicant, are closely related to her taxable activities in Poland, consisting in the sale of goods. The scope of the services ordered and used by the company allows to conclude that it will create a permanent place of business in Poland.

In the opinion of the authority, however, the fact that all management decisions relating to the company, in particular decisions regarding business activity, development, sales, as well as general administration (such as finance, IT services, marketing), are irrelevant in this case, are made in Germany, because constancy | the place of business cannot be equated with the intensity and frequency of activities undertaken as part of the business activity, as well as with management decisions that are not made in the country. Determining the place of the head office of the enterprise is important when determining the place of business, but these functions do not determine the permanent place of business.

Consequently, the services provided by service providers should be regarded as provided to the company's permanent place of business in Poland. Therefore, the services in question are not subject to taxation pursuant to Art. 28b paragraph. 1 of the VAT Act at the company's seat, but pursuant to Art. 28b paragraph. 2 of the VAT Act in Poland, i.e. in the country where the company has a permanent place of business for which the services are provided.

In the complaint against the above individual interpretation, brought to the Provincial Administrative Court in Gliwice, the following was alleged:

1. breach of procedural regulations, i.e. art. 14c 1 and 2 of the Opportunities the company's failure to operate in the territory of the Republic of Poland as part of its permanent place of business and failure to present an internally consistent and logical legal justification for the authority's position in the event of a negative assessment of the applicant's position;

2. breach of the procedural regulations, ie art. 121 1 in connection with with art. 14h of the Tax Act by conducting the interpretation proceedings in a manner that violates the principle of trust in the tax authorities due to the issuance of the challenged interpretation, disregarding the relevant factual circumstances cited by the complainant for the interpretation and in response to the summons;

3. error of interpretation of Art. 11 sec. 1 and sec. 2 of Regulation No 282/2011 in connection with art. 44 of Directive 112 consisting in assuming that, in the light of the above-mentioned facts / future event, the complainant has a permanent place of business in Poland;

4. incorrect assessment as to the application of Art. 28b paragraph. 1 and sec. 2 of the VAT Act resulting from an error in the interpretation of the above-mentioned provisions of the regulation and consisting in the assumption that the place of taxation of the services purchased by the applicant is the territory of Poland.

In justifying the first of the allegations of the complaint, the complainant stated that the challenged interpretation issued by the Director of KIS is in breach of Art. 14c 1 and 2 of the Act, because it contains a number of statements that are not covered by the content of the Application and Supplement, and some of the circumstances relevant to the decision were completely omitted by the authority. As a consequence, the Director "went" beyond the

description of the facts and future events resulting from the Application and Supplement, which violates the provision of Art. 14c 1 of the Op. By ignoring the key facts of the case, the challenged interpretation in fact relates to a factual state / future event that does not coincide with the facts / future event resulting from the application and its supplement and should be repealed as such.

The above also proves that the authority violates Art. 121 in connection with Art. 14 hrs

As regards the third plea, the applicant in fact repeated the arguments already set out in the application for an individual interpretation. She emphasized, referring to the judgments of the CJEU, in particular to the judgment of 16 October 2014. C-605/12 **Welmory**sp. z oo, that in order to be able to speak of a permanent place of business, it is necessary to have a structure characterized by sufficient stability and this structure is to enable the receipt and use of services provided by the other company for own needs of business activity through technical and personnel facilities. However, the applicant has no technical or human resources in the territory of Poland. The company does not have legal title to any facility located in Poland and does not actually have any facility located in Poland or any significant business infrastructure therein. Handling orders placed via the online platform (including their acceptance, processing, information about the status of implementation, settlement of complaints, accepting payments), as a rule, takes place outside Poland. On the other hand, the activities undertaken in the territory of Poland will be aimed solely at the technical support of logistics processes (in terms of deliveries and returns) and will be auxiliary (accessory) to the company's activities in Germany and will be purchased from entities other than the applicant. It fully upheld the arguments put forward in support of its position in the application.

In response to the complaint, the Director of KIS motioned for its dismissal. In particular, it did not agree with the complainant's allegations that it had misinterpreted Art. 11 sec. 1 and 2 of Regulation No 282/2011 and article. 28b paragraph. 2 of the VAT Act. In its opinion, the circumstances presented by the applicant support the conclusion that it has sufficient technical and human resources to conduct business in Poland. At the same time, using the above resources, it carries out its activities in Poland on a permanent and organized basis. It uses three warehouses in which service providers handle incoming shipments, handle outgoing shipments, and handle returns, inventory and other related services o In addition, the complainant acquires other services for the delivery of goods stored in warehouses located in Poland. Moreover, the applicant is the owner of certain movable assets located in Poland, such as transport carts for goods, specialized printers cooperating with WMS, as well as providing service providers with WMS, which is used to handle the receipt of goods, warehouse management, including goods records or goods flow management. In addition, the applicant has the power to inspect the warehouses to a degree that enables the compliance of the services provided by the service provider with the contract and other applicable provisions. At the same time, and importantly with regard to her arguments, service providers currently provide logistic services exclusively to her.

