

New preliminary ruling question about the ‘fixed establishment’ concept for VAT purposes

On December 20, 2019 the Austrian Bundesfinanzgericht asked the Court of Justice of the European Union (‘CJEU’) for a preliminary ruling on the concept of a ‘fixed establishment’ in the Titanium Ltd case (‘Titanium’, case no. C-931/19).

The case concerns a property letting company established on Jersey. The let property is located in Austria. The recently published question is whether the let property must be regarded for VAT purposes as a fixed establishment in Austria. If so, the property letting company has to charge Austrian VAT. The case is not only relevant for property letting companies, but potentially also for all VAT taxable persons with foreign activities, as it may provide a more detailed interpretation of the EU concept of fixed establishment. We will, of course, have to wait for the CJEU’s judgment, but it is clear that it can have implications for internationally operating businesses.

1. Background

Titanium is a company established on Jersey, whose activities include the letting of property. It lets VAT-taxed property it owns to two Austrian VAT taxable persons. The management of the property is outsourced to an Austrian property manager, which performs support and technical management activities in respect of the property.

Titanium did not charge any Austrian VAT