I SA / Gl 755/20 - Judgment of the Provincial Administrative Court in Gliwice

Date of the judgment	2020-09-17 *invalid judgment*
Date of receipt	2020-06-29
Court	Provincial Administrative Court in Gliwice
Judges	Adam Nita / chairman rapporteur /
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 complaint was dismissed
Cited regulations	Journal of Laws 2020 item 106 art. 28b paragraph. 1 and sec. 2 *The Act of March 11, 2004 on tax on goods and services - i.e.*

SENTENCE

The Provincial Administrative Court in Gliwice composed of the following composition: Chairman Judge of the Provincial Administrative Court Bożena Pindel, Judges of the Provincial Administrative Court Paweł Kornacki, Adam Nita (spokesman), court reporter Monika Rał, after hearing at the hearing on September 3, 2020, the case from the complaint of A GmbH in K. on the interpretation of the Director of the National Tax Information of [...] no [...] regarding tax on goods and services dismisses the complaint.

SUBSTANTIATION

In the challenged interpretation of [...], No. [...] the Director of the National Tax Information (hereinafter referred to as the Interpretation Body) expressed his opinion on the application for an individual interpretation of tax law provisions concerning a future event in value added tax, and submitted by the Swiss company A GmbH (hereinafter referred to as the Applicant, Company, Party or Complainant). In doing so, the Interpretation Body stated that the position of the Party, presented in its letter initiating the interpretation proceedings:

1) is incorrect as regards the lack of a permanent place of business,

2) is incorrect - as to the place of provision and taxation of purchased services,

3) is correct in terms of the right to deduct the tax resulting from invoices documenting the purchased services.

The interpretative motion presents the following future event, the description of which was additionally supplemented by the Company, at the request of the Director of the National Tax Information. An agreement was signed between the Complainant and one of the global cosmetic concerns, under which the Party distributes selected products of the said manufacturer in the territory of Russia, Ukraine, Belarus, Moldova, Azerbaijan, Georgia, Armenia, Tajikistan, Turkmenistan, Uzbekistan, Kyrgyzstan and Kazakhstan. The agreement was concluded for 3 years, and according to its provisions,

the Applicant is to acquire the ownership of cosmetic products from their manufacturer, and then distribute them on the previously indicated markets. As the complainant emphasized,

An important circumstance in the case is that the Applicant has made a decision to use the services of a logistics center located on the territory of the Republic of Poland in W. (hereinafter referred to as the Logistics Center or Center) in order to perform the tasks resulting from the concluded contract. The said entity operates as a joint stock company and is not in any way connected with the Party. It is on the basis of the material and personnel facilities of the Logistics Center, including facilities and devices owned by it located in Poland, that cosmetics are to be distributed to the markets of the previously indicated countries of the former USSR. The same entity is also a supplier of transport services to the Company. The task of the Center will also be to collect and store goods sent from third countries and other EU countries. Additionally,

As emphasized in the interpretative application, the Party will not have the right to freely use the warehouse space of its contractor in Poland - no specific room will be allocated to it in the warehouse, but only the total area of which the Applicant can use will be reserved. On the other hand, the distribution and delivery of goods to eastern markets will be carried out in accordance with the instructions given by the Company from Switzerland to fulfill orders accepted by the Complainant. The applicant also revealed that it does not assume any operational activity, including service activities in Poland and other EU countries, and does not plan to sell goods on the territory of the Republic of Poland.

According to the complainant's statements, contained in the description of the future facts, he will not employ any employees in Poland, nor will he organize any office, branch, plant, etc. in the Republic of Poland. All distribution processes will be controlled from the headquarters in Switzerland, and will be performed by the Center under the supervision of the Company, exercised from the territory of Switzerland and - partially - by the Logistics Manager based in Poland. The said entity has been engaged by the Party on the basis of a B2B contract. He is a natural person running a self-employed business in Poland.

The applicant also emphasized that no persons authorized to represent the Complainant will permanently reside in the territory of the Republic of Poland (except for his tax representative in the tax on goods and services and an attorney in the procedure for issuing an individual tax ruling). In Poland, there will also be no one authorized to place orders on behalf of the Company (the management board of this entity will reside in Switzerland). Consequently, economic decisions regarding the purchase and sale of goods will be made outside Poland. Contracts with customers, as well as contracts with the main supplier, will also be negotiated and concluded outside the Republic of Poland. As the applicant assured,

As for the role of the Logistics Manager, in the description of the future event, included in the interpretative proposal, it was emphasized that this entity will carry out its normal activities, which will not be subject to specific instructions (directives) and total control by the Company (in the B2B formula, at most, the framework has been defined team work). The contract with this entity was concluded for 3 years, and the tasks of the Logistics Manager are to include:

1) collecting information obtained from the Management Board of the Company about the current demand for goods,

2) supervision over the quality control of goods delivered to the warehouse in Poland (physical access to goods in the above-mentioned Center warehouse will be provided on the basis of an authorization issued by the Company),

3) supervision of the current stock of goods stored in a warehouse in Poland,

4) planning the quantity of goods delivered to the warehouse and distributed to customers and the related coordination of deliveries to and from the warehouse in Poland,

5) supervision and coordination of operations with goods carried out by logistics operators in Poland (import, export, storage, shipping),

6) providing the Company with information on inventory, i.e. goods receipts and releases, inventories and forecasts for future deliveries and releases of goods.

