III SA / Wa 1316/21 - Judgment of the Provincial Administrative Court in Warsaw

Date of the judgment	2022-04-13 *invalid judgment*
Date of receipt	2021-06-02
Court	Provincial Administrative Court in Warsaw
Judges	Anna Zaorska / rapporteur / Katarzyna Owsiak Piotr Dębkowski / chairman /
Symbol with description	6110 Tax on goods and services
Thematic slogans	Tax on goods and services
The appealed authority	Director of the Tax Administration Chamber
Result content	The contested decision was annulled
Cited regulations	Journal of Laws 2016 item 710 art. 28b paragraph. 1-4, art. 28e, art. 28f paragraph. 1 and sec. 1a, art. 28 g of paragraph 1. 1, art. 28i, art. 28j paragraph. 1 and sec. 2 and art. 28n *Act of March 11, 2004 on tax on goods and services, Journal of* Laws No. 2020 item 1325 art. 191 *The Act of August 29, 1997. Tax Ordinance - i.e.*

SENTENCE

Provincial Administrative Court in Warsaw composed of the following composition: Chairman judge of the Provincial Administrative Court Piotr Dębkowski, Judges judge of the Provincial Administrative Court Katarzyna Owsiak, judge of the Provincial Administrative Court Anna Zaorska (rapporteur), reporter, reporter Katarzyna Dorota Wielgosz, after hearing at the hearing on April 13, 2022, the case from a PSA complaint based in P. against the decision of the Director of the Tax Administration Chamber in W. of [...] March 2021 No. [...] regarding tax on goods and services for August and September 2016 1) repeals the contested decision 2) orders the Director of the Tax Administration Chamber in W. for PSA based in P. the amount of PLN 15,477 (say: fifteen thousand four hundred and seventy-seven zlotys) as reimbursement of the costs of court proceedings.

JUSTIFICATION

1.1. By the appealed decision of [...] March 2021, the Director of the Tax Administration Chamber in W. (hereinafter: "DIAS") upheld the decision of the Head [...] of the Customs and Tax Office in G. (hereinafter: "NUCS") of [...] September 2020 on tax on goods and services for August and September 2016.

1.2. As is clear from the case files, pursuant to the decision of the Director of the Tax Control Office in G. of [...] November 2016, control proceedings were initiated against O. sp. Z oo - now: PSA (hereinafter: "the Company" or ") in terms of the accuracy of the declared tax bases and the correctness of calculating and paying the tax on goods and services for the period from August 2016 to October 2016.

The head [...] of the Customs and Tax Office in G., by decision of [...] September 2020, determined the Company's tax liability in the tax on goods and services for the months of August 2016 and September 2016.

NUCS determined that the company dealt with the provision of ticketing services, among others for the following entities registered in European Union countries:

1) P. Ltd. based in Cyprus,

2) R. sro based in the Czech Republic,

3) I. Ltd based in Great Britain,

4) R. Ltd. based in Great Britain,

5) A. GmbH based in Germany,

6) A. OU based in Estonia.

In August and September 2016, the complainant issued invoices without VAT (reverse charge) to the indicated entities. From October 2016, VAT was charged at the rate of 23% on the services provided.

According to NUCS, these entities had a permanent place of business in Poland. Therefore, acting pursuant to Art. 28b paragraph. 2 of the Act of March 11, 2004 on tax on goods and services (Journal of Laws of 2016, item 710, as amended, hereinafter: "the VAT Act") assumed that the ticket services provided by the Company to the above-mentioned entities should not be documented with invoices without VAT, but with invoices with a VAT rate of 23%.

In the opinion of NUCS, the evidence gathered in the case allowed to conclude that the activity of P. Ltd., R. sro, I. Ltd, R. Ltd., A. GmbH and A. OU consisted in introducing fuel to the territory of the country, from through registered customers, excise tax and fuel surcharge were paid, and then the fuel was sold to Polish customers. Thus, these entities, conducting a licensed business activity consisting in purchasing fuel from abroad, were obliged to maintain a certain level of organization of their activities in the territory of the country. This organization has a specific material dimension, in particular with regard to fuel storage, due to the obligation to maintain mandatory reserves. The concessions for fuel trading obtained by the entities indicated their intention to be present in the country for a long time in connection with their economic activity. For these reasons, NUCS assumed that they had the necessary personnel and technical resources in Poland, enabling them to receive services provided by Polish entities and use them for the purposes of economic activity performed in the country (Poland).

