KPMG Meijburg & Co Tax & Legal

New policy statement on VAT fixed establishments

On December 18, 2020 the Deputy Minister of Finance ('Deputy Minister') published a new policy statement on VAT fixed establishments. The policy statement is relevant for internationally operating businesses with one or more fixed establishments.

The policy statement, among other things, lays down the Dutch viewpoint on the concept of a fixed establishment and the VAT treatment of transactions between a head office and a fixed establishment. The most important change compared to the previous policy statement from 2003 is the update of the guidelines on VAT recovery. The most important aspects of the policy statement are addressed below.

Sales fixed establishment and purchase fixed establishment

A fixed establishment is an establishment set up by a head office in another country as a foreign place of business. As far as the scope of the fixed establishment concept is concerned, the Deputy Minister has sought to align the policy statement as much as possible with the EU VAT Implementing Regulation and case law by the Court of Justice of the European Union ('CJEU') and the Dutch Supreme Court.

In accordance with the CJEU judgment in the Dong Yang Electronics case (no. C-547/18), the starting point according to the Deputy Minister is that a legally independent subsidiary does not qualify as a fixed establishment of a parent company. The Deputy Minister thus does not automatically completely rule out that a subsidiary may nevertheless, under circumstances, qualify as a fixed establishment of the parent company or of another group company. In this respect the CJEU judgment in the Berlin Chemie case (no. C-333/20), which is expected later this year, is relevant.

According to the Deputy Minister, the mere exploitation of an asset cannot in itself be regarded as a fixed establishment. This is in accordance with the judgment rendered by the Dutch Supreme Court on February 8, 2019 in a case concerning the letting of holiday homes. In some other countries the letting of immovable property does lead to a fixed establishment, even if the management thereof is outsourced to a third party. In this respect, it is important to keep a close eye on the CJEU judgment in the Austrian Titanium Ltd case (no. C-931/19), which is expected later this year.

The new policy statement also sets out the distinction between a 'sales fixed establishment' and a 'purchase fixed establishment'. This distinction is, among other things, important for the question whether local VAT is payable on outgoing and incoming services. It is a confirmation of current practice, regulations and case law.

The relationship with the fixed establishment matter in direct taxation is also important. In that respect we see that the definition of fixed establishment (including following Action 7 of the OECD's BEPS Framework) has been tightened, with the aim being to arrive at a proper division of the power to tax between countries. In practice, especially in other Member States, we are seeing more interaction between the concepts of the VAT fixed establishment and the direct tax fixed establishment. For example, with regard

to the digital economy, a French court has recently sought to align the VAT fixed establishment more with the direct tax fixed establishment.

No VAT on transactions between a head office and fixed establishment

A head office and a fixed establishment constitute one single taxpayer, which means the basic assumption is that transactions between the head office and fixed establishment fall outside the scope of VAT. A Dutch fixed establishment is therefore not a separate taxpayer from the head office.

The policy statement moreover contains the welcome confirmation that the CJEU Skandia judgment (case no. C-7/13) does not have any implications for the Netherlands. That is also the position taken in practice and had previously been mentioned by the Ministry of Finance. However, this has now been clearly established in policy. As such, the basic assumption continues to be that if there is a VAT group in the Netherlands, the foreign fixed establishments and head offices of Dutch members of the VAT group also belong to the Dutch VAT group (being one taxpayer) and transactions between the head office and fixed establishments in principle fall outside the scope of Dutch VAT.

This is different in some other countries, depending on their view of the Skandia judgment. Foreign VAT groups as such are not addressed in the policy statement. The CJEU judgment in the Swedish Danske Bank case (no. C-812/19), which is expected later this year, may also be relevant in this respect. Depending on the judgment in that case, the Netherlands may have to reappraise its currently confirmed views.

VAT recovery right on the basis of cross-border use of costs

The most important change compared to the old policy statement, is the manner in which the VAT recovery right in head office-fixed establishment situations must be dealt with. The Deputy Minister has sought alignment with the judgment in the Morgan Stanley case (no. C-165/17). The policy statement mentions several situations where a Dutch fixed establishment incurs costs that are (partly) used for the transactions by a head office established in another Member State. Compared to the policy statement from 2003, the new policy statement makes even more clear that in determining the VAT recovery right, alignment must be sought with the transactions to which the costs are attributable. These can be transactions by the fixed establishment and/or the foreign head office.

The transactions by a foreign head office only have a favorable effect on the VAT recovery right of a Dutch fixed establishment insofar as the transactions both 1) from a Dutch perspective as well as 2) from the perspective of the other Member State allow for VAT recovery. This 'double test' is by definition potentially more disadvantageous than a single test from a Dutch perspective. The EU VAT Directive does in our view not offer room for a double test in all situations.

The Deputy Minister states that all this also applies if there is a Dutch head office that incurs costs, with a fixed establishment in another EU Member State. The Deputy

Minister does not address the question what, for example, the impact will be if a non-EU country (such as the UK) is involved or if costs are, for example, incurred for branches in several countries. It is also not clear in all situations which part of the turnover will affect the VAT recovery right.

Practical consequences

It remains essential to check whether and in which countries there is a fixed establishment for VAT purposes, whether or not in combination with a VAT group, and to keep a close eye on the forthcoming judgments by the CJEU. The relationship with the fixed establishment matter in direct taxation is also crucial in that respect.

If there is a cross-border head office-fixed establishment situation, then we strongly recommend reviewing the VAT recovery right in the Netherlands. Under the old policy statement, the turnover of foreign establishments already should have been (partly) considered for determining the VAT recovery right in the Netherlands. However, in Dutch practice this was only taken into account in exceptional cases. Moreover, in the old policy statement there was no double test for the purposes of qualifying the turnover of the foreign head office or the foreign fixed establishment. In practice and in case law we are seeing more attention being paid to the manner in which the VAT recovery right should be calculated. This applies in a broader sense to more than just head office-fixed establishment situations. This is also apparent from the updated VAT Recovery Right Policy statement (available in Dutch) published on December 14, 2020.

The tax advisors of Meijburg & Co's Indirect Tax Group would be pleased to help you identify the potential implications of this policy statement. Feel free to contact one of them or your regular advisor for more information.

Meijburg & Co
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