Its own resources and purchased services, as well as personal involvement and infrastructure of other entities both within the capital group and outside the group used by the applicant, are closely related to its taxable activities in Poland, consisting in the sale of goods.

The Provincial Administrative Court considered the following.

According to Art. 3 § 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, as amended, hereinafter: Ppsa), control exercised by administrative courts also includes adjudication in cases of complaints against written interpretations of tax law provisions issued in individual cases.

Pursuant to Art. 57a Ppsa, a complaint against a written interpretation of tax law provisions issued in an individual case may be based only 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 invoked. The new wording of Art. 134 § 1 of the PPSA, according to which the court decides within the limits of a given case, however, not being bound by the allegations and motions of the complaint and the legal basis referred to, subject to Art. 57a. Moreover, according to the current wording of Art. 146 § 1 of the PPSA, the court, allowing the complaint against the individual interpretation of tax law (Art. 3 § 2 point 4a), repeals the interpretation, and Art.

It should also be emphasized that the specificity of the procedure for issuing a written interpretation consists, inter alia, in the fact that the interpretative body examines the matter only within the legal issue contained in the taxpayer's question, the facts presented by him and the legal assessment expressed by the taxpayer (the position of taxpayer). The authority does not conduct evidence proceedings in this type of cases, limiting itself to analyzing the circumstances specified in the application. In relation to these circumstances only, he then expresses his position, which should be a response to the position presented in a given case by the applicant, and in the event of a negative assessment of the position expressed in the application, it should indicate the correct position with a legal justification (Article 14b § 3 and Article 14c § 1 and 2 of the Op.)

In essence, the review of the administrative court consists in assessing whether the facts / future event presented by the taxpayer in the request for interpretation were the basis for the given tax interpretation, and if so, whether the authority correctly interpreted the legal provisions.

Understanding its role in this way, the Court decided that the complaint should be upheld.

The dispute in the present case revolves around the question whether, in the described facts, which under Article 14 c of the Op binds both the interpreting body and the Court, the applicant has a permanent place of business in Poland within the meaning of Art. 28b paragraph. 2 of the VAT Act and Art. 11 of Regulation No 282/2011 and art. 44 of Directive 112, and thus whether the services purchased by the applicant will be taxed in Poland.

In the complainant's view, the interpretative body incorrectly found that she had a permanent place of business in Poland, which violated Art. 11 of Regulation No 282/2011 in connection with art. 28b paragraph. 1 and 2 of the VAT Act, because it does not employ employees in Poland, does not delegate its employees to perform tasks in Poland, nor does it obtain them from external resources, the applicant's activity is directed entirely from its seat in Germany and key activities are undertaken there activities from the point of view of its operations, there are servers that support the Internet form dedicated to it, it does not have direct control over the solutions used by companies belonging to Group B located in Poland and running warehouses located in Poland,

The interpretative body negated this position, stating in particular that the criteria of having a minimum size of activity characterized by a certain level of stability, in which there are human and technical resources necessary to conduct the taxpayer's business, are met. The use of the technical infrastructure located in Poland with the use of the WMS program and personnel to carry out part of the applicant's business activities in an organized and continuous manner qualifies its activity in Poland as a permanent place of business in Poland.

When resolving the dispute outlined in this way, it should be stated at the outset that pursuant 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. Taxpayers are also legal persons, organizational units without legal personality and natural persons purchasing goods, if the person supplying them within the territory of the country is a taxpayer who does not have a registered office or a permanent place of business in the territory of the country (Article 17 (1) (5) of this Act) .

Pursuant to Art. 17 sec. 2 of the VAT Act, in the cases specified in sec. 1 points 4, 5. 7 and 8, the service provider or the supplier of goods does not account for output tax. Pursuant to Art. 17 sec. 5 point 1 of the Act, the provision of para. 1 paragraph 5 shall apply if the acquirer is the taxpayer referred to in article 2. 15, having a registered office or a permanent place of business in the territory of the country, or a non-taxable legal person referred to in art. 15, established in the territory of the country, subject to paragraph 2. 6.

According to Art. 28b paragraph. 1 of the Act on VAT, 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. 1 and 1a, art. 28 g of paragraph 1. 1, art. 28i, art. 28j paragraph. 1 and 2 and article. 28n.