Taking into account the identified irregularities, NUCS questioned the accuracy of the entries in the VAT sales registers kept by the Company for the period from August to September 2016, stating that they were defective with regard to the recognition of sales receipts issued to foreign contractors P. Ltd., R. sro, I. Ltd , R. Ltd., A. GmbH and A. OU by applying the wrong tax rate.

1.3. The Company appealed against the above decision. The NUCS decision alleged a violation of:

- Art. 28b paragraph. 1 in conjunction joke. 106e paragraph. 1 point 18 of the VAT Act, by erroneously assuming that during the audited period, all of the companies for which it provided the ticket service had a permanent place of business in Poland, and thus these services should be subject to VAT taxation in the territory of the country ,

- Art. 210 § 4 of the Act of August 29, 1997. Tax Ordinance (Journal of Laws of 2020, item 1325, hereinafter: "Op"), due to the lack of exhaustive reference in the justification of the decision to the allegations and legal arguments presented by The Company in its objections to the report on the inspection of tax books and limiting itself to general statements about not sharing the arguments of the Company,

- Art. 22 of the EU Council Regulation 282/2011, by failing to analyze the fulfillment of the conditions for verification of the recipient in connection with the possession of a fixed place of business.

1.4. While upholding the decisions of NUCS, DIAS shared the position of the first instance authority that contractors for whom the Company issued contested invoices in connection with the provision of the so-called ticket services, had a permanent place of business in Poland, and thus the Company should have taxed the services sold at 23% VAT.

In the first place, DIAS pointed out that P. Ltd, R. sro, I. Ltd., R. Ltd., A. GmbH, A. OL, conducted commercial activities consisting in trading in liquid fuels, which was manifested in intra-Community acquisitions of goods (fuel) taxed on the territory of Poland and their resale to Polish entities. To this end, they

all obtained the license required in Poland to trade in liquid fuels and the license to trade liquid fuels with foreign countries.

Moreover, the above entities concluded agreements with the Company (and with other entities, such as the agreement between P. Ltd. and S. Sp. Z oo) for the creation and maintenance of mandatory reserves of liquid fuels. These contracts concerned the maintenance of mandatory stocks for an indefinite period (as in the case of P. Ltd. and A. OU) or for a definite period, with the indication that the dates of maintaining the stocks were extended many times under the annexes to the agreements.

All the entities mentioned above used the services of registered customers for the purpose of trading liquid fuels in the territory of the country. This cooperation was manifested in the constant submission of orders for the implementation of services in the field of fuel acceptance and completion of the excise duty suspension procedure. Registered recipients constantly collected, accepted and inspected shipments of excise goods, and made excise duty and fuel surcharge payments. Performing the "excise clearance" was necessary for the resale of fuels by the above-mentioned entities. The DIAS stressed that the service registered recipient was not involved in the transactions in question in the course of a self-employed activity, but that all its activities were de facto those of those foreign registered entities.

He argued that these entities used the services of Polish carriers to organize fuel transport and that these were not one-off services. In the opinion of DIAS, one cannot ignore the fact that, also in the field of legal, financial and accounting services, translation of documents, repair of means of transport, and correspondence services, entities submitted standing orders to companies located in Poland.

In the opinion of the DIAS, these facts prove the durability of the place of business. They indicate that the economic activity planned and organized in this way was not to be carried out on an ad hoc basis, but on a continuous basis.

DIAS took the position that NUCS had sufficiently demonstrated the functioning of the organizational structures of the above entities on the territory of Poland, which allowed them to trade in fuel and assume that it was in Poland that their permanent place of business was located. These entities met the requirement set forth in the provisions of the Energy Law, that conducting business activity in the territory of the country in the field of fuel trade requires obtaining an appropriate license. DIAS concluded that the granting of concessions to these entities to trade in fuels proves that the authority granting the concessions stated that they meet the conditions (they have the technical capacity to ensure the proper performance of their activities, they ensure employment of people with appropriate professional qualifications),

DIAS also argued that these entities did not hold a license to trade in fuels and did not apply for such licenses in the countries of their seat or other European Union countries, or refused, like A. OU, using trade secrets to provide appropriate explanations in this issues. According to DIAS, the fact of organizing an appropriate technical and personnel structure is also indicated by the use of technical facilities of registered recipients in the field of receiving and releasing fuel at the place of receipt of excise goods, and the payment of excise duty and fuel surcharge by them on behalf of individual entities. Using the technical resources of registered customers required adequate human resources. The fact that staff and infrastructure

