# I SA / Gl 1706/20 - Judgment of the Provincial Administrative Court in Gliwice

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| **Date of the judgment** | 2021-04-28 *invalid judgment* |
| **Date of receipt** | 2020-12-22 |
| **court** | Provincial Administrative Court in Gliwice |
| **Judges** | Anna Tyszkiewicz-Ziętek<br>Krzysztof Kandut / chairman-rapporteur /<br>Wojciech Gapiński |
| **Symbol with description** | 6110 Goods and services tax<br>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. 2<br>*The Act of March 11, 2004 on tax on goods and services - i.e.* |

## SENTENCE

Provincial Administrative Court in Gliwice composed of the following composition: President Judge of the Provincial Administrative Court Krzysztof Kandut (spokesman), Judges of the Provincial Administrative Court Wojciech Gapiński, Anna Tyszkiewicz-Ziętek, after examination in a simplified procedure on April 28, 2021, the case from A AG's complaint in W. against the interpretation of the Director of the National Tax Information of [...] no. [...] regarding tax on goods and services dismisses the complaint.

## JUSTIFICATION

Contested by the individual interpretation of [...] No. [...] the Director of the National Tax Information, based on, inter alia, art. 14b § 1 of the Act of August 29, 1997. Tax Ordinance (Journal of Laws of 2020, item 1325 as amended - hereinafter referred to as: Op), stated that the position of A AKTIENGESELLSCHAFT based in W. in Germany (hereinafter referred to as : company, applicant, party, complainant) presented in the application of June 25, 2020, supplemented by further letters, for an individual interpretation of tax law provisions regarding value added tax, in the scope of not having a permanent place of business in Poland, registration obligation and tax settlements - is incorrect.

The interpretation was issued in the following state of the case (future event):

In the application of June 25, 2020, supplemented by further letters, for a written interpretation of tax law, the party stated that it is a company under German law, has its registered office in Germany and is registered as a VAT payer there. There he also runs a business in the field of implementing projects related to renewable energy sources, such as, for example, wind and solar power plants. He is not a registered VAT payer in Poland. Activities in Germany include various stages of the implementation of projects related to renewable energy sources, ranging from the search for a location for investment, through the design of the installation, implementation of the installation, connection of the installation to the power grid, installation service, and ending with the management of the

existing installation. Implementation of projects in Germany - depending on a specific project - may include one, several or all of the above-mentioned activities. In Germany, the party has an office with the seat of the management board, as well as the departments: [...], [...], [...], [...], [...]. It employs approx. [...] people in Germany.

The applicant plans to conclude an agreement and start cooperation with a Polish limited liability company with its registered office in Poland and being an active VAT taxpayer. The applicant owns 100% of the shares in the Polish company. The Polish company referred to above, under the contract with the applicant and in close cooperation with him, will provide services to him, in particular in the field of searching for sites in Poland suitable for the implementation of projects related to renewable energy sources, and preparatory activities for the implementation of this type of projects, technical planning of projects, and technical management of projects. All rights and obligations related to the indicated activities performed by the Polish company will be transferred to the applicant.

The applicant, based on the services purchased from the Polish company, intends to provide services of searching for investors interested in the implementation of projects related to renewable energy sources in Poland. The investors will be VAT taxpayers with their registered office in Poland or a permanent place of business in Poland, who will be registered or obliged to register as VAT taxpayers - EU. The company plans to implement the following cooperation models:

1.the applicant will sell the investor all rights related to the project (e.g. obtained permits and approvals, rights to land, technical documentation enabling the project to be implemented in a given area) as part of the sale of assets, and then the investor will independently implement the project - project implementation will be took place without the participation of the applicant and without the participation of the Polish company;

2.The applicant will sell the investor all rights related to the project (e.g. obtained permits and approvals, rights to land, technical documentation enabling the project to be implemented in a given area) as part of the sale of assets, and then the investor will independently implement this project - project implementation will take place without the participation of the applicant, however, the investor will use the advisory services of a Polish company on the basis of a separate agreement;

3.The investor will commission the implementation of the project to a Polish company, and the applicant will sell to that Polish company or another company with its registered office in Poland all rights related to the project (e.g. obtained permits and approvals, rights to land, technical documentation enabling the project to be implemented in a given area ), and then a Polish company or another company based in Poland will implement the project on its own or with the participation of subcontractors, which will then be sold to the investor.