This description of the future facts was supplemented in such a way that the Party replied to the detailed questions of the Interpretation Body. It was then explained that the Applicant does not use warehouses located in Switzerland. The party also indicated the period of storage of goods on the territory of Poland after their delivery to the Logistics Center (in each case it should not exceed 3 months) and described the factors affecting the length of storage time of goods in Poland. Moreover, the activities performed by the Logistics Manager were indicated. According to the Party's assertion, he will report to the Applicant on the services he performs and will perform his tasks independently and independently, however, taking into account the general guidelines and instructions, aimed at securing the interests of the Company. As emphasized by the aforementioned entity, the Logistics Manager, in order to perform its tasks, will not have an office / desk / computer / separate place in the Logistics Center to perform its duties. He will, however, gain access to the Company's goods in the warehouse of the Logistics Center, after having announced his arrival and assisted by an employee of this entity. As emphasized, as part of his duties, the Logistics Manager will control the condition of the Company's goods, located in the warehouse of the Logistics Center - he will check the compliance of the goods with the order, the correctness of the marking of goods and the condition of packaging and goods, including damage to them.

In such a future event, the Applicant formulated two questions:

1) Should it be assumed that the territory of the Republic of Poland will have a permanent place of business for the Company within the meaning of the provisions on value added tax?

2) whether the services indicated in the application - provided to the Party and purchased by it from contractors based in the territory of the Republic of Poland - are subject to tax on goods and services in Poland and whether the Company is entitled to reduce the amount of VAT due by the amounts input tax resulting from invoices documenting services purchased by the Applicant?

At the same time, presenting his own position in the case, the Complainant stated that in the described future facts, there could be no question of a permanent place of business in Poland, within the meaning of the provisions on tax on goods and services. Therefore, the previously indicated services should not be subject to tax on goods and services in Poland. Consequently, in the opinion of the Applicant, he will not be entitled to reduce the output tax by the input tax on goods and services, resulting from the invoices documenting the services purchased by this entity, presented in the description of the future event. However, if the services purchased by the Party were subject to taxation in the territory of Poland (if the Company is deemed to have a permanent place of business in Poland or, that the place of taxation of these services should be determined on the basis of Art. 28e of the Value Added Tax Act), in his opinion, the Applicant should be entitled to reduce the output tax by the amounts of the input tax on goods and services, resulting from

the invoices documenting the services purchased by him, presented in the description of the future event (in accordance with Art. section 1 of the Value Added Tax Act).

Justifying its view, the Party referred mainly to the Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011. It happened because it was this legal act that defined the concept of a permanent place of business. In doing so, the Applicant referred to art. 28b of the act on tax on goods and services. As it was concluded, pursuant to Art. 11 sec. 1 of the aforementioned act of EU law, a fixed place of business means any place - other than the place of business of the taxpayer, (...) which is characterized by sufficient stability and an appropriate structure in terms of human and technical resources to enable it to receive and use services provided for the needs of that permanent place of business. The party also pointed to Art. 11 sec. 2 of Council Implementing Regulation (EU) No 282/2011. In turn, it follows from this provision that a fixed place of business means any place - other than the place of business of the taxpayer, (...) which is characterized by sufficient stability and an appropriate structure in terms of human and technical resources to enable it to provide services. which he does. Additionally, the Company pointed to the jurisprudence of the Court of Justice of the European Union, Polish administrative courts and individual interpretations issued to other entities. that a fixed place of business means any place, other than the place of business of the taxpayer, (...) which is sufficiently stable and has an appropriate structure in terms of human and technical resources to enable it to provide the services it performs. Additionally, the Company pointed to the case law of the Court of Justice of the European Union, Polish administrative courts and individual interpretations issued to other entities. that a fixed place of business means any place, other than the place where the taxpayer's business is established, (...) which is sufficiently stable and has an appropriate structure in terms of human and technical resources to enable it to provide the services it performs. Additionally, the Company pointed to the case law of the Court of Justice of the European Union, Polish administrative courts and individual interpretations issued to other entities.

Based on all this material, the Party argued that the taxpayer has a permanent place of business for the purposes of value added tax, when the following conditions are jointly met:

1) 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 at the sole disposal of the taxpayer and technical infrastructure);

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

3) the activity carried out in this place is independent in relation to the main activity (a condition understood in particular as the possibility of concluding contracts and making management decisions independently), which results from the inherent element of economic activity, which is conducting it independently.

In the further part of its argument, the Party compared the facts of the future event that it intends to implement with the conditions presented by it for recognizing that a taxpayer has a permanent place of business in a given country for the purposes of value added tax. As for the first of the premises, she indicated that in Poland it does not have an appropriate structure in terms of human resources - there is no entity that would be authorized to conclude contracts on behalf of the Company, or to negotiate key elements of contracts with its contractors. Therefore, all key decisions regarding operations in Poland will be made at the registered office of the Company, which is located in Switzerland. The applicant's activity in Poland will be

only auxiliary to his main activity. According to the Applicant, Nor can it be considered that the employees of the Logistics Center are sufficient human resources for the Company to establish a permanent place of business in Poland. As emphasized, First of all, these persons act for their employer / principal (Logistics Center), and not for the Party. In this context, the Applicant has articulated that it does not control the activities of its contractor's employees, therefore they cannot be considered as the Company's human resources.

