VAT EUROPEAN CASE·LAW

Can an immovable property for itself be a fixed establishment in VAT? Commentary on case C-931/19

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FACTS (I)

In its judgment of 3-6-2021, C-931/19, Titanium, the ECJ has ruled on the possibility that an **immovable property**, by itself, **without** the support of **human resources** for its exploitation, constitutes a fixed establishment for VAT purposes.

Titanium was a Jersey based company dedicated to property and wealth management, housing and accommodation management. During 2009 and 2010, this company leased, subject to VAT, a property that it owned in Vienna to two Austrian taxable persons.

To carry out these operations, which were the only ones of Titanium in Austria, said company empowered an Austrian property management company to act as an intermediary with clients, invoice rents and operating costs, keep business records and prepare the data for the VAT returns. The commissioned agent carried out these services in premises other than those of the property belonging to Titanium.

Titanium retained the decision-making power to enter into and terminate lease contracts and determine their economic and legal conditions, make investments and repairs and organize their financing, choose third parties to provide other prior services and, finally, select, appoint and supervise the property management company itself.

FACTS (II)

The Austrian tax authorities considered that a leased property is a permanent establishment for these purposes, demanding from this company the VAT corresponding to the years 2009 and 2010, which gave rise to the controversy.

REASONING (I)

The ECJ has been asked whether an **immovable property** that is leased in a Member State is a fixed establishment, in the sense of Dir 2006/112 art.43 to 45, in circumstances in which the owner of said property **does not have of its own personnel** to carry out the provision in connection with the lease.

The ECJ has begun by recalling that the **concept** of fixed establishment, by virtue of settled case-law, requires a **minimum consistency**, through the permanent gathering of the **human and technical resources** necessary for the provision of certain services. Consequently, it presupposes a sufficient degree of permanence and a suitable structure, from the point of view of the human and technical team, to make possible, autonomously, the provision of services in question (judgment of 28-6-2007, Planzer Luxembourg, C-73/06, among others). In particular, a structure lacking its own staff cannot be included in the concept of fixed establishment (judgment of 17-7-1997, ARO Lease, C-190/95).

REASONING (II)

This jurisprudence is **corroborated by Implementing Regulation EU/282/2011 art.11**, according to which a fixed establishment is characterized, in particular, by an adequate structure in terms of human and technical means. Even though it is true that this Implementing Regulation is only applicable from 7-1-2011 and that, therefore, ratione temporis does not apply to the main proceedings, its recital 14 states that it is intended to clarify certain concepts, including the concept of fixed establishment taking into account the jurisprudence of the Court of Justice.

CONCLUSION

Considering that **the claimant did not have its own staff** in Austria and that the persons in charge of certain management tasks were empowered by contract by said company, this company having **reserved all the important decisions** regarding the lease of the property in question, the ECJ has declared that a property that does not have any human resources that makes it capable of acting independently clearly fails to comply with the criteria established by jurisprudence to be classified as a fixed establishment for VAT purposes.

With these premises, it has been concluded by declaring that a **real estate property** that is leased in a Member State in circumstances in which the owner of that property **is not a fixed establishment**, in the sense of Dir 2006/112 art.43 to 45 it does not have its own staff to perform the service in connection with the lease.

RELATED TOPICS (I)

1st. First of all, let us remember that the **services related to real estate** are located where the properties in question are placed. This is the result of Dir 2006/112 art.47 and has confirmed the same ECJ in several of its judgments (among others, 12-07-2006, C-166/05, Rudi).

2nd. The topic at issue in this case was therefore not whether the leasing services provided by the claimant were to be taxed in Austria or not. On the contrary, what was discussed was who was the tax debtor, that is, whether the **reverse charge** mechanism was applicable or not.

RELATED TOPICS (II)

3rd. This issue is analysed by Dir 2006/112 art.192a and following. It is important, for these purposes, to **distinguish** between the cases in which the reverse charge is **mandatory**, regulated by articles 195 to 198, and those in which it is **optional** for the States of the Union, so these are those who decide whether to apply it or not.

This second is the case of article 194, par.2 of which adds that it is up to the EU States to determine their conditions of application.

4th. As described in the judgment, it appears that in the real estate transfer services provided by persons or entities with real estate in this country, Austria had been decided not to apply the reverse charge procedure, being, on the contrary, the lessor obliged to register, charge the VAT and pay it to the tax authorities. This decision, in light of the flexibility that Dir 2006/112 art.194 seems to offer to the EU States, appeared to be compatible with it.

RELATED TOPICS (III)

5th. The ECJ has not gone into this **detail** (despite the Austrian tax authorities having pointed this out).

Rather, it has focused on determining whether the structure available from Titanium in Austria could be a fixed establishment or not, without further consideration. Nor has it been entered into the detail that Implementing Regulation EU/282/EU art.11 itself, which expressly indicates that the definition it offers is only for the purposes of several articles of Directive 2006/112, but not for the purposes of its article 194.

6th. It is **doubtful**, in view of the foregoing, whether the final result would have been different in the event that Austrian regulations, instead of qualifying the leased property as a fixed establishment and, thereby, excluding the reverse charge mechanism, had directly indicated that in the case of exploited or leased real estate properties, the reverse charge would be inapplicable, so their owners should register and pay the tax. The foregoing proves how difficult it is, at times, to transpose EU law for its States.

RELATED TOPICS (IV)

7th. Finally, we must highlight the **consequences** that the previous conclusion may have **in other areas**, such as returns to non-established investors in real estate if the same criterion is extended to them, again without taking into account the circumstances of the case, as the ECJ has done in this judgment.