DIAS also indicated that the persons who actually managed the activities of the Company's contractors or related to their day-to-day service, resided permanently in the territory of the Republic of Poland and had permanent residences here, and made tax settlements:

- P. Ltd. - G. (appointed by O. sp. Z oo and S. sp. Z oo as the president of this entity) and TM,

- R. sro - JZ (running his own business and sitting on the boards of other companies),

- I. Ltd. - MW, KS, PS (participating in an organized crime group),

- R. Ltd. - PK (resided in Poland, filed tax returns, performed functions in many other companies based in Poland),

- A. GmbH - DZ (recipient of correspondence), TN (person responsible for transport), GW (representing the branch of A. GmbH with whom O. sp. Z oo has established contact as part of cooperation already in December 2015),

- A. OR – AG, DS.

According to DIAS, the organization of a permanent organizational structure will also be indicated by:

- permanent use by the entities in question of the services of Polish transport companies that transported fuel,

- making financial settlements with the use of bank accounts kept by banks based in Poland,

- sitting on the authorities of the Company's contractors of persons who were closely related to Polish companies providing services to the Company's contractors,

- actual performance of management functions not by the management board, but by persons more or less formally related to the Company's contractors residing in Poland,

- the existence of managing bodies at the Company's contractors, which include employees of foreign entities providing paid administrative services, - constant use of the services of domestic law firms, entities and persons professionally prepared to provide legal and advisory services in the field of taxes in the conducted activity,

- constant use of the services of domestic entities in the field of accounting services,

- using the services of entities registered in Poland belonging to the same capital groups,

- constant use of the services of translators based in the country,

- the use of technical infrastructure in the conducted business activity necessary for office services provided to the Company's contractors by entities based in Poland,

- standing orders in the field of business process support provided to the Company's contractors by Polish business units,

- the use of certification services or the development of documentation required for the purposes of permanent operations in Poland, which services were provided to the Company's contractors by Polish companies.

DIAS also indicated that it is impossible to conduct (perform) economic activity in the field of both production and trade of fuels in Poland without creating and maintaining mandatory reserves.

In view of the above circumstances, it considered that the resources owned by P. Ltd, R. sro, I. Ltd., R. Ltd., A. GmbH, A. were sufficient to conduct ongoing operations in Poland on a permanent basis and to a certain extent independent of the headquarters in another European Union country, because in the DIAS opinion, in order to achieve the goal of conducting commercial activities consisting in the purchase and resale of fuel, it is not necessary to have a more extensive personnel and material structure.

In the opinion of DIAS, the collected evidence of the case allowed it to be concluded that P. Ltd, R. sro, I. Ltd., R. Ltd., A. GmbH, A. had the necessary personnel and technical facilities in Poland enabling them to receive services provided by Polish entities and using them for the purposes of economic activity carried out in Poland. The presence of these entities in Poland was related to a strictly defined project, ie the sale of fuel to

Polish customers. The foregoing entitles to conclude that their activity was aimed at the consumption of services in the territory of the Republic of Poland, where the target customer was located. These entities, without the involvement of their own economic potential, operated in Poland through Polish companies. The scope of activity of these entities and the services provided by Polish companies constitute an economically inseparable whole. Therefore, without the cooperation of these entities with Polish service providers, the goal of the entire project could not be achieved.

DIAS mentioned that on August 1, 2016, changes were introduced to the Polish legislation (the so-called "fuel package"), which changed the provisions of the Energy Law and the VAT Act. The new regulations stated that licenses for foreign trade in fuels would be granted only to entities based in Poland or to foreign companies that had registered a branch in Poland and would use it to introduce liquid fuels to Poland. All the entities mentioned above have registered a branch of a foreign entrepreneur in Poland and have registered in Poland as a taxpayer for the purposes of value added tax. Consequently, they issued invoices showing sales subject to VAT at the rate of 23%. What is important, this change did not result in a change in the functioning or organization of the activities of entities in the country in the further period. As a result of the change in regulations, these entities formalized their place of business only in response to these circumstances.

At the same time, DIAS, referring to the objections of the appeal, including in particular the allegation of violation of Art. 22 of the EU Council Regulation 282/2011, he took the position that the Company refrained from analyzing the nature and application of the service provided, which could indicate a permanent place of business by its contractors in Poland.