The aforementioned entity did not find an appropriate structure in terms of technical facilities. As indicated by the Complainant, he does not have the infrastructure in Poland sufficient to conduct independent activity. The Company's goods will be transported to the warehouse of the Logistics Center and from there to customers abroad, but due to the nature of the activity conducted by the Party, it cannot be considered that it has sufficient technical facilities to create a permanent place of business. In particular, it cannot be considered that the mere fact of keeping goods in a warehouse in connection with their further delivery may be considered sufficient technical facilities.

As noted, the company's core business is the distribution of goods (cosmetics). What is worth emphasizing, all activities necessary to achieve this goal are performed at the Party's headquarters in Switzerland. At the same time, the Company does not have any office or other premises in Poland which could be used to conduct independent activities in this area. In addition, it was noted that the Applicant is also not entitled to freely use the warehouse space of the Logistics Center. The said entity only provides a logistic service for the benefit of the Company, under which it is necessary to provide adequate space for storing the Complainant's goods. The fact that goods are stored in a warehouse is closely related to the adopted business model of the Company.

In the opinion of the Party, it does not and will not have a structure in Poland that could participate in making management decisions or in the process of concluding contracts. In particular, in Poland there is and will not be any employee of the Company or any other person authorized to conclude contracts on behalf of this entity. All key decisions regarding the Company's operations are made at its headquarters in Switzerland. In addition, all activities of the Logistics Center (warehousing / transport of goods) and the activities of the Logistics Manager are only auxiliary to the Applicant's economic activity conducted from Switzerland.

Additionally, the Applicant referred to Art. 28b of the Value Added Tax Act and revealed that since he has no permanent place of business in Poland, the services provided to him are not subject to value added tax in the Republic of Poland (they are taxed outside Poland). In this context, it was also articulated that in the future facts presented in the interpretative application, the statutory exceptions concerning the determination of the place of provision of services indicated in 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 of the Value Added Tax Act. In the opinion of the Complainant, this means in particular that the logistics and warehouse services, purchased by him from the Logistics Center do not constitute real estate services. This is because the Company does not have the right to use a specific part of the warehouse, the said entity, and warehousing is only one of the components of the service provided by the Logistics Center to the Party.

Finally, in commenting on the question of the deduction of input tax on goods and services, the Complainant argued that he was not entitled to it. In his opinion, according to Art. 28b of the Value Added Tax Act, the purchased services, indicated in the description of the future event, should be qualified as provided outside the territory of Poland. Consequently, in the light of Art. 5 of the Value Added Tax Act, these services should be classified as non-taxable with value added tax. Therefore, in its opinion, the Party is not entitled to reduce the output tax by the amounts of the input tax on goods and

services, resulting from the invoices documenting the services it purchases, presented in the description of the future event. However, in the event that the interpretative body adopts

As is known, the Director of the National Tax Information took the position that the Complainant's opinion on the legal assessment of the presented future event was:

incorrect in terms of not having a permanent place of business in Poland,

incorrect with regard to the place of supply and taxation of services purchased by the Company,

correct in terms of the right to deduct in Poland the tax resulting from invoices documenting the purchased services.

In justifying its arguments, the Interpreting Body referred to the same sources of EU and national law as the Complainant, as well as to the jurisprudence of the CJEU. Based on this material, the Director of the National Tax Information Office assumed that the activities of the Company carried out in Poland meet the conditions for recognizing that the Party conducts business activity in the territory of the Republic of Poland. This is because the mentioned activity is characterized by sufficient stability and an appropriate structure in terms of personnel and technical resources. As it was emphasized, conducting part of the activity in Poland results from the long-term possession by the Company in the Republic of Poland of sufficient human and technical resources,

The interpreting body drew attention to the cooperation of the Party with the Logistics Center and the Logistics Manager. As he emphasized, the contract with the Logistics Center, concluded for an indefinite period, will cover transport, logistics, bonded warehousing services, etc. The assumption is that the period of storage of goods on Polish territory after their delivery to the Logistics Center in Poland should not exceed 3 months. In the opinion of the Director of the National Tax Information, the Company will have the necessary infrastructure in Poland to purchase and deliver goods to contractors, i.e. to conduct business in the field of goods distribution. This is despite the fact that

it will not employ any employees in Poland and will not organize any office, branch or plant. The Logistics Manager will carry out his activity as part of his own business and will not be involved in presenting the Company's offer. The different opinion of the Interpretation Body was also not affected by the fact that the employees of the Logistics Center and the Logistics Manager will not have the power of attorney to make declarations of will on behalf of the Party and will not negotiate contracts with its customers or suppliers, and all distribution processes, including economic decisions regarding the purchase and sales of goods will be controlled from the headquarters in Switzerland.

