

New questions to CJEU: towards a broader concept of fixed establishment for VAT purposes?

A Romanian Court recently sought a preliminary ruling from the Court of Justice of the European Union ('CJEU') about the concept of fixed establishment for VAT purposes in the Berlin Chemie A. Menarini SRL case ('BCAM', case no. C-333/20, submitted July 22, 2020).

The case concerns a company established in Romania, BCAM, that performs services for its affiliated second-tier parent company Berlin Chemie AG ('BC') established in Germany. The question is whether BCAM must be regarded as a fixed establishment of the German second-tier parent company BC. After the recent CJEU judgment in the [Dong Yang case \(C-547/18\)](#) and the request for a preliminary ruling in the [Titanium case \(C-931/19\)](#), the present case again shows that the concept of fixed establishment for VAT purposes is evolving. We will, of course, have to wait for the CJEU's judgment, but it is clear that it may have consequences for internationally operating businesses with (sub-)subsidiaries in other EU Member States.

1. Background

BC is a company established in Germany, which has been selling pharmaceutical products in Romania since 1996, distributing these from a local warehouse. BC is registered for VAT purposes in Romania and has a fiscal representative. In 2011 it incorporated the Romanian sub-subsidiary BCAM. BC and BCAM concluded a marketing, advertising and regulatory agreement, with BCAM undertaking to perform a wide range of activities. For example, marketing, advertising, obtaining permits and registrations and maintaining a network of medical healthcare specialists for BC in order to further develop the sales market for BC's products in Romania. BCAM charged BC a monthly cost-plus fee for its activities. BCAM employs, on average, 200 staff, including 150 sales representatives. The Romanian employees are not authorized to conclude contracts on behalf of BC.

BCAM performed the services stated in the agreement for BC in the belief that these were not taxable in Romania but in Germany, where BC is established. BCAM therefore issued invoices with application of the reverse-charge mechanism. However, the Romanian tax authorities are of the opinion that BC has sufficient technical resources and personnel to have a fixed establishment in Romania. The Romanian tax authorities thus believe that the particular services were taxable in Romania and not in Germany.

2. Questions for which a preliminary ruling was sought

The Romanian referring court asked the CJEU for a more detailed interpretation of the concept of fixed establishment in order to clarify whether BCAM, as sub-subsidiary of BC, can be regarded as a fixed establishment of BC. More specifically, the central issue is whether there is a fixed establishment in the situation in which BC does not have the personnel and technical resources itself, but the affiliated company BCAM does and uses them entirely for the business purposes of BC. What seems to be particularly important here is that BCAM operates under the control of BC and BCAM performs its activities

entirely for BC. In that respect, BCAM plays an important supporting role in initiating and concluding new agreements with customers in the Romanian sales market. In short, should BCAM be regarded as a fixed establishment of BC in Romania?

3. Practical consequences

Depending on the final judgment by the CJEU, what will have to be considered is how this case will impact the daily practice of internationally operating companies. If the CJEU rules that BCAM must indeed be regarded as a fixed establishment of BC in the present situation, then this could have a significant impact on current Dutch practice, but possibly also in many other Member States of the European Union. Such a view is inconsistent with the positions currently taken in the Netherlands and the current status of case law.

The recent Dong Yang case (C-547/18) and the older DFDS case (C-260/95) show that it is not, in principle, excluded that there may be a fixed established when an independent legal entity is set up in, for example, parent-subsidary situations. It should be noted that these cases involved very specific situations and the CJEU attached a great deal of importance to the contractual relationship and additional special circumstances.

Also from the Welmory case (C-605/12) we can infer that the concept of a fixed establishment for VAT purposes is evolving and adapting to changing social and economic developments. We are also seeing with other taxes, such as corporate income tax, that the definition of fixed establishment/permanent establishment (including in response to Action 7 of the OECD's BEPS Framework) is being tightened. The aim is to arrive at a proper division of the power to tax between countries.

In view of current developments in EU case law, we recommend assessing whether your cross-border activities could lead to the existence of a fixed establishment with associated tax obligations. Our advice is to ensure that the results of this assessment are properly documented, just in case the Dutch or foreign tax authorities raise questions about it.

The tax advisors of Meijburg & Co's Indirect Tax group would be pleased to help you identify the potential implications of the preliminary ruling and the subsequent CJEU judgment. Feel free to contact one of them or your regular advisor for more information.

Meijburg & Co
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