Moreover, the Company failed to properly verify its contractors. It could not rely on their assurance that they did not have a permanent place of business in Poland, because the circumstances of their operation indicated a different state of affairs.

2. In the complaint to the local Court, the complainant requested that the contested decision be repealed and the case be remitted for re-examination and the costs of proceedings should be awarded in accordance with the prescribed standards.

She raised allegations of violation:

- Art. 28b paragraph. 1 in conjunction joke. 106e paragraph. 1 point 18 of the VAT Act, by erroneously assuming that during the audited period, all of the companies for which the complainant provided the ticket service had a permanent place of business in Poland, and thus these services should be subject to VAT taxation in the territory of country;

- Art. 22 of the EU Council Regulation 282/2011 by accepting that the complainant was able to identify the fact that the contractors had a permanent place of business in accordance with the above provision;

- Art. 210 § 4 of the Tax Ordinance Act, by not referring to the allegations and arguments of a legal nature in the substantiation of the decision, and by limiting ourselves to general statements that the Company's arguments were not shared.

The complainant argued that the nature of the services she provides, and therefore the premise referred to in EU Regulation 282/2011, does not in itself indicate that the contractors have a permanent place of business in Poland. The company provided a ticket service, introduced into Polish law precisely so that entities without technical infrastructure could bring fuel to Poland. Moreover, the possession of a permanent place of business is not determined by the possession of a license or an entry in the register of obligatory reserves. On the other hand, the detailed arrangements concerning the circumstances and manner of conducting business activity in Poland by foreign partners, presented in the contested decision, were not possible for the Company to make. The applicant submitted that these findings resulted from the operational work of the authority, including

information provided by persons cooperating with foreign contractors regarding the details of this cooperation. This type of information was the result of evidentiary activities on the part of the tax authorities and is not available to private entities such as the complainant.

The complainant emphasized that the verification of the manner of conducting business by foreign contractors was performed by the Company on the basis of available and determinable information, which was confirmed by the content of the contested decision itself. When the contractors changed the business model in Poland and registered branches in Poland (in October 2016), which was confirmed by the information available to the Company, the Company decided that the place of service provision is Poland.

3. DIAS, in its defense, upheld the position set out in the statement of reasons for the contested NUCS decision and requested that the present action be dismissed.

4. In the procedural letter of March 22, 2022, in support of her position, the complainant referred to the judgments of the Supreme Administrative Court of March 1, 2022, file ref. act: I FSK 647/18, I FSK 1080/19 and I FSK 1081/19.

The Provincial Administrative Court in Warsaw considered the following:

5.1. The complaint deserved to be upheld.

5.2. The essence of the dispute in the present case boils down to answering the question whether the applicant, while providing ticket services to P. Ltd., R. sro, I. Ltd, R. Ltd., A. GmbH and A. OU, was entitled to apply to of these services, art. 28b paragraph. 1 of the VAT Act, assuming that the place of performance of the above-mentioned services for these taxpayers acting as such is the place (s) where these entities have stated that they have their business activity, being registered with them as VAT taxpayers.

The essence of the problem is not whether the applicant's contractors had a permanent place of business in Poland. The contested decision does not concern P. Ltd., R. sro, I. Ltd, R. Ltd., A. GmbH and A. OU, but the applicant and its rights. The applicant's right to apply the so-called However, the reverse charge mechanism does not result from the mere existence of a fixed place of business of the recipient. It results from the fulfillment of its obligations under the EU Council Regulation 282/2011 (the implementing regulation), i.e. establishing - on the basis of available data, whether the service is performed for such a permanent place.

5.3. As for the substantive grounds for the decision, it should be noted that pursuant to Art. 28b paragraph. 1 of the VAT Act, the place of the provision 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 sec. 1a, art. 28 g of paragraph 1. 1, art. 28i, art. 28j paragraph. 1 and 2 and article. 28n.

As provided for in Article 28b para. 2 of the VAT Act, in the event that the services are provided for the taxpayer's permanent place of business, which is located in a place other than his seat or permanent residence, the place of providing these services is the permanent place of business.

When examining a case regarding value added tax, the Court is also obliged to take into account the regulations of Community law, in particular Directive 2006/12 / EC. According to its Art. 44, the place of supply of services to the taxpayer acting as such is the place where the taxpayer has its 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

It should also be pointed out to Art. 22 sec. 1 of the implementing regulation, according to which, in order to determine the fixed place of business of the recipient to whom the service is provided, the service provider

analyzes the nature and application of the service provided.