In the opinion of the Director of the National Revenue Information, it is not necessary to have own personnel and technical facilities, as long as the availability of other facilities is comparable to the availability of own facilities (the taxpayer must have comparable control over the personnel and technical facilities). In the case analyzed by him, it should be stated that the Company will have control over the personnel and technical facilities of the Polish Logistics Center and the Logistics Manager. As it was concluded in the interpretation, although the Logistics Center will provide services to the Company based on its material and personal resources, the interpretative application clearly indicates that the tasks of this entity will be performed in accordance with the instructions provided by the Party and,

In the opinion of the Director of the National Tax Information, the fact raised by the Party that all key decisions concerning its activities are made at the registered office of the Company, which is located in Switzerland, is irrelevant. The permanence of the place of business cannot be equated with the intensity and frequency of activities undertaken as part of the conducted business activity, as well as with management decisions. What is important, however, is that the decisions made in the country of the seat in fact relate to activities conducted in Poland. As emphasized by the interpretative body, determining the place of the company's management board is important when determining the place of business activity,

The interpretation also drew attention to the fact that in Poland the Company cooperates with the logistics manager, whose tasks will include supervision over the quality control of goods delivered to the warehouse in Poland, supervision over the current stock level of goods stored in the warehouse in Poland, planning the quantity of goods delivered to the warehouse and distributed to customers, and the related coordination of deliveries to and from the warehouse in Poland, supervision and coordination of operations with goods carried out by logistics operators in Poland, providing the Company with information on inventory levels, i.e. goods receipts and releases, inventories and forecasts for future deliveries and releases of goods, and staying in touch with suppliers or recipients of goods in order to control the status of the order in progress .

As for the issue raised by the Party in the second question, the Interpretation Body, like the Complainant, referred to art. 28b of the act on tax on goods and services. In doing so, he agreed with the Party that the services purchased by the Applicant from the Logistics Center, Logistics Manager, legal and tax advisor and tax representative in VAT do not apply to the specific rules for determining the place of service provision, resulting from with 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 of the Value Added Tax Act. Consequently, in the opinion of the Director of the National Tax Information, the place of providing services to the Company should be determined in accordance with Art. 28b of the act on tax on goods and services.

Referring to this legal regulation, the above-mentioned entity took the position that the services referred to above are provided for the Company's permanent place of business in Poland. Thus, the place of supply, and thus the taxation of these services, is in the Republic of Poland, i.e. in the country where the Applicant has a permanent place of business pursuant to Art. 28b paragraph. 2 of the act on tax on goods and services. That is why the Party's view of the place of supply and taxation of the services it purchases was also incorrect. The consequence of this was that the interpreting body assumed that in the future facts presented by the Applicant, the conditions for positive deductions indicated in Art. 86 sec. 1 of the act on tax on goods and services. At the same time, in the opinion of the same entity, there will be no negative premises for reducing the amount of tax due by the input tax on goods and services referred to in art. 88 sec. 3a point 7 of the Act on tax on goods and services. This is because the place of supply, and thus taxation of purchased services, is the territory of Poland. Therefore, the Director of the National Tax Information took the position that the Applicants, pursuant to Art. 86 sec. 1 of the act on tax on goods and services, there is the right to reduce the amount of tax due by the amount of the input tax on goods and services. They result from invoices documenting the purchased by the Company: services provided by the Logistics Center, 2) Logistics Manager, 3) legal and tax advisor and 4) tax representative in the tax on goods and services. there will be no negative premises for reducing the amount of tax due by the input tax on goods and services referred to in art. 88 sec. 3a point 7 of the Act on tax on goods and services. This is because the place of supply, and thus taxation of purchased services, is the territory of Poland. That is why the Director of the National Tax Information took the position that the Applicants, pursuant to Art. 86 sec. 1 of the act on tax on goods and services, there is the right to reduce the amount of tax due by the amount of the input tax on goods and services. They result from invoices documenting the purchased by the Company: services provided by the Logistics Center, 2) Logistics Manager, 3) legal and tax advisor and 4) tax representative in the tax on goods and services. there will be no negative premises for reducing

the amount of tax due by the input tax on goods and services referred to in art. 88 sec. 3a point 7 of the Act on tax on goods and services. This is because the place of supply, and thus taxation of purchased services, is the territory of Poland. That is why the Director of the National Tax Information took the position that the Applicants, pursuant to Art. 86 sec. 1 of the act on tax on goods and services, there is the right to reduce the amount of tax due by the amount of the input tax on goods and services. They result from invoices documenting the purchased by the Company: services provided by the Logistics Center, 2) Logistics Manager, 3) legal and tax advisor and 4) tax representative in the tax on goods and services.