In paragraph 2 Art. 28b of the VAT Act, there is an exception to the above rule, according to which, 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 providing these services is the permanent place of business economic.

The VAT Act does not contain a definition of a permanent place of business. However, it is included in Art. 11 sec. 1 of Regulation 282/2011, it follows from this regulation that a fixed 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 doing business.

The issue of the prerequisites 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. And so in the judgment of October 16, 2014 in the **Welmory** caseC-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 Court emphasized that the question concerned the interpretation of Art. 44 of Directive 112 from the point of view of the recipient, and the previous jurisprudence took into account the point of view of the service provider, which means that when interpreting the wording of the provision, its context and the objectives of the regulation, part of which this provision constitutes (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 Directive 112, the seat of business comes first, and only the second permanent place of business, which is a derogation from 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. exercising control over these facilities, the possibility of receiving and using the purchased services for their own needs - running the contractor's business 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. exercising 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 turn, in the judgment of 7 May 2020 in case C-547/18 (issued after the challenged interpretation was given), the CJEU stated that Art. 44 of Directive 112 and Art. 11 sec. 1 and art. 22 sec. 1 of Regulation No 282/2011 should be interpreted as meaning that the service provider cannot infer the existence in the territory of a Member State of a permanent establishment of a company established in a third country from the mere fact that that company has a subsidiary in that Member State, and, that the service provider is required to examine, for the purpose of making such an assessment, the contractual relations between the two entities.

In paragraph 31, the Court also recalled that taking into account economic and commercial reality is a fundamental criterion for the application of the common VAT system (see, to that effect, judgment of 2 May 2019, C-224/18, EU: C: 2019: 347, paragraph 27 and the case-law cited there). Consequently, the classification of a place as a permanent establishment cannot depend solely on the legal status of the entity concerned.

In the opinion of the court, the above judgments of the CJEU, although the factual circumstances on the basis of which the rulings were issued differ from the factual state described in the applicant's application, they contain important guidelines as to 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 indicated 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 indefinite manner (judgment 168/84), requires a minimum durability, by pooling the permanent human and technical resources necessary to provide certain services independently (judgment C-73/06 or C-260/95).

You should also pay attention to Art. 22 of Regulation No 282/2011, which is addressed to service providers, but provides for a number of criteria that should be taken into account in order to determine the recipient's fixed place of business. Thus, it also contains interpretative guidelines for the recipient enabling him to determine his permanent place of business. This mainly includes an analysis of the nature and application of the service provided to the taxpayer-recipient. Then, when that analysis does not permit the determination of the recipient's fixed establishment, it is necessary to analyze in particular whether the contract, the order and the VAT identification number allocated by the recipient's Member State and communicated to the supplier by the recipient indicate the fixed establishment as the place of receipt of the service and whether the fixed establishment is the same as the paying entity. It is only where those criteria do not allow the determination of the recipient's fixed establishment to be established that the service provider is entitled to conclude that the services are supplied to the place where the recipient has his establishment.

It is apparent from the facts described in the application initiating the proceedings that the applicant is established in Germany. The subject of its activity is retail sale of mainly shoes and clothing via a dedicated internet platform. In Poland, it has three companies belonging to the B Capital Group,