Where the nature and application of the service provided do not allow the provider to determine the fixed place of business for which the service is provided, it shall in particular analyze whether the contract, order and VAT identification number granted by the State are recipient's member states and transferred to the provider by the recipient indicate the fixed place of business as the place of receipt of the service and whether the fixed place of business is the same as the entity paying for the service.

Where, pursuant to the first and second subparagraphs of this paragraph, the fixed establishment of the recipient to whom the service is supplied cannot be determined or the services covered by Article 44 of Directive 2006/112 / EC are supplied to the taxpayer under a contract covering at least one service that is used in an unidentifiable and non-quantifiable manner, the service provider has the right to conclude that the services are supplied to the place where the customer is established.

As argued by the Court of Justice of the European Union in its judgment of 7 May 2020 in case C-547/18, art. 44 of Directive 2006/112 provides in the first sentence that the place where services are supplied to a taxable person acting as such is the place where that taxable person has his place of business. However, the second sentence of that article provides that, where those services are supplied to a taxable person's permanent place of business other than his place of business, the place of supply of those services is his fixed place of business.

These provisions determine the place of supply of services in order to avoid, on the one hand, conflicting properties that could lead to double taxation, and, on the other hand, the lack of taxation of revenues (judgment of 16 October 2014, **Welmory** , C - 605/12, EU: C: 2014: 2298, point 42).

The Court has already held that, where the most useful link for determining the place of supply of services from a tax point of view, and therefore the main link, is the place where the taxpayer has his place of business, taking into account the taxpayer's permanent place of business constitutes a derogation from that general rule, if certain conditions are met (judgment of 16 October 2014, **Welmory** , C - 605/12, EU: C: 2014: 2298, paragraphs 53 and 56).

Therefore, in order to prevent the emergence of circumstances that could jeopardize the proper functioning of the common VAT system, the EU legislator provided for in Art. 44 of Directive 2006/112 that, where a service has been supplied to a place which may be regarded as the taxpayer's fixed establishment, it must be considered that the place of supply is the fixed establishment.

As regards the question of whether there is a "fixed establishment" within the meaning of Art. 44 second sentence, it should be noted that this issue is to be examined from the perspective of the taxpayer who is the recipient of the service (judgment of 16 October 2014, **Welmory**, C - 605/12, EU: C: 2014: 2298, paragraph 57). In this regard, pursuant to Art. 11 of the implementing regulation, "fixed place of business" shall mean any place - other than the place of business of the taxpayer referred to in Art. 10 of this 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 of this permanent place of business.

From the point of view of the service provider, the already mentioned Art. 22 of the implementing regulation, which provides for a number of criteria that should be taken into account by the service provider in order to establish the recipient's fixed establishment. This mainly includes an analysis of the nature and application of the service provided to the taxpayer-recipient. Then, when that analysis does not allow the determination of the recipient's fixed place of business, it is necessary to analyze in particular whether the contract, the order and the VAT identification number allocated by the recipient's Member State and communicated to the supplier by the recipient shall indicate the fixed establishment as the place of receipt of the service and whether the fixed establishment is the same as the paying entity. Finally, when the two above-mentioned the criteria do not allow

the recipient's fixed establishment to be determined, the service provider is entitled to conclude that the services are supplied to the place where the recipient of his establishment is established.

At this point, it is worth noting that the above provision was the subject of the CJEU's statement in the judgment of May 7, 2020 in the case, C-547/18 Dong Yang Electronics, EU; C: 2019: 976. Although this judgment was issued in a different factual state (it concerned the examination of contractual relations between a company established in a third country and its subsidiary established in a Member State), it nevertheless contains a universal indication as to the verification of the contractor by the service provider. The ruling shows that, of course, the taxpayer providing services is obliged to take precautionary measures in terms of checking his contractor, but only such measures as can reasonably be required of him. The tax authorities cannot oblige the taxpayer to carry out complex and wide-ranging audits. Such an obligation lies with the tax authorities,

It should also be noted the opinion of Advocate General Juliane Kokott of November 14, 2019, issued for this judgment, which stated that when examining whether the contractor has a fixed place of business (1), and if so, whether it participates in the transaction (2) , the taxpayer should confine himself to those arrangements which, within the limits of common sense, may be required of him in the circumstances of the case.

5.4. Transferring the above considerations to the present case, the Court shared the arguments of the complaint that DIAS did not in fact demonstrate what actions the applicant could and was able to take to establish that its contractors have a permanent place of business in Poland.