The presented positions were maintained in the proceedings before the Provincial Administrative Court. It happened because in the pleading initiating court and administrative proceedings, the Applicant requested for the entire interpretation of the challenged interpretation to be revoked, as well as for ordering the authority to reimburse the costs of the proceedings in accordance with the prescribed standards, including the costs of legal representation, provided by a legal counsel, and the costs of stamp duty on the power of attorney. At the same time, the Complainant alleged breach of the individual interpretation of tax law:

1) art. 28b paragraph. 1 and sec. 2 of the Act of March 11, 2004 on tax on goods and services (i.e. Journal of Laws of 2020, item 106, as amended - hereinafter referred to as with art. 11 sec. 1-3 and art. 21 sentence 2 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 series of 23 March 2011) r., No. 77, as amended) through:

a) their erroneous interpretation consisting in the assumption that for the existence of a "fixed place of business" in a given country, it is sufficient that the taxpayer in that country has - taking into account the requirement of the permanent place of business - comparable control over the personnel and technical resources belonging to another taxpayer when the exercise of such control, with the simultaneous lack of own technical and personnel facilities in a given Member State, does not prejudge the existence of a "fixed place of business" and, consequently, also making an incorrect assessment as to the application of these provisions consisting in assuming that in the future event described in the application for the interpretation, the Company will have in Poland "permanent place of business "due to contracts concluded with the Logistics Center and Logistics Manager, as well as other contracts for the provision of specialist services;

b) making an incorrect assessment as to the application of these provisions to the extent to which the authority found that the place of taxation of legal advisory services, tax advisory services and tax representation in VAT as well as services of the Logistics Manager and Logistics Center provided to the Applicant by domiciled in Poland is the Republic of Poland, not the seat of the applicant Company. In the opinion of the Party, due to the fact that it will not have a "fixed place of business" in Poland, these services will not be taxed in Poland;

2) art. 86 sec. 1 and art. 88 sec. 3a point 7 of the UPT - through an incorrect assessment as to their application, consisting in the assumption that the Company will be entitled to deduct the input tax shown on invoices by Polish service providers, indicated in the plea no. b) complaints. Meanwhile, in the opinion of the Applicant, a correct assessment of the application of these provisions should lead to the conclusion that the tax on goods and services (possibly) charged by the aforementioned Polish entities will not be deducted by the Company as incorrectly shown in the invoice.

As already mentioned, in response to these accusations, the Director of the National Tax Information maintained all his views. Consequently, he requested that the action be dismissed.

The Provincial Administrative Court considered the following.

The complaint is unfounded and must therefore be dismissed. A contentious issue in relations between the parties to administrative court proceedings is the territorial scope of the tax on goods and services. As you know, the aforementioned public levy is territorial in the sense that, by the will of the legislator (and in the first place - the EU legislator), its consequences in terms of public-law obligation are limited to tax events taking place in the territory of a given state. This is achieved, among others, by operating with a zero tax rate (or - in other countries - exemption with the right to deduct) in the case of export of goods or intra-community delivery of goods. Moreover, the legislator determines in which country the services provided to an entity from one country by a contractor established in another country are subject to taxation. In terms of this type of activity, carried out between two taxpayers of value added tax, the relevant legal regulation is contained in Art. 28b of the taxpayer The aforementioned provision stipulates, inter alia, that, as a rule, the place where services are provided when they are performed for the taxpayer is the place where the taxpayer who is the service recipient has his registered office (Article 28b (1) of the Act). On the other hand, pursuant to Art. 28b paragraph. 2 of the same Act, where the services are provided for the taxpayer's permanent place of business, which is located in a place other than the place of business, the place of supply of these services is the permanent place of business. the relevant legal regulation is included in Art. 28b of the taxpayer The aforementioned provision stipulates, inter alia, that, as a rule, the place where services are provided when performed for the taxpayer is the place where the taxpayer who is the recipient of the service has his registered office (Article 28b (1) of the Act). On the other hand, pursuant to Art. 28b paragraph. 2 of the same Act, where the services are provided for the taxpayer's permanent place of business, which is located in a place other than the place of business, the place of supply of these services is the permanent place of business. the relevant legal regulation is contained in Art. 28b of the taxpayer The aforementioned provision stipulates, inter alia, that, as a rule, the place where services are provided when they are performed for the taxpayer is the place where the taxpayer who is the service recipient has his registered office (Article 28b (1) of the Act). On the other hand, pursuant to Art. 28b paragraph. 2 of the same Act, where the services are provided for the taxpayer's permanent place of business, which is located in a place other than the place of business, the place of supply of these services is the permanent place of business. in which the taxpayer who is the recipient of the service has his registered office (Article 28b (1) of the Act) On the other hand, pursuant to Art. 28b paragraph. 2 of the same Act, where the services are provided for the taxpayer's permanent place of business, which is located in a place other than the place of business, the place of supply of these services is the permanent place of business. in which the taxpayer who is the recipient of the service has his registered office (Article 28b (1) of the Act) On the other hand, pursuant to Art. 28b paragraph. 2 of the same Act, where the services are provided for the taxpayer's permanent place of business, which is located in a place other than the place of business, the place of supply of these services is the permanent place of business.

Thus, it may be that the place of supply of services is not the country of the taxpayer's (purchaser's) economic activity, but another country where his permanent place of business is situated. All this matters, because pursuant to Art. 5 sec. 1 point 1 of the tax return, one of the subjects of taxation with this public levy is the supply of goods for consideration and the provision of services in the territory of the country for consideration.