The applicant stated that he would not employ any employees or associates in Poland, moreover, his employees or associates employed in Germany would not be permanently resident in Poland. However, they will be able to stay in Poland temporarily, approx. 4 times a year, for approx. 1-2 days for the purpose of monitoring cooperation with a Polish company. In addition, if the Polish company reports such a demand, the applicant will provide specialist consultancy services regarding the implementation of the project and then, for the duration of these services, his employees or associates employed in Germany will also be able to temporarily stay in Poland. The company added that it will not always have real estate in Poland used in its business activity (e.g. office) or technical facilities (e.g. machinery, equipment), subject to

The company further announced that there will be no persons authorized to represent the applicant, manage its activities or conclude contracts in Poland.

Specifying the scope and principles of cooperation with the Polish company, the party stated that the activities of the Polish company will consist in providing the applicant with services, in particular in the field of searching for areas in Poland suitable for the implementation of projects related to renewable energy sources, and carrying out preparatory activities for the implementation of such projects , technical planning of projects, technical management, design. As indicated by the applicant, the Polish company will perform the services described in the application for him and for related entities, but it is possible that in the future also for other entities. The contract with the Polish company will be concluded for one year and will be automatically extended for another year, unless it is terminated by either party within the indicated period. Activities performed by the Polish company will be carried out in accordance with the instructions of the applicant and will be subject to its approval. The effects of the services provided by the Polish company will be verified by the applicant's employees or associates.

As part of the project implementation, the applicant will obtain appropriate approvals and permits, such as: a building permit, a decision on environmental conditions, a decision on development conditions, a decision on the location of a public purpose investment, a license for energy production, an occupancy permit. The Polish company will make every effort to obtain the above consents and permits, acting as the applicant's attorney with legal effect for the applicant. As the party added, the Polish company will cooperate with the relevant state or local government administration bodies, energy entrepreneurs and other entities to the extent necessary to implement the project on renewable energy sources.

The applicant further stated that, apart from the services purchased from the Polish company, it will not purchase any other goods or services on the territory of Poland for the purposes of providing the services referred to in the application. In addition to the services provided, referred to in the application, consisting in the sale of all rights related to the project, the applicant will not be obliged to recognize / tax on the territory of Poland for the delivery of goods against payment, for the provision of services against payment, export of goods, import of goods, intra-Community acquisition of goods for remuneration or intra-Community supply of goods. He added that the services referred to in the request for interpretation did not constitute services to which Art. 28b of the Value Added Tax Act, but these are the services referred to in Art. 28e of this act.

In such a state of fact (a future event), the party asked the question: will the applicant have a permanent place of business in Poland in connection with the provision of the described services, and, consequently, whether he is obliged to register as an active VAT payer in Poland and whether he is obliged as a taxpayer to settle VAT in Poland?

Presenting its own position, the company stated that due to the provision of the described services, it would not have a permanent place of business in Poland, and consequently it was not obliged to register as an active VAT taxpayer in Poland and was not obliged to settle VAT in Poland. . In the applicant's opinion, in the presented future event, the condition of the continuity of conducting business in Poland will not be met, as the company will not have an appropriate structure in Poland in terms of human resources and technical facilities necessary to conduct business activity. In particular, it will not employ employees or associates in Poland at all, while employees or associates employed in Germany will stay in Poland temporarily and, as a rule, short-term, only for the purpose of general monitoring of cooperation with a Polish company or for the purpose of specialist consultancy, which cannot be considered as having an appropriate structure in terms of human resources in Poland. The applicant's activity in Poland will not be characterized by a certain level of independence. This means that due to the provision of the described services, the applicant will not have a permanent place of business in Poland. The applicant's activity in Poland will not be characterized by a certain level of independence. This means that due to the provision of the described services, the applicant will not have a permanent place of

business in Poland. The applicant's activity in Poland will not be characterized by a certain level of independence. This means that due to the provision of the described services, the applicant will not have a permanent place of business in Poland.

The Director of the National Tax Information issued to the applicant the appealed interpretation, in which he considered that his position was incorrect.

Motivating its decision, the interpretative body quoted, inter alia, the content of Art. 5 sec. 1, art. 7 sec. 1, art. 8 sec. 1, art. 15 sec. 1 and 2, art. 17 sec. 1 point 4 and art. 28b paragraph. 1 and 2 of the Act of March 11, 2004 on tax on goods and services (Journal of Laws of 2020, item 106, as amended - hereinafter: the Act on PTU) and stated that, as a rule (with certain reservations), the service provided to the taxpayer is subject to taxation at the place of the service recipient's place of business, unless it is provided for the service recipient's permanent place of business, which is located in a place other than his seat of business. Then the place of providing this service is the fixed place of business for which the service is provided. In the case of real estate services, as stated in Art. 28e of the PTU Act, the place of provision of services is the location of the real estate.