It should be noted that the authorities were able to establish the above circumstances after conducting the proceedings, collecting extensive evidence, including interrogating witnesses.

DIAS repeatedly indicated in the contested decision that the fact that the applicant's contractors had a permanent place of business in Poland is evidenced by a number of circumstances established in the case, assessed jointly.

According to DIAS, the organization of a permanent organizational structure is indicated by: obtaining by contractors a concession for trading liquid fuels in Poland; concluding agreements with the Complainant for the creation and maintenance of mandatory stocks of liquid fuels; permanent use by the entities in question of the services of Polish transport companies that transported fuel; making financial settlements with the use of bank accounts maintained by banks based in Poland; sitting on the authorities of the Company's contractors of persons who were closely related to Polish companies providing services to the Company's contractors; actual performance of management functions not by the management board, but by persons more or less formally related to the Company's contractors residing in Poland; existence of managing bodies at the Company's contractors, which included employees of foreign entities providing paid administrative services; constant use of the services of domestic law firms, entities and persons professionally prepared to provide legal and advisory services in the field of taxes in the conducted activity; constant use of the services of domestic entities in the field of accounting services; using the services of entities registered in Poland belonging to the same capital groups; constant use of the services of translators based in the country; using the technical infrastructure in the conducted business activity necessary for office services provided to the Company's contractors by entities based in Poland; standing orders in the field of business process support provided to the Company's contractors by Polish business units; use of certification services or the development of documentation required for the purposes of permanent operations in Poland, which were provided by Polish companies to the Company's contractors.

Undoubtedly, therefore, the fact that these entities held a license to trade in liquid fuels in Poland and concluded agreements with the Complainant for the creation and maintenance of obligatory stocks of liquid fuels does not in itself prove that these entities have a permanent place of business in the country.

The complainant rightly points out, which is also not denied by DIAS, that the possession of a concession and the conclusion of a ticket agreement are the conditions that a foreign entity had to meet in order to be able to trade fuel in the territory of Poland at all (Article 32 of the Act of April 10, 1997 - Energy Law, Art. 5 and Art. 11 of the Act of February 16, 2007 on stocks of crude oil, petroleum products and natural gas and the rules of conduct in situations of threat to the state's fuel security and disruptions on the crude oil market).

In the opinion of the Court, meeting these conditions is not tantamount to having a permanent place of business in Poland.

The above also results from the contested decision and the direction of the evidentiary proceedings conducted by the authorities. It should be noted that the tax authorities, when establishing a permanent place of business for the applicant's counterparties in this case, did not stop at the legal requirements of conducting business in the field of trading in liquid fuels in the territory of the country (concession, ticket agreement), but considered it necessary to make arrangements in much wider. DIAS itself on page 45 of the decision, referring to the grounds of the appeal, argued that: "the contested decision presents a number of circumstances indicating that customers of O. sp. Z oo had a permanent place of business in Poland. It is obvious that in order to trade in fuel in the country they had to meet a number of legal requirements, which condition the conduct of an activity of this nature. It should be noted, however, that in addition to meeting the legal requirements, customers of O. sp. Z oo also created an organized, permanent, technical and organizational structure that allowed them to consume the purchased services in the territory of Poland, where their target customer, purchasing fuel from them, was located. . The content of the appeal focuses on emphasizing that the fact that O. sp. Z oo's contractors have a concession or the conclusion of contracts for the provision of ticket services cannot prejudge the assumption that these entities have a permanent place of business in Poland. Meanwhile, it should be pointed out that the conclusion by P. Ltd, R. sro, I. Ltd., R. Ltd., A. GmbH, A. OU of contracts with O. sp. Z oo for the creation and maintenance of mandatory stocks of liquid fuels, Whether these entities obtain a license to trade in fuels in Poland are not the only reasons for adopting such a decision as presented in the contested decision. They were also not considered as independent circumstances of adopting such a decision. A number of other, additional arrangements have been described in the decision of the authority of the first instance and in this decision of the Director of the Tax Administration Chamber in W. and all of them considered jointly contributed to making such a decision ".

Consequently, one must agree with the applicant that the mere analysis of the nature and application of the service provided to recipients, carried out in accordance with Art. 22 of the implementing regulation did not allow for the determination of a fixed place of business for these recipients in Poland.