These legal regulations, compared to the future facts presented in the interpretative application, affect the separation of the tax jurisdiction of two countries in the field of tax on goods and services. If it were assumed that the Applicant, due to his activities carried out in Poland, does not have a permanent place of business in that country, the services of his contractors (including the Logistics Center and Logistics Manager) are not taxed in the Republic of Poland, VAT . They are, on the other hand, subject to Swiss value added tax (Mehrwertsteuer). Otherwise, that is, if we take the position that the features of the Applicant's activity in Poland mean that he / she continuously carries out economic activity in the Republic of Poland,

Thus, in the case at hand, the problem is not where the cosmetics supplied by the Applicant will be taxed. These are, for the said entity, an export of goods, subject to a zero rate of tax on goods and services. Besides, this was not the issue that was asked in the request for individual interpretation. In the light of this pleading, a debatable issue is whether a party can be assigned a permanent place of business in Poland, which has its consequence in the form of whether the services of its Polish economic partners are subject to Polish tax on goods and services.

The normative space for resolving the dispute between the parties to the administrative court proceedings in the case in question is determined by three types of provisions - both Polish tax law and EU law. According to Art. 44 of Council Directive 2006/112 / EC of 28 November 2006 on the common system of value added tax (OJ EU L 2006.347.1 - hereinafter referred to as Directive 112), the place of supply of services to the taxpayer acting as such is the place where the taxpayer has his registered office. However, if these services are provided to the taxpayer's fixed place of business located in a place other than his place of business, the place of supply of these services is his fixed place of business.

It is this provision that has its counterpart in an act of national law, namely in the previously quoted Art. 28b uptu As is known, from Art. 28b paragraph. 1 shows that, as a rule, the place of supply of services in the event of their performance for the taxpayer is the place where the taxpayer who is the recipient of the service has its registered office. On the other hand, if the services are provided for the taxpayer's permanent place of business, which is located in a place other than the place of business, the place of supply of these services is the fixed place of business (cf. Article 28b (2) of the same Act.).

In turn, in Art. 10 and 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 (OJ EU L.2011.77. 1 - hereinafter referred to as the Regulation), the EU legislator has clarified the concepts of the place of business of the taxpayer and the permanent place of business. This happened for the purposes of Art. 44 and 45 of Directive 112. Since Art. 28b uptu is just an implementation of art. 44 of Directive 112, the aforementioned definitions should also be referred to the act of national tax law, i.e. the act on tax on goods and services.

In art. 10 of the Regulation clarifies the concept of "place of establishment of the taxpayer's business". It happened in two "steps". In essence, this is the place where the company's head-office functions are performed - the place where important decisions relating to the overall management of the company are taken, the address of the registered office of the company, and the place where the board of directors meets (Article 10 (1) and (2) sentence 1). Regulation). On the other hand, if these criteria do not allow to determine with certainty the place of the taxpayer's seat of business, the decisive criterion is the place where important decisions concerning the general management of the enterprise are taken (Article 10 (2) sentence 2 of the Regulation),

This regulation is supplemented by Art. 11 sec. 1 of the Regulation. It applies when the taxpayer's permanent place of business is located somewhere other than his seat of business. In such a circumstance, the EU legislator provided that for the purposes of applying Art. 44 of Directive 112, "fixed place of business" shall mean any place, other than the place of business of a taxable person as referred to in Art. 10 of the Regulation - which 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 at this permanent place of business. Same, to establish a permanent place of business within the meaning of Art. 28b paragraph. 2 uptu, it is irrelevant where the functions of the company's top management are performed - the place where important decisions concerning

the general management of the company are made or the place where important decisions concerning the general management of the company are made. These distinguishing features allow only the place of the taxpayer's seat to be established.

In the present case there is no doubt that the applicant's place of business is K. in Switzerland. The dispute focuses on whether, in the future facts presented in the interpretative application, there is a permanent place of business of the complainant in Poland within the meaning of Art. 28b paragraph. 2 of the UPT, specified in Art. 11 sec. 1 of the Regulation. Consequently, what matters is not so much where the important decisions relating to the general management of the enterprise are taken, the address of the registered office of the enterprise and the place where the management board of the enterprise meets, or - should these criteria be unreliable - the place where the relevant decisions regarding the overall management of the enterprise are taken. It is essential, however, that whether the Company has a permanent place of business in Poland, understood as any place - other than the place of business of the taxpayer - which is characterized by sufficient stability and an appropriate structure in terms of human and technical resources to enable it to receive and use services provided for its own needs of this permanent place of business. These are the features, if their fulfillment were confirmed in the description of the future factual state, as a consequence - by such and not another disposition of Art. 5 sec. 1 point 1 of the UPTU - would mean that services provided to the Party are subject to Polish tax on goods and services Otherwise, the general rule should be applied and

There is no doubt that a permanent place of business can only be considered when there is an appropriate structure in terms of personnel and technical resources necessary to conduct business and there is a certain minimum scale of business activity, which allows for the recognition that the taxpayer's activity, including site is not run periodically. In addition, the activity from this place should be carried out independently of the activity of the company's seat (see the judgment of the Provincial Administrative Court in Szczecin of 5 March 2020, file reference number I SA / Sz 915/19 and the judicature of the Tribunal referred to in this judgment) European Union Justice: judgment C- 168/84 Gunter Berkholz, C-231/94 Faaborg -Gelting Linien A / S, C-190/95 ARO Lease By,**Welmory** Sp. z oo

Consequently, a fixed place of business must be characterized by a certain degree of commitment, which allows it to be considered that the activity is carried out there not temporarily or temporarily. Therefore, a certain minimum scale of activity is necessary, which is an external sign that the activity at this site is carried out continuously. This involvement should also take a specific personal and material dimension, allowing for the provision of services in an independent manner. Therefore, in order to recognize that a specific place of business is permanent, it is necessary to have technical infrastructure and staff that can independently perform certain activities. Such a personal and material structure in a permanent place of business should be permanent, i.e.