Next, the authority cited the provisions of Art. 96 sec. 1 and art. 97 sec. 1 of the PTU Act, indicating that the taxpayers referred to in art. 15, subject to the obligation to register as active VAT taxpayers, are required before the date of the first intra-Community supply or the first intra-Community acquisition to notify the head of the tax office in the registration, referred to in article 2. 96 about the intention to start performing these activities. However, pursuant to § 1 point 1 lit. j of the Regulation of the Minister of Finance of November 14, 2014 on the determination of taxpayers not required to submit a registration application (Journal of Laws of 2014, item 1624), taxpayers who do not have their registered office in the territory of the country do not have the obligation to submit a registration, permanent place of business, from which they make economic transactions, permanent place of residence or habitual residence, if they perform in the territory of the country only services in relation to which the taxpayers settling the tax on goods and services are the taxpayers referred to in art. 17 sec. 1 point 4 of the Act on PTU.

In addition to the above-mentioned national regulations, the interpretative body established Council Regulation (EU) No. 282/2011 of March 15, 2011 laying down implementing measures for Directive 2006/112 / EC on the common system of value added tax (Journal of Laws UE L 77 of 23.03.2011, page 1, as amended - hereinafter: the Council Regulation) and the explanation of the concept of "fixed place of business" contained therein. Namely, pursuant to Art. 11 sec. 1 of this regulation, for the purposes of applying Art. 44 of Directive 2006/112 / EC, "fixed place of business" shall mean any place - other than the place of business of the taxpayer as referred to in Art. 10 of the Council Regulation - which is characterized by sufficient stability and an appropriate structure in terms of human and technical resources, to enable him to receive and use the services provided for his own needs at that fixed place of business. In accordance with Art. 11 sec. 2 of the Council Regulation, for the purposes of applying the following articles, a fixed place of business means any place - other than the place of business of the taxpayer referred to in art. 10 of this regulation - characterized by a sufficient constancy and an adequate structure in terms of human and technical resources to enable it to provide services (...). The fact of having a VAT identification number in itself is not sufficient to conclude that a taxpayer has a fixed place of business (Article 11 (3) of the Regulation).

On the other hand, pursuant to Art. 53 sec. 1 of the Council Regulation, for the purposes of applying art. 192a of Directive 2006/112 / EC, the taxpayer's permanent place of business is taken into account only if it is characterized by a sufficient degree of stability and an adequate structure in terms of human and technical resources to enable it to supply the goods or services in which it participates.

As further pointed out by the authority, when interpreting the concept of "fixed place of business", one should take into account the appropriate structure in terms of human and technical resources necessary to conduct business activity and the existence of a certain minimum scale of economic activity, which allows for the recognition that the taxpayer's activity in this place is not carried out periodically, as well as the activity from this place is carried out independently from the activity of the seat of the enterprise. In this regard, the authority referred to examples of CJEU judgments (e.g. judgments: C-168/84, C-231/94, C-190/95, C-390/96, C-605/12), as well as court judgments domestic (e.g. judgments: Supreme Administrative Court of February 16, 2015, file reference I FSK 2004/13, WSA in Olsztyn of September 30, 2009, reference number I SA / Ol 563/09).

According to the authority, a permanent place of business is a place showing the features of "permanence", permanently connected with a given place, non-transferable, unchangeable, with a certain degree of commitment, which allows for the recognition that the activity is carried out in this place in a non-transient manner, or periodic. Therefore, a certain minimum scale of activity is necessary, which is an external sign that the activity at this site is carried out continuously. The involvement should take on a specific personal and material dimension, allowing for the provision of services in an independent manner. In other words, in order to recognize that a given place of business is permanent, it is necessary to have technical infrastructure and human staff who can independently perform certain activities. Such a personal-material structure in a permanent place of business should be permanent, i.e. repetitive and permanent. As further argued by the authority, the entity has a fixed place of business in the territory of the country, if, using the infrastructure and personnel on its territory, in an organized and continuous manner, it conducts activities in which it carries out activities subject to tax on goods and services, while the technical infrastructure and personal involvement must be closely related to the performance of taxable activities. The authority stipulated that in order to establish a permanent place of business in a given country, it is not necessary to have one's own personnel and technical resources. However, the taxpayer must be entitled - on the basis of the requirement of sufficient permanence of the place of business - to have comparable control over the personnel and technical resources. Therefore, if a given entity has its personnel and structure (including technical infrastructure) in a given country that are adequately stable, it has a permanent place of business in that country. However, it is irrelevant whether they are employees directly employed by this entity or whether they are "own" infrastructure. it has a permanent place of business in that country. However, it is irrelevant whether they are employees directly employed by this entity or whether they are "own" infrastructure. it has a permanent place of business in that country. However, it is irrelevant whether they are employees directly employed by this entity or whether they are "own" infrastructure.

