KPMG Meijburg & Co Tax Lawyers

Advocate General at CJEU in Dong Yang VAT case: subsidiary not just a fixed establishment of parent company

On November 14, 2019 Advocate General Kokott rendered her Opinion in the Dong Yang Electronics case (C-547/18). The case concerned the question whether a subsidiary that is established in the European Union should be regarded for VAT purposes as a fixed establishment of a parent company established outside the European Union. According to the Advocate General, it should not, unless there is an abusive contractual structure. In the Netherlands, a subsidiary is, in principle, not regarded as a fixed establishment. If the CJEU does not follow the Opinion of the Advocate General, then this case could have a major impact on current Dutch practice.

1. Background and reference for a preliminary ruling

Dong Yang Electronics (Poland) ('Dong Yang') assembles printed circuit boards for LG Display established in Korea ('LG Korea'). This assembly qualifies as a service for VAT purposes, with the right to levy VAT being allocated to the country where the customer is established or has a fixed establishment. Dong Yang obtains the components from a subsidiary of LG Korea, i.e. LG Poland Production, although LG Korea remains the owner. After assembly, Dong Yang Electronics sends the printed circuit boards back to LG Poland Production.

Dong Yang issues invoices, without VAT, to LG Korea, because it has a contract with LG Korea and thus regards LG Korea as the purchaser of its services. Furthermore, LG Korea assured Dong Yang that it did not have a fixed establishment for VAT purposes in Poland.

The Polish tax authorities argued that Dong Yang should have charged Polish VAT to LG Korea. According to the Polish tax authorities, LG Poland Production qualifies for VAT purposes as a fixed establishment of LG Korea and this fixed establishment is the actual beneficiary of the services of Dong Yang Poland. The contractual structure of the business model means that LG Korea has access to the personnel and technical resources of LG Poland Production. According to the Polish tax authorities, on the basis of the type of services performed and their use, Dong Yang Poland, as supplier, should have determined for which fixed establishment of the customer the service was performed. It would thus have determined that LG Korea had a fixed establishment in Poland.

The questions for which a preliminary ruling was requested were:

1. Can it be inferred from the mere fact that a company established outside the European Union has a subsidiary in Poland, that this company has a fixed establishment in Poland?
2. If not, is the supplier obliged to examine the contractual relationships between the customer established outside the European Union and its subsidiary in the European Union in order to determine whether there is a fixed establishment?

2. Advocate General's Opinion and impact on Dutch practice

With regard to the first question, Advocate General Kokott concluded that, in principle, a subsidiary of a company established outside the EU should not be regarded as a fixed establishment for VAT purposes. According to the Advocate General, this is evident from

the text of the relevant provisions of the EU VAT Directive. She also noted that a different conclusion is only conceivable if the contractual structure chosen by the customer were to infringe the prohibition of abusive practices (which does not appear to be the case in the relationship between Dong Yang Poland and LG Korea). Abuse requires, among other things, that a tax benefit is obtained. Because LG Korea could have recovered the Polish VAT – had it been payable – there is no tax benefit. This was different in the DFDS judgment (CJEU, February 20, 1997, C-260/95) where the subsidiary assisted the parent company with the sale of travel services.

In answer to the second question, the Advocate General concluded that a service provider does not have to examine inaccessible contractual relationships between its customer and their subsidiaries in order to determine that the customer actually uses this subsidiary as if it was a fixed establishment for VAT purposes. Insofar as there are no indications to the contrary, a taxpayer may rely on a written statement from its customer that it does not have a fixed establishment.

We consider the Advocate General's Opinion to be fiscally rational and in line with previous CJEU case law. Legal certainty would be served if the CJEU were to follow the Opinion. In our view, the exception for abuse situations referred to by the Advocate General should be applied very restrictively. After all, the doctrine of abuse of law concerns an *ultimum remedium*.

Currently, a Dutch subsidiary in the Netherlands is, in principle, not regarded as a fixed establishment for VAT purposes. This Opinion does however show the importance of the investigation obligation placed on service providers to confirm who their customer is and whether they are subject to Dutch VAT. In this respect, it should, for example, be verified whether a customer established outside the Netherlands has a fixed establishment in the Netherlands to determine whether Dutch VAT should indeed be charged, because the Dutch fixed establishment must be regarded as the recipient of the service for VAT purposes. Although in most situations, inquiring with the customer whether this is the case would appear to suffice, it is important to, in any case, document that inquiries were made and the result of those inquiries.

In various EU Member States we are increasingly seeing disputes about the alleged presence of fixed establishments for VAT purposes (whether or not inspired by the Welmory judgment (CJEU, October 16, 2014, C-605/12)). It is not uncommon for these disputes to run parallel with disputes about the presence of and profit attribution to permanent establishments for the purposes of direct taxes. In such cases, tax authorities also argue that a subsidiary is a fixed establishment for VAT purposes of a foreign parent company. The Advocate General's Opinion can help in such disputes, certainly if the CJEU follows it.

However, if the CJEU decides to deviate from the Advocate General's Opinion, this could have a major impact on current Dutch practice. Unfortunately, this will likely lead to legal certainty and confusion.

3. What can you do now?

As the Opinion is in line with current Dutch practice, the impact for the Netherlands at this stage appears manageable. However, our advice is to assess whether it is sufficiently clear whether customers established outside the Netherlands have a fixed establishment for VAT purposes in the Netherlands, which must be regarded as the purchaser of the service. Moreover, it is advisable to properly document the results of this assessment. In ongoing disputes about alleged fixed establishments for VAT purposes in other EU Member States, the Advocate General's arguments can certainly be used.

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