Nowadays, there is no doubt that the use by a foreign taxpayer of the services of other entities or persons under joint business agreements allows for the creation of an economic platform in the country, characterized by elements of stability. This, in turn, leads to the establishment of a place of business within the meaning of the UPT (see the judgment of the Provincial Administrative Court in Warsaw of June 15, 2015, file number III SA / Wa 3332/14 and the judgment of the Supreme Administrative Court, which dismissed the cassation appeal against this judgment - the judgment of the Supreme Administrative Court of 23 November 2017, file reference number I FSK 160/16). For the adoption of a permanent place of business in a given state, it is not necessary for the taxpayer to have at his disposal the staff and technical facilities, which is his property (cf. the judgment of the Court of Justice of the European Union of 16 October 2014, ref. no. C-605/12 - thesis 48-50). Moreover, a taxpayer may have direct and permanent access to the

personnel and technical resources of another taxpayer who, at the same time - in a different context - may also be a service provider for a fixed place of business established in this way (cf. thesis 52 of the judgment of the Court of Justice of the European Union in October 16, 2014, file reference number C -605/12). We have the same view, previously expressed by the Provincial Administrative Court in Kraków in its judgment of May 9, 2012, file ref. no. I SA / Kr 176/12. It was stated there that having a personal and material infrastructure in the classical sense is not necessary for that the applicant company's contractor has a permanent place of business in Poland. It can therefore be assumed that the company's contractor will use its personnel and technical resources, which implies a determination that the conditions of Art. 28b paragraph. 2 uptu

All these thoughts - both expressly expressed in legal acts and formulated in the jurisprudence of the Court of Justice of the European Union - should be taken into account when analyzing the future event presented by the Party in its application for individual interpretation of tax law provisions. In this context, it is worth noting that - as is clear from the letter initiating the interpretation procedure, supplemented in response to specific questions from the Director of the National Tax Information - the Company does not use warehouses located in Switzerland. As a consequence, cosmetics purchased by it and owned by it, directly from their EU or non-EU supplier, are to be transported to the Logistics Center in Poland, which also ensures transport and is a customs warehouse.

All economic activity, in the form of importing, storing (as indicated in the interpretative application) and further shipment of goods (their export) will therefore be carried out on the territory of the Republic of Poland, by the Logistics Center, related to the economic contract with the Company and by the Logistics Manager, carrying out its tasks in Poland - incl. controlling the stock levels, informing the Applicant about them, controlling the quality of goods, planning the quantity of goods delivered to the warehouse and distributed to customers, and coordinating deliveries to the warehouse in Poland and from there abroad, informing the Company about the stock levels). All these activities, from the economic point of view, are identical to the behavior that the Complainant would undertake on the territory of the Republic of Poland,

Therefore, in the opinion of the Court, the described activities of the Logistics Center and the Logistics Manager mean that it should be assumed that by using these entities, the Party will use the personal and material structure in Poland, and it will be done in a permanent, i.e. repeatable and permanent manner. In this context, it is worth noting that the contract for the purchase of cosmetics was concluded by the Company with their manufacturer for three years, the agreement with the Logistics Center is planned to be signed for an indefinite period, and the contract with the Logistics Manager is to be valid for three years. This proves, beyond all doubt, the existence of a permanent place of business of the complainant in Poland, within the meaning of the act on tax on goods and services. This conviction is confirmed by the Court by the fact that, according to the Applicant's intentions, the goods he purchases will not end up in his warehouses in Switzerland at all. However, they will be immediately transported to Poland, where in the Logistics Center (in its warehouses) these products, with the use of local employees, associates (including the Logistics Manager) and infrastructure, will be performed all the activities described above characteristic of the local activity entrepreneurs (persons performing economic activity in Poland within the meaning of Art. 15 (2) of the Act). In economic (economic) terms, the entire described activity of the Party will therefore be carried out in Poland, in the Logistics Center, which will also provide services for the Party (cf. judgment of the CJEU in case C-605/12). The court draws attention to this circumstance, because for the purposes of value added tax (or more broadly - value added tax), the tax consequences should be associated with the economic effects of the taxpayer's activities, and not with their civil law "cover". Moreover, also in the laws of German-speaking countries, as well as in the local tax law science, the importance of "economic thinking" (wirtschaftliche Betrachtungsweise) is emphasized for the assessment of tax and legal effects of taxpayer's actions taken in the area of civil law.