Referring the above comments to the description of the future event presented in the request for interpretation, the authority stated that the applicant's activity in Poland meets the conditions for being considered a permanent place of business in Poland, because it is characterized by sufficient stability and an appropriate structure in terms of personnel and technical resources. . Conducting part of the activity in Poland results from the possession in Poland of sufficient human and technical resources necessary to conduct part of the economic activity and the existence of a certain minimum scale of economic activity, which allows for the recognition that the activity in Poland is not carried out periodically, as well as is carried out in in a manner independent in relation to the activity of the applicant's registered office.

Referring to individual elements of the events described in the application, the authority finally stated that the applicant will have an appropriate structure in Poland in terms of human resources and technical support, proving it has a permanent place of business. In particular, it has control over the facilities of the Polish company, which, acting on behalf of the applicant, remains at its disposal. An applicant whose activity in Germany is related to the broadly understood implementation of projects related to renewable energy sources, in Poland, on the basis of an agreement concluded with a Polish company, will provide the same

services, with the proviso that all activities will be performed by the Polish company in close cooperation with the applicant and taking into account the conditions indicated by the applicant (in accordance with the applicant's instructions,

As emphasized by the authority, the applicant will have an appropriate structure in Poland in terms of human and technical resources necessary to conduct independent business activities in the implementation of projects related to renewable energy sources. Its activities are characterized by a certain level of stability and, using the resources of a Polish company, it is able to provide services itself. Therefore, it will have a permanent place of business in Poland. Although the applicant will provide services taxed on the territory of Poland pursuant to Art. 28e of the above-mentioned act for investors who are VAT taxpayers who have their registered office in Poland or a permanent place of business in Poland, who will be registered or obliged to register as VAT-EU taxpayers, Art. 17 sec. 1 point 4 of the Act on PTU. This means that the applicant is obliged to register as an active VAT taxpayer in Poland in connection with the provision of services related to the implementation of projects in the field of renewable energy (carrying out activities specified in Article 5 (1) (1) of the Act) taxed on the territory of Poland, and , as a taxpayer, to settle VAT in Poland on the services provided.

Referring to the remaining arguments included in the request, the authority found the company's position incorrect.

In her complaint to the Provincial Administrative Court, the applicant, requesting that the challenged interpretation be revoked in its entirety, alleged an incorrect interpretation and, consequently, an incorrect assessment of the application of Art. 17 sec. 1 point 4 and art. 17 sec. 2 of the Act on PTU in connection with joke. 11 sec. 1 and sec. 2 and art. 53 sec. 1 of the Council Regulation, consisting in the recognition that the company will have a permanent place of business in Poland, and consequently is obliged to register as an active VAT taxpayer in Poland and, as a taxpayer, to settle VAT in Poland.

The company argued that a permanent place of business can be considered if the activities conducted in Poland meet all of the following conditions: 1) the activity is characterized by a certain level of stability, 2) there is an appropriate structure in terms of human resources necessary to conduct business, 3) there is an appropriate structure in terms of technical facilities necessary to conduct business activity, 4) the activity is carried out independently. In this case, the applicant will use the services of a Polish company, which is its subsidiary and which has its registered office in Poland. Using the services of a subsidiary may create a permanent place of business, but only if it meets the above-mentioned conditions of permanence, an adequate structure in terms of human and technical resources and independence to a degree comparable to the availability of own facilities, and additionally these conditions should be assessed in the context of economic and commercial realities. According to the complainant, in the presented situation, the condition of having permanent human resources necessary to conduct business activity in Poland will not be met. The complainant will not have such facilities, will not employ employees or associates in Poland, while employees or associates employed in Germany will only be able to stay in Poland temporarily, i.e. temporarily, and not permanently. in addition, these conditions must be assessed in the context of economic and commercial realities. According to the complainant, in the presented situation, the condition of having permanent human resources necessary to conduct business activity in Poland will not be met. The complainant will not have such facilities, will not employ employees or associates in Poland, while employees or associates employed in Germany will only be able to stay in Poland temporarily, i.e. temporarily, and not permanently. in addition, these conditions must be assessed in the context of economic and commercial realities. According to the complainant, in the presented situation, the condition of having permanent human resources necessary to conduct business activity in Poland will not be met. The complainant will not have such facilities, she will not employ employees or associates in Poland, while employees or associates employed in Germany will only be able to stay in Poland temporarily, i.e. temporarily, and not permanently.

