



Own staff required for a fixed establishment

The Court of Justice of the EU (CJEU) stated in its important VAT case C-931/19 (Titanium) that own staff is required for a fixed establishment (FE) to be created.

If the owner of the property does not have his own staff for the rental then this property does not create a FE for him.

Based on previous decisions by CJEU it was not clear whether presence of own staff and technical resources is always required to create a FE.

Several EU countries (MSs) should change their policies as a result of this decision.

Background

Facts of this case are that a company established in Jersey ('Titanium') owned properties in Austria which it rented out. Titanium did not have own staff in Austria and appointed an Austrian real estate management company to provide services relating to the letting. Titanium retained the decision-making power to enter into and terminate leases, to determine the conditions of the tenancy agreements, to make investments and repairs and to organise their financing, to choose third parties intended to provide other upstream services and, finally, to select, appoint and oversee the real estate management company itself. The Austrian tax authority's view was that a property which was rented out by Titanium constituted its FE in Austria. The referring court asked whether the existence of human and technical resources is always necessary for a FE to be created.

Ruling of the CJEU

CJEU refers to its existing case law (e.g. Planzer Luxembourg, C-73/06 and ARO Lease, C-190/95), and states that the concept of 'FE', "implies a minimum degree of stability derived from the permanent presence of both the human and technical resources necessary for the provision of given services".

It also refers to Article 11 of VAT Implementing Regulation No 282/2011, according to which a FE is characterized by

a suitable structure 'in terms of human and technical resources'.

CJEU points out that Titanium did not have any staff of its own in Austria and that the persons responsible for certain management tasks were contractually appointed by Titanium, which reserved for itself all important decisions concerning the letting of the property in question.

CJEU concluded that a property which does not have any human resource enabling it to act independently clearly does not satisfy the criteria established by the case-law to be characterised as a FE for VAT. Consequently, a let property in the circumstance where the owner of that property does not have his or her own staff to perform services relating to the letting does not constitute a FE.

Treatment of this issue in various countries

This decision could have major consequences in EU MSs where the tax authorities or courts consider that a FE could exist without own human or technical resources present in this EU MS.

In **Poland**, the tax authorities and courts have ruled that that presence of own human and technical resources may not always be required for the existence of a FE. Access to the premises and equipment of third parties and leased staff created a FE in Poland for a non-established entity.

In **Germany**, courts have held that a wind farm may be regarded as constituting a FE where such a farm has a significant value and has a maximum degree of stability, even if it does not use any human resources.

The UK (non-EU) tax authorities (HMRC): a non-established business that owns a property in the UK which it leases to tenants creates a FE if the company appoints a UK agent or representative (such as a subsidiary company acting on their instructions) to carry on its business.

In several EU MSs a FE is considered to exist when a permanent establishment (PE) exists for CIT purposes although (OECD) rules determining an existence of a PE are slightly different from EU VAT rules for FEs. E.g. in case of a construction project, a third-party subcontractor acting under direct supervision of a non-resident business could create a PE for this business.

On the other hand, in some MSs, e.g. in the **Netherlands**, the policies and the court decisions are already largely in line with the Titanium decision.

What are the consequences of the decision?

CJEU provides important guidance how the existence of a FE should be determined. Changes are expected in EU MSs where the tax authorities or courts have held that a FE could exist without own human or technical resources present in this EU MS.

The decision is important for other sectors than property letting, e.g. for ICT or e-commerce. A FE existence is very relevant for B2C supplies, but also for B2B services (e.g. a place of supply issues, the reverse charge applicable or not) or even supply of goods (e.g. the EU call-off stock simplification).

Contact

Do you have questions or do you need more detailed information? Please do not hesitate to contact us. Grant Thornton's international indirect tax team and digital advisory team can assist you in your VAT / customs matters.

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