The economic activity of the Party, carried out in Poland with the use of employees and infrastructure, as well as with the help of the Logistics Manager, is independent of its activities in Switzerland. In this context, it should be recalled once again that, as disclosed by the Complainant, he has no warehouses in his country and the goods, after their purchase, are transported directly to Poland. Thus, the storage and distribution of cosmetics belonging to the Party, carried out from the territory of the Republic of Poland, are obviously independent of the activities undertaken by the Company in Switzerland. The activities analogous to that carried out in Poland, in the Swiss Confederation, are not carried out by the Company at all.

In this context, it does not matter where the contracts are concluded for the sale of cosmetics transported to Poland, stored in that country, and then exported from there outside the European Union. Apart from the fact that nowadays it is common practice to conclude distance contracts in electronic form, which allows you to incur liabilities from anywhere in the world, it is worth paying attention to the content of Art. 10 and 11 of the Regulation. As already indicated, Art. 10 sec. 1 of this legal act, the EU legislator defined the seat of the taxpayer's economic activity as the place where the functions of the head office of the enterprise are performed. At the same time, in Art. 10 sec. 2 of the Regulation, he pointed to the differentiators that allow to set this point. As you know, they are: in the first place - the place, where important decisions regarding the general management of the enterprise are taken, the address of the registered seat of the enterprise and the place of the company's management board meetings (10 (2) sentence 1 of the Regulation), and then the place where important decisions concerning the general management of the enterprise are taken (10 (2) sentence 2 of the Regulation). The court draws attention to this legal regulation because the place where economic contracts are concluded appears rather as an element of determining the place of establishment of the taxpayer's business. This, in the actual state of the case, in the light of Art. 10 of the Regulation does not raise any doubts and has not been presented as an issue covered by the request for individual interpretation - it is certainly K. in Switzerland. the address of the registered seat of the enterprise and the place of the company's management board meetings (10 (2) sentence 1 of the Regulation), and then - the place where important decisions concerning the general management of the enterprise are taken (10 (2) sentence 2 of the Regulation). The court draws attention to this legal regulation because the place where economic contracts are concluded appears rather as an element of determining the place of establishment of the taxpayer's business. This, in the actual state of the case, in the light of Art. 10 of the Regulation does not raise any doubts and has not been presented as an issue covered by the application for individual interpretation - it is certainly K. in Switzerland. the address of the registered seat of the enterprise and the place of the company's management board meetings (10 (2) sentence 1 of the Regulation), and then - the place where important decisions concerning the general management of the enterprise are taken (10 (2) sentence 2 of the Regulation). The court draws attention to this legal regulation because the place where economic contracts are concluded appears rather as an element of determining the place of establishment of the taxpayer's business. This, in the actual state of the case, in the light of Art. 10 of the Regulation does not raise any doubts and has not been presented as an issue covered by the application for individual interpretation - it is certainly K. in Switzerland. in which important decisions concerning the general management of the enterprise are taken (10 (2) sentence 2 of the Regulation). The court draws attention to this legal regulation because the place where economic contracts are concluded appears rather as an element of determining the place of establishment of the taxpayer's business. This, in the actual state of the case, in the light of Art. 10 of the Regulation does not raise any doubts and has not been presented as an issue covered by the request for individual interpretation - it is certainly K. in Switzerland. in which important decisions concerning the general management of the enterprise are taken (10 (2) sentence 2 of the Regulation) The court draws attention to this legal regulation because the place where economic contracts are concluded appears rather as an element of determining the place of establishment of the taxpayer's business. In the actual state of the case, in the light of Art. 10 of the Regulation does not raise any doubts and has not been presented as an issue covered by the application for individual interpretation - it is certainly K. in Switzerland.

However, the debatable issue in this case is another problem, i.e. whether, regardless of its seat, the Company has a permanent place of business in the territory of the Republic of Poland within the meaning of Art. 11 sec. 1 of the Regulation. It is - as has already been indicated - any place - other than the place of business of the taxpayer referred to in art. 10 of the Regulation - which 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 at this permanent place of business. In the opinion of the Court, this matter cannot be identified with the place of concluding civil law (economic) contracts, but with the actual state, concerning actual business activity - if the tax obligated entity, in a country other than the one in which its seat is located, has a permanent place of business (within the meaning of Article 11 (1) of the Regulation), i.e. an actual, alternative to its seat economic structure in terms of human and technical resources, enabling him to receive and use the services provided for his own needs of this permanent place of business, it should be assumed that services are provided to him at this point (cf. art. 28b section 2 of the Act). Consequently, in that place, they are subject to value added tax applicable to the country in which the taxpayer's business activity is permanently carried out.

As previously indicated, in the facts of the case, there is no doubt that the Applicant's personal and technical resources, located in the Republic of Poland, allow him to receive and use the services provided for his own needs of this permanent place of business (including the Center Logistics and Logistics Manager). In this state of affairs, the correctness of the contested individual interpretation cannot raise any objections. Consequently, the allegations raised in the complaint were not confirmed. The director of the National Tax Information Service did not offend any of the provisions of the national tax law, as well as EU law, indicated in the aforementioned pleading. And since in the one presented to him,

As such, the General Court dismissed the action for all the reasons put forward. It happened under Art. 151 of the Act of August 30, 2002, Law on proceedings before administrative courts (i.e. Journal of Laws of 2019, item 2325)