The complainant further argued that the Polish company was a separate legal entity bound by a cooperation agreement with the party. Thus, the applicant does not have a control over the personnel of the Polish company comparable to that which it exercises over its own personnel located in Germany. The Polish company has its own employees and associates and exercises control over them, and there is no basis for assuming that the applicant controls the employees and associates of the Polish company in any way, and in particular that it does so to a degree comparable to that of its own employees and associates.

In the future event referred to in the application, there is no question that some of the applicant's economic activities in Poland would be independent of its main economic activities in Germany. Both the persons responsible for making decisions regarding the applicant's business activity and the persons responsible for concluding contracts related to the provision of services by the applicant will be located in Germany, and the employees or associates of the Polish company will only be authorized to perform auxiliary activities (e.g. obtaining consents, land permits and rights,

In the applicant's opinion, in the situation presented, the condition of having a permanent technical base in Poland necessary for running a business will also not be met. It will not have a permanent property in Poland used in its business activities (e.g. an office, a flat) and will not have a permanent technical base in Poland (e.g. machinery, equipment). The technical facilities of a Polish company, which is a separate legal entity and has its own technical facilities over which it exercises full control, cannot be considered permanent technical facilities.

Consequently, the applicant considers that the services provided by it will be subject to the taxation method provided for in Art. 17 sec. 1 point 4 and art. 17 sec. 2 of the PTU Act, so it will not be obliged, as a taxpayer, to settle VAT in Poland.

In response to the complaint, the authority applied for its dismissal, maintaining in full the position expressed in the challenged interpretation.

The Provincial Administrative Court in Gliwice considered the following:

The complaint is unfounded and must therefore be dismissed.

Pursuant to Art. 57a of the Act of August 30, 2002, Law on Proceedings before Administrative Courts (Journal of Laws of 2019, item 2325, as amended - hereinafter referred to as: ppsa), a complaint against a written interpretation of tax law provisions issued in an individual case may be based solely on the grounds 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 essence of the dispute between the parties boils down to the answer to the question whether - in the future event presented in the application for interpretation - the German company has a permanent place of business in Poland? The answer to this question, in turn, determines the position on the remaining issues covered by the company's inquiry.

When defining the legal framework of the case, reference should be made to Art. 28a of the PTU Act, according to which for the purposes of applying Chapter 3 (place of performance when providing services):

1.every time a taxpayer is mentioned - it means:

a) entities that independently conduct the economic activity referred to in art. 15 sec. 2, or economic activity corresponding to this activity, regardless of the purpose or result of such activity, taking into account art. 15 sec. 6,

b) a non-taxable legal person pursuant to point (a) and, which is identified or required to be identified for the purposes of tax or value added tax;

2. a taxpayer who also conducts business or conducts transactions that are not considered taxable supplies of goods or services in accordance with Art. 5 sec. 1, shall be considered a taxable person in respect of all services provided to him.

Further reference is made to Art. 2 point 1 of the Act on PTU, establishing the principle of territoriality. It states that the territory of the country means the territory of the Republic of Poland (subject to Article 2a).

It should be remembered that the tax on goods and services is a territorial tax, which means that it is charged on transactions that take place or are treated as taking place in a strictly defined territory. In a situation where the performance of a taxable activity takes place outside this territory, the activity will, as a rule, not be subject to taxation in a given country. Due to the frequent cross-border transactions, and at the same time the harmonization of PTU within the European Union and the corresponding 0% rates for this type of transactions, the determination in which country is subject to taxation of services provided to an entity from one country by a contractor established in another country. This issue was regulated by the legislator in Art. 28b of the Act on PTU. In accordance with the regulations contained therein, the place of supply 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 (Article 28b (1) of the Act). 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 provision of these services is the permanent place of business (Article 28b (2) of the Act). On the other hand, when the taxpayer who is the recipient of the service does not have a registered office or a fixed place of business referred to in paragraph 2, the place of the provision of services is the place,

As follows from the above regulations, the principle is that services provided to the taxpayer (within the meaning of Article 28a), subject to the above-mentioned reservations not relevant in this case, are subject to taxation at the place of the service recipient's place of business, unless they are provided for the permanent place of business business of the service recipient, which is located in a place other than his seat of business. In such a case, the place of supply of services is the fixed place of business for which the service is provided.

A reservation in this regard is contained in Art. 28e of the PTU Act, which concerns real estate services. Namely, the place where real estate services (...) and services for the preparation and coordination of construction works, such as architects and construction supervision services, are provided, is the place where the real estate is situated.