5.5. Regardless of the above, the Court in the composition examining this case shares the position of the Supreme Administrative Court presented in the judgments of January 27, 2022, file ref. I FSK 2312/21, February 1, 2022, file ref. act I FSK 2082/21 and of March 1, 2022, file ref. act: I FSK 647/18, I FSK 1080/19 and I FSK 1081/19. These judgments concerned the issue of verification of the service recipient's fixed place of business by drivers transporting fuel to entities that stated that they had their business established outside the territory of the country, being registered in them as VAT taxpayers (i.e. they were issued in very similar factual situations).

These rulings indicated, inter alia, that, as it is aptly noted in the doctrine, the vast majority of taxpayers do not have legal or organizational instruments that would enable them to verify whether the address of the registered seat of the enterprise corresponds to the place where the functions of the company's chief management board are performed. . Therefore - as well as taking into account the probable inability to obtain information on the place of performance of the company's management board functions - the standard will be to rely on the formal criterion (i.e. the registered address of the registered office).

Therefore, the application of Art. 28b paragraph. 1 of the VAT Act and Art. 10 of the implementing regulation is associated with threats to taxpayers, since the taxpayer will in practice be able to rely only on formal criteria, while the tax authority examining a given case of ex-post provision of services, having the appropriate tools (supported by state coercion), may differently assess the actual state of the seat of the recipient. It may therefore turn out after a few years that the customer with a registered office (registered address) in a given country may not actually have a registered office there or does not exist at the time of verification (cf. (A. Bartosiewicz, EU VAT Regulation - Comment 2012, commentary to Art. 10, UNIMEX 2012).

Therefore, the question arises what due diligence behavior of the service provider can be required from him in order to conclude that he acted in the so-called good faith to consider that his customer is established in the country he designates?

The content of Art. 18 of the implementing regulation, which defines the conditions on the basis of which the service provider may establish the status of the service recipient, indicating, inter alia, what circumstances and evidence give rise to the conclusion that the customer is a taxable person.

This provision stipulates that, unless the supplier is otherwise informed, he may consider a recipient established in the Community to be a taxable person:

(a) where the recipient has provided him with his individual VAT identification number and the service provider obtains proof of the validity of that identification number as well as of the name and address assigned to that number in accordance with Art. 31 of Council Regulation (EC) No. 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax;

b) when the customer has not yet received an individual VAT identification number, but has informed the supplier that he has applied for it and the supplier will obtain any other evidence that the customer is a taxable person or a non-taxable legal person for which identification is required for VAT purposes and if it has reasonably verified the accuracy of the data provided by the customer through normal commercial security measures, such as those relating to identity or payment checks.

This provision is of cardinal importance for determining the status and nature of the recipient's activities and, consequently, for determining the place of supply. The status and nature of the service recipient to whom the service is provided, i.e. whether it is performed for the taxpayer or a non-taxable entity, is decisive for determining the place of supply of a given service.

Thus, if, in order to determine the status and nature in which the recipient for whom the service is provided, acts, it is normatively indicated that it is sufficient for the service provider to "reasonably verify the accuracy of the data provided by the recipient by normal commercial security measures, such as measures relating to identity or payment checks "(point b of Article 18 of the abovementioned regulation), it would also be appropriate to assume that the same scope of verification is required from the service provider in determining the place of establishment of the recipient's business.

Verification to a "reasonable extent" by "normal commercial security measures" of the status of the customer and the place where he is established should be taken to mean the actions and activities that are normally carried out in the marketplace to check whether an entity claiming to be the customer actually exists in a given country and at which address he is registered there as part of his business, which should result in particular from the tax identification number of a given country obtained from the recipient, verified in the scope of the data provided in the VIES system, or from an excerpt from the register of entrepreneurs. It is also important that the regulation does not require any exceptional or extraordinary actions to be taken - for data verification - other than those usually performed when checking a contractor.

Moreover, the Supreme Administrative Court took the position that the circumstances that could give the taxpayer grounds for questioning the foreign locations of contractors are not:

- making payments by these companies through a Polish bank,

- contacting Polish-speaking representatives of these entities,

- no employees were hired, contractors were only Polish companies;

- the fact that the presidents of those companies, who were Polish nationals, lived in Poland.

The Supreme Administrative Court emphasized that the authority in the above-mentioned scope cannot be guided by the due diligence criteria that have been developed in the jurisprudence of administrative courts in the context of the right to reduce the output tax by input tax, and the provisions of the implementing regulation.

