More clarity on the EU VAT concept of Fixed Establishment

The CJEU Berlin Chemie-case

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Berlin Chemie A. Menarini SRL

The latest judgement in a series of cases on the EU VAT concept of fixed establishment

On 7 April 2022, the Court of Justice of the EU (CJEU) issued its decision in the Berlin Chemie A. Menarini SRL case (C-333/20). This concerns another judgment in a series of cases on the EU VAT concept of fixed establishment.

The JCEU had to assess whether a company, in order to be regarded as having a fixed establishment in the Member State in which it carries out local supplies, must have 'its own' human and technical resources in the territory of that Member State or whether it would be sufficient for that company to have 'immediate and permanent access' to such human and technical recourses through another affiliated company which it controls since it holds the majority of its shares.

Facts of the case
A business established in Romania, BCAM, performs services for its parent company BC, established in Germany. Under a contract concluded between these parties, BCAM agreed to do all the marketing required to actively promote BS's products in Romania, in accordance with the strategies and budget established and developed by BC. The contract covered a wide range of (related) services.

BCAM did not charge Romanian VAT on these services as performed for BC. The Romanian VAT authorities nevertheless took the position that the services should be taxable in Romania (instead of Germany) as BC would have sufficient technical and human resources to have a fixed establishment in Romania.

The ruling
The CJEU has ruled I this case that BC does not have of a fixed establishment in Romania, on the ground that that company owns a (sub-)subsidiary there that makes available to it human and technical resources under contracts by means of which that (sub-)subsidiary provides, exclusively to it, marketing, regulatory, advertising and representation services that are capable of having a direct influence on the volume of its sales.

The CJEU begins by noting that the place of supply of a general B2B service is the country where the customer has established its place of business. An exception to this are the services performed for a customer's fixed establishment. In that case, the place of supply of the service is the country where the fixed establishment is established.

There is a fixed establishment if a taxpayer has a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs or to render services itself. The fact that a company constitutes an independent legal entity, is not decisive in determining whether there may be a fixed establishment. According to the CJEU, any assessment of whether the substantive conditions for a fixed establishment have been complied with must be based on economic and commercial reality.

One of the conditions is that the taxpayer has sufficient technical and human resources in the

country where there may be a fixed establishment. In that respect, the Romanian court wanted to know whether the technical and human resources must belong to the taxpayer itself, or whether it is sufficient for the taxpayer to have access to such resources through an affiliated company on the basis of a majority shareholding. The CJEU ruled that a taxpayer does not have to have its own human and technical resources, but that it must have access to these as if they were its own resources. That can, for example, be the case if an affiliated entity makes human and technical resources available to the taxpayer under services or lease agreements. It is important that these agreements cannot be terminated at short notice.

The CJEU then examined whether the existence of a fixed establishment can be inferred from the circumstance that BCAM provides services that may affect the results of BC, and whether it is necessary for BCAM to participate in decisions taken by BC.

The CJEU established that it is important to distinguish between, on the one hand, the services provided by BCAM and, on the other, the goods BC supplies in Romania. The CJEU subsequently noted that the human and technical resources that would constitute a fixed establishment for BC in Romania, are the same resources with which BCAM provides its services to BC. According to the CJEU, the same technical and human resources cannot be used to provide and purchase the same services at the same time. The CJEU thus concluded that BC had purchased BCAM's services in Germany and that BCAM therefore must not be regarded as a fixed establishment of BC in Romania.

Practical implications

In our view, there are a number of elements that are important to take away from this judgment.

A first element is that it would not be a requirement for a taxable person to own the human or technical resources itself. At first sight, this seems to contradict the Titanium case of last year based on which at least the human resources would have to be the 'own' human resources. This ruling could be explained as interpreting the term 'own resources' as having the right to dispose of those human and technical resources in the same as if they were its own.

A second element, although not new, is that the existence of a fixed establishment does not depend on the decisions that the 'structure' is authorized to take.

A third element, which will be welcomed by businesses, is that the same means cannot be used both to provide and receive the same services. In this case, this means that BC cannot possess a fixed establishment through its affiliated company as it would mean that that affiliated company (the fixed establishment) would be deemed to perform services to itself. This is an important point for other set-ups where the VAT authorities could arguing that a fixed establishment exists, for example for toll manufacturing set ups in Belgium (see a recent referral to the CJEU on this topic).[1]

In the Netherlands, a sub-subsidiary is rarely regarded as a fixed establishment of a second-tier parent company. Under the Fixed Establishment Decree,[2] the general rule is that a legally independent sub-subsidiary is regarded as an independent taxpayer. It is therefore reassuring news that the CJEU has reconfirmed that a sub-subsidiary does not automatically

1 Cabot Plastics Belgium (Case C-232/22).

2 Decree of 17 December 2020, nr. 2020-25513, Vaste inrichting.

constitute a fixed establishment for VAT purposes.

Other EU Member States sometimes see this differently. Therefore, it cannot be ruled out that in other EU Member States a sub-subsidiary may qualify as a fixed establishment. Tax authorities may use the ruling of the CJEU in this case to argue that a sub-subsidiary does indeed qualify as a fixed establishment in certain cases.

Even though this ruling answered some relevant questions, it also raised a few new ones. Please contact your EY VAT contact person, or any of the people mentioned in this memo, if you want to discuss whether this ruling affects your business.

The above is based on our interpretation of current tax legislation and case law published to date. This Indirect Tax Alert provides general information with no pretence of completeness, and it is not a tax advice.

Information
For more detailed information about the matters discussed in this Alert, please contact one of EY's tax advisers listed below.

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