National regulations are consistent with the provisions of EU law in the above-mentioned scope. According to Art. 44 of Directive 2006/112 / EC of 28 November 2006 on the common system of value added tax, the place of supply of services to a taxpayer acting as such is the place where that 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. In the absence of such a seat or a fixed place of business, the place of supply of services is the place where

Simply put,, as a rule, the place of supply of services in the case 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, 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 fixed place of business.

The provisions of Art. 10 and art. 11 of the aforementioned Council Regulation establishing implementing measures to the above-mentioned Directive 2006/112 / EC, including the provisions of Art. 44 and art. 45.

And so, according to Art. 10 sec. 1-3 of the Council Regulation, for the purposes of applying Art. 44 and 45 of Directive 2006/112 / EC, the "place where the taxpayer's business is established" is the place where the functions of the company's central administration are carried out (paragraph 1). In order to determine the place referred to in paragraph 1, the place where important decisions concerning the general management of the enterprise are made, the registered office address of the enterprise and the place of the meetings of the management board of the enterprise are taken into account. Where these criteria do not allow the place of establishment of the taxpayer to be established with certainty, the decisive criterion is the place where significant decisions relating to the general management of the enterprise are taken (paragraph 2).

Pursuant to Art. 11 sec. 1 - 3 of the above-mentioned Council Regulation, for the purposes of applying Art. 44 of Directive 2006/112 / EC, "fixed place of business" shall mean any place - other than the place of business of the taxpayer 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 of this permanent place of business (paragraph 1). For the purposes of the application of the following articles, "fixed place of business" shall mean any place - other than the place of business of the taxpayer as referred to in Art.

a) Art. 45 of Directive 2006/112 / EC;

b) from 1 January 2013 - Art. 56 sec. 2, second paragraph of Directive 2006/112 / EC;

c) by 31 December 2014 - Art. 58 of Directive 2006/112 / EC;

d) Art. 192a of Directive 2006/112 / EC (paragraph 2).

The fact of having a VAT identification number is not in itself sufficient to consider that a taxable person has a fixed establishment (paragraph 3).

In terms of determining the place of business of the taxpayer, the provisions of Art. 53 sec. 1 and 2 of the Council Regulation, which refers to the tax obligation of a taxpayer who has a permanent place of business in the territory of a Member State. The complainant referred to these regulations in her complaint. These provisions state that for the purposes of applying Art. 192a of Directive 2006/112 / EC, the taxpayer's permanent place of business is taken into account only if it is characterized by sufficient stability and an adequate structure in terms of human and technical resources to enable it to supply the goods or services in which it participates (paragraph 1). Where the taxable person has his fixed establishment in the territory of the Member State where VAT is due, the fixed establishment shall be deemed not to participate in the supply of goods or services within the meaning of Art. 192a lit. (b) of Directive 2006/112 / EC, unless the technical facilities and staff of that fixed establishment are used by that taxable person for the purposes of carrying out the taxable supply of these goods or services in that

Member State, prior to the delivery of the goods or the provision of services or during the provision of services (paragraph 2). that this fixed place of business does not participate in the supply of goods or services within the meaning of Art. 192a lit. b) of Directive 2006/112 / EC, unless the technical facilities and staff of that fixed establishment are used by that taxable person for the purposes of carrying out the taxable supply of these goods or services in that Member State, prior to the delivery of the goods or the provision of services or during the provision of services (paragraph 2). that this fixed place of business does not participate in the supply of goods or services within the meaning of Art. 192a lit. (b) of Directive 2006/112 / EC, unless the technical facilities and staff of that fixed establishment are used by that taxable person for the purposes of carrying out the taxable supply of these goods or services in that Member State, prior to the delivery of the goods or the provision of services or during the provision of services (paragraph 2).

The analysis of the above regulations leads to the conclusion that a permanent place of business is such a space (place) in which there is (is) an appropriate structure in terms of personnel and technical resources, necessary for running a business, and there is a certain minimum scale of economic activity that allows for the recognition that the taxpayer's activity in this place is not carried out periodically (incidentally), as well as that the activity from this place is carried out independently in relation to the activity of the company's seat (see the judgment of the Provincial Administrative Court in Szczecin of 5 March 2020. reference number I SA / Sz 915/19). In this regard, the jurisprudence of the CJEU remains valid, including judgments in cases: C - 168/84 Gunter Berkholz, C-231/94 Faaborg-Gelting Linien A / S, C-190/95 ARO Lease By,**Welmory** Sp. z o. o. They indicated that a permanent place of business must be characterized by a certain degree of commitment, which allows for the recognition that the activity is conducted in this place not in a temporary or periodic manner. There must be a certain minimum scale of activity, which is an external indication that the activity at the site is ongoing. This involvement must take on a specific personal and material dimension, allowing for the provision of services in an independent manner.