5.6. As already indicated, the local court shares the position expressed in these judgments. Therefore, in the opinion of the Court, the DIAS in the present case did not demonstrate what the applicant's verification obligations under the implementing regulation were not fulfilled, which verification should lead the applicant to believe that the contractors have a permanent place of business in Poland.

As previously stated, these circumstances do not include the knowledge of the complainant indicated by DIAS about the fact that these entities had a license to trade in fuel in Poland or the ticket agreements signed with the complainant.

On the other hand, it is difficult to demand from the applicant the findings of, inter alia, in the scope of: constant use by its contractors of the services of Polish carriers in the field of fuel transport; permanent commissioning of services to companies located in Poland in the field of legal, financial and accounting services, translation of documents, repair of means of transport, correspondence service; capital or personal ties between contractors; and the fact that the persons actually managing the activities of these entities or related to their day-to-day service resided permanently in the territory of Poland and had permanent residences here, and made tax settlements.

DIAS also argued that the complainant had not raised any objections that allegedly foreign entities were represented by Poles, and Poles made key decisions in these entities. The company also knew that its contractors with foreign headquarters in different countries, formally unrelated to each other, were represented by the same people of Polish nationality. By way of example, mention was made of Ms DB who represented both P. Ltd. from Cyprus and R. sro from the Czech Republic. According to DIAS, by using the website, the complainant could at least establish who, according to the registration data, represents P. Ltd. and that it is EM and ME. Meanwhile, while providing explanations, the Company indicated that the president of P. Ltd., representing this entity, inter alia, at the time of making the contracts, it was Mr. GH.

Referring to the above, it should be noted that in the cited judgments, the Supreme Administrative Court considered the issue of the representation of a foreign contractor by Polish citizens as not allowing for questioning the seat of such a contractor. Moreover, out of the 6 entities questioned by DIAS, 2 (ie P. Ltd and A. Ou) do not show at all that Polish citizens are the members of their boards. As for the representation of P. Ltd. from Cyprus and R. sro from the Czech Republic by the same person of Polish nationality - Mrs. DB (collection of correspondence), it should be noted that while O. sp. Z oo could have knowledge of the representation R. sro by Ms DB, the person does not appear in contacts between P. Ltd and O. sp. Z oo, but between P. Ltd and SE sp. as for the representation of its contractors by the same people of Polish nationality, he is mistaken. Regarding the issue raised by DIAS that, according to the registration data, EM and ME

represent P. Ltd., it should be noted that the contract concluded by O. sp. Z oo with P. Ltd was just signed by EM.

In the opinion of the Court, the DIAS cannot disadvantage the Applicant that the rules of procedure for the verification of clients presented by it do not regulate in detail the issue of verification of contractors in terms of a permanent place of business. The important thing is not what was written in these regulations, but whether the applicant verified the permanent place of business by her contractors, in accordance with the provisions of the implementing regulation.

Moreover, DIAS also draws attention to the participation of some of the applicant's contractors in tax fraud in the field of fuel trade, but it is not known whether the ticket services themselves were properly taxed by these entities in the countries of their seat.

5.7. To sum up, it should be noted that the authorities failed to conduct the correct procedure - taking into account the provisions of the implementing regulation - with regard to the Complainant's verification of contractors with regard to the fact that these entities had a permanent place of business in Poland, taking into account the legal and organizational instruments limited by the service provider, which would allow such verification.

Consequently, the contested decision infringes the provisions of Art. 191 Op in conj. joke. art. 28b paragraph. 1 and sec. 2 of the VAT Act in connection with joke. 22 and art. 18 of the implementing regulation, to the extent that could have a significant impact on the outcome of the case.

5.8. When re-examining the case, the authority will take into account the above-mentioned position of the Court and re-assess, separately for each of the contractors, whether the applicant has fulfilled its verification obligations - but only those that can be reasonably required of her in the light of Art. 22 and art. 18 of the implementing regulation - with regard to whether its contractors had a permanent place of business in Poland.

5.9. The above-mentioned violations of the substantive and procedural law had an impact on the outcome of the case. In this state of affairs, the decision is subject to annulment pursuant to Art. 145 § 1 point 1 lit. a) and c) of the Act of August 30, 2002 - Law on proceedings before administrative courts (Journal of Laws of 2022, item 329).

At the request of the complainant, the Court awarded her the reimbursement of court proceedings costs in the amount of PLN 4,660, stamp duty on the power of attorney in the amount of PLN 17 and costs of legal representation in the amount of PLN 10,800.