which provide services to the applicant in their warehouses. These include, in particular, the packaging, labeling and shipment of goods, as well as the storage, warehousing and stock keeping of the applicant's goods, inventory management taking into account a warehouse program common to the entire Group, provided by the applicant, handling returns, as well as handling, in two different ways, the cooperation models described above in the application, the applicant's partners, selling their goods on the applicant's platform. The complainant entrusts the goods to service providers to store and fulfill their customers' orders, and the service providers (three companies belonging to the Capital Group) ensure that the complainant's stocks of goods placed in warehouses or returned to return centers are managed in accordance with pre-established quality standards, the purpose of which is to minimize order processing time. This is also the purpose of the WMS storage system, shared by the entire Group, owned by the applicant. The activity of service providers with warehouses located in Poland, according to the content of the application, for the applicant is only part of its activity without the possibility of supervising the performance of the purchased services, without having any personnel or the necessary infrastructure. The complainant does not employ employees in Poland, does not delegate its employees to perform tasks in the territory of Poland, and does not outsource them. It does not control service providers, apart from contractually defined terms of service provision, and compliance with contractual conditions. The staff of service providers, when carrying out the (technical) activities involved in the provision of the ancillary services purchased by the applicant, do not act on behalf of or on behalf of the applicant. He is employed by service providers and carries out their instructions. The same is true of infrastructure that is not subject to the applicant's supervision and may be used to provide similar services to other entities. nor does it outsource them. It does not control service providers, apart from contractually defined terms of service provision, and compliance with contractual conditions. The staff of service providers, when carrying out the (technical) activities involved in the provision of the ancillary services purchased by the applicant, do not act on behalf of or on behalf of the applicant. He is employed by service providers and carries out their instructions. The same is true of infrastructure that is not subject to the applicant's supervision and may be used to provide similar services to other entities. nor does it outsource them. It does not control service providers, apart from contractually defined terms of service provision, and compliance with contractual conditions. The staff of service providers, when carrying out the (technical) activities involved in the provision of the ancillary services purchased by the applicant, do not act on behalf of or on behalf of the applicant. He is employed by service providers and carries out their instructions. The same is true of infrastructure which is not subject to the applicant's supervision and may be used to provide similar services to other entities. when carrying out the (technical) activities constituting the ancillary services purchased by the applicant, he is not acting on behalf of or on behalf of the applicant. He is employed by service providers and carries out their instructions. The same is true of infrastructure which is not subject to the applicant's supervision and may be used to provide similar services to other entities. when carrying out the (technical) activities constituting the ancillary services purchased by the applicant, he is not acting on behalf of or on behalf of the applicant. He is employed by service providers and carries out their instructions. The same is true of infrastructure which is not subject to the applicant's supervision and may be used to provide similar services to other entities.

In the opinion of the court, the application cannot be drawn from the contractually defined service quality standards and the applicant's ability to control the fulfillment of the terms of the contract by the service providers and the fact that the service providers use the warehousing program applicable throughout the Capital Group and managed by the applicant, allowing her to control the stocks. that the applicant is able to control the personnel, that it has, in fact, its own technical and organizational facilities and facilities, that it has sufficient human resources that it uses, that it can directly influence and control them. Likewise, the availability of the back office cannot be inferred from the fact that the applicant's representatives may, during the working hours of the warehouse, inspect the goods after notifying the service provider in advance.

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. Although the purchase of each service purchased by an economic entity is aimed at specific economic benefits, such behavior does not automatically create a place of permanent business in the country where the service provider provides services to such entity.

It cannot be lost sight of the fact that the services provided to the applicant in Poland are only part of its business activities, also conducted outside Poland, including in the country where the company is established.

The view expressed in the judgment of the Provincial Administrative Court in Warsaw of July 12, 2017, ref. No. III SA / WA 1979/16, according to which 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 whenever the entity purchases services provided in a country other than its seat, irrespective of the scope of the entity's powers to authoritatively manage such personnel, exercise control over them or impose the manner of performing the ordered service. Taking into account the indicated conditions for establishing a permanent place of business and the facts presented by the applicant, it should be stated that the applicant only purchases in Poland auxiliary services for its main activity conducted outside Poland.

As shown above, the interpretative body misinterpreted Art. 28b paragraph. 1 and sec. 2 of the VAT Act in connection with with art. 11 sec. 1 and art. 21 sentence 2 of Regulation 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. Series L of 23 March 2011, No. 77 as amended).

The consequence of the above is the conclusion that the position of the authority on taxation pursuant to Art. 28 b paragraph. 2 of the VAT Act in Poland, the services purchased by the applicant and described in the application are defective.

It was also rightly pointed out in the complaint that the interpreting body, while negating the applicant's position, did not take into account all the relevant circumstances indicated by it in the exhaustive description of the facts, which resulted in the incorrect assumption that the applicant had a permanent place of business in Poland. Regarding the allegation of infringement of the procedural provisions, i.e. Art. 14c § 1 and 2 of the Act, it should be noted, however, in particular that the interpretative body sent a precise call to the party to supplement the description of the facts. Undoubtedly, the challenged individual interpretation also contains an exhaustive description of the facts presented in the application and an assessment of the applicant's position together with the legal justification of this assessment, which meets the requirement specified in Art. 14 c § 1 Op

Due to the above, the Court, pursuant to Art. 146 PPSa repealed the challenged interpretation, obliging the interpretative body to take into account the presented arguments.

The costs of the proceedings were determined pursuant to Art. 200 and art. 205 § 1 of the PPSa, awarding the complainant the amount of PLN 697, including the fee paid for the complaint (PLN 200), costs of legal representation (PLN 480) specified in § 2 (1) (2) of the Regulation of the Minister of Justice of 16 August 2018. on remuneration for the activities of a tax advisor in proceedings before administrative courts (Journal of Laws of 2018, item 1687) and stamp duty on the power of attorney (PLN 17