In other words, in order to recognize that a given place of business is permanent, it is necessary to have adequate technical infrastructure and personnel who can perform specific activities on their own. Such a personal and material structure in the place of business should be permanent, i.e. repetitive and permanent (see the judgment of the Provincial Administrative Court in Gliwice of February 11, 2021, ref. IS / Gl 1475/20). As pointed out by the Provincial Administrative Court in Gliwice in the judgment of September 17, 2020, file ref. I SA / Gl 755/20, in order to establish a permanent place of business (within the meaning of Art.28b (2) of the PTU Act), it is not important where the functions of the company's management board are performed - the place where important decisions regarding general management are made company or place in which important decisions are made regarding the overall management of the enterprise. These distinguishing features allow only the place of the taxpayer's seat of business to be determined.

Therefore, in order to assume that a given entity has a permanent place of business in the territory of the country, it should be able to use infrastructure and personnel in the territory of the country in an organized and continuous manner and carry out activities subject to tax on goods and services, while the said infrastructure and personal involvement should be closely related to the performance of taxable activities. Importantly, for the existence of a permanent place of business, it is not necessary that the created business structure is characterized only by its own personnel and technical background, including, inter alia, employees or their own tools. It is enough for the taxpayer to have sufficient control over the existing human and technical facilities.

In the reality of the case under examination, the company has its seat and conducts business activity in Germany. There, important decisions are made regarding the general management of the enterprise, including decisions on concluded contracts. In Poland, the applicant does not employ workers, does not maintain its own technical resources (tools, machines), does not rent any office or warehouse space, except where the applicant's employees or associates employed in

Germany will stay in Poland (temporarily, approx. 4 times in one year after approx. 1-2 days) to monitor cooperation with a Polish contractor. The applicant intends to conclude a cooperation agreement with a Polish limited liability company. This Polish contractor (Polish company) will be based in Poland and will be an active VAT payer. What is important, the only and 100% shareholder in this Polish company will be a German company - i.e. the complainant. The Polish company, under the contract with the applicant and in close cooperation with him (including, inter alia, specialist advice on the implementation of the project through its own employees or associates employed in Germany) will provide services (and these will be services remaining in the mainstream of the applicant's activities, and therefore regarding the search in Poland for sites suitable for the implementation of projects related to renewable energy sources, preparatory activities for the implementation of such projects, technical planning of projects and technical management of projects) for its sole shareholder, taking into account his instructions and after obtaining his approval . All rights and obligations related to the above-mentioned activities performed by the Polish company will be transferred to the applicant. What's more, the activity of the Polish company will consist in providing services only to the applicant and possibly related entities (in the future, possibly for other entities). Also, the complainant will purchase services only from the Polish company and will not purchase goods or services on the territory of Poland from other entities for the purposes of providing the services referred to in the application. What is particularly important, a Polish company will sometimes act as the applicant's attorney with legal effect for it, including cooperating on its behalf with the relevant state and local government administration bodies,

When analyzing the state outlined by the company in the request for interpretation - future event, in the context of the question asked and the above-mentioned comments, it is of fundamental importance to assess whether the applicant company has a permanent place of business in Poland, understood as any place - other than the place of its registered office. economic activity of the taxpayer - which is characterized by sufficient stability and an appropriate structure in terms of human and technical resources to enable him to receive and use the services provided for his own needs of this permanent place of business.

As the Court indicated above, 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 is at this point, it is not conducted periodically. The activity from this place should be carried out independently of the activity of the company's seat (see the judgment of the Voivodship Administrative Court in Szczecin of 5 March 2020, ref. I SA / Sz 915/19 and the judgments of the CJEU cited therein). As it is pointed out in the jurisprudence of administrative courts, today there is no doubt that 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, may lead to the establishment of a permanent establishment within the meaning of the Act on PTU (see judgments: Supreme Administrative Court of 23 November 2017, file number I FSK 160/16 and WSA in Warsaw of June 15, 2015, file reference number III SA / Wa 3332/14).

On the other hand, the jurisprudence of the CJEU emphasizes that in order to adopt a permanent place of business in a given country, it is not necessary for the taxpayer to have at his disposal staff and technical facilities owned by him. It is sufficient for a taxpayer to have direct and permanent access to the personnel and technical resources of another taxpayer who may be a service provider for the fixed place of business established in this way (judgment of 16 October 2014, C-605/12). This leads to the conclusion that having a personal and material infrastructure in the classic sense (i.e. own and solely managed by it) is not necessary if the contractor has a permanent place of business in Poland and it can be assumed that that the company will use its personnel and technical facilities (see the judgment of the Provincial Administrative Court in Gliwice of September 17, 2020, file no. I SA / Gl 755/20). Such action ensures that the conditions of Art. 28b paragraph. 2 of the Act on PTU.

In the circumstances of this case, the applicant company realizes such a state of affairs, that is, it plans to provide services in Poland using the services of a subcontractor, which subcontractor provides services through its employees and the technical infrastructure necessary to perform the service for the end customer; the complainant gives instructions on the subcontractor's activities, the subcontractor's activities are subject to the complainant's approval and control. It cannot be ignored that the subcontractor, i.e. the Polish company, is an entity with 100% of the applicant's share, sometimes acting as the applicant's attorney, and in each case for her or its related entities, provided that in the future the possibility of acting on behalf of the applicant was not excluded. for unrelated entities.

Taking all of this into account, in the opinion of the Court, the authority assessed correctly that the circumstances presented in the application indicate that the applicant uses an entity established for this purpose in its operations in Poland (a Polish limited liability company). The personnel involvement and infrastructure of this entity - the subcontractors are closely related to the services provided by the applicant company, as described above. The scope of these activities in favor of the applicant allows it to be concluded that it has created a permanent place of business in Poland. This assessment is not changed by the fact that all decision-making (management) activities are undertaken in Germany. The permanence of the place of business cannot be equated with management decisions, and crucial for recognition,

In the opinion of the Court, in the circumstances specified in the request for interpretation, the activities of the company described therein should be considered permanent and undertaken with the use of a personal and material structure in Poland. They testify to the existence of a permanent place of business in Poland within the meaning of the Value Added Tax Act. The entire economic activity of the applicant, as described in the application, will be carried out in Poland, with the participation of a subcontractor (the Polish company and its technical and personnel facilities) and employees and associates from Germany - acting on behalf of the party. The applicant's economic activity in Poland will be carried out with the use of the above-mentioned persons and infrastructure, and will be independent enough to assume that it will be independent of the company's operations in Germany. The infrastructure planned by the applicant is to allow Poland to obtain appropriate approvals and permits, such as: a building permit, a decision on environmental conditions, a decision on development conditions, a decision on the location of a public purpose investment, a license to generate energy, a use permit - for the purpose of providing the service, among others in the field of obtaining land in Poland suitable for the implementation of projects related to renewable energy sources, the implementation of preparatory activities for this type of projects, technical planning of projects and technical management of projects. All this is to sell the investor all rights related to a specific project in various transaction options. a decision on development conditions, a decision on the location of a public purpose investment, a license for energy production, a use permit - for the purpose of providing the service, inter alia, in the field of acquiring land in Poland suitable for the implementation of projects related to renewable energy sources, carrying out preparatory activities for this type of projects, technical planning of projects and technical management of projects. All this is to sell the investor all rights related to a specific project in various transaction variants. a decision on development conditions, a decision on the location of a public purpose investment, a license to generate energy, a use permit - for the purpose of providing the service, inter alia, in the field of obtaining land in Poland suitable for the implementation of projects related to renewable energy sources, the implementation of preparatory activities for this type of projects, technical planning of projects and technical management of projects. All this is to sell the investor all rights related to a specific project in various transaction options. carrying out preparatory activities for this type of projects, technical planning of projects and technical management of projects. All this is to sell the investor all rights related to a specific project in various transaction variants. carrying out preparatory activities for this type of projects, technical planning of projects and technical management of projects. All this is to sell the investor all rights related to a specific project in various transaction variants.

Contrary to the applicant's arguments, a permanent place of business cannot be equated with the place of concluding the contracts or the seat of the company's authorities. The place where the actual business activity is actually conducted is of key importance - "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 Council Regulation) . It is a place that creates a real, alternative to its seat, economic structure in terms of personnel and technical resources, enabling it to receive and use the services provided for its own needs of this permanent place of business, when the services for it are provided at this point. (see Art. 28b par.

According to the Court, the interpretative body correctly assumed that in the facts of this case the applicant's personal and technical resources (in the form of a Polish company and, if necessary, German employees and associates) were located in Poland and allowed the applicant to receive and use the services provided for own needs of this permanent place of business.

In this state of affairs, in the interpretation issued, the authority correctly indicated that the complainant has a permanent place of business in Poland, therefore: 1) it is obliged to register as an active VAT taxpayer; 2) is obliged to settle VAT on this account in Poland.

The above makes the allegation of violation of Art. 17 sec. 1 point 4 of the Act on PTU. The conditions referred to in this provision, and thus also in Art. 17 sec. 2 of the above-mentioned act, because they did not exist, as shown above.

In this state of affairs, the Court dismissed the complaint, pursuant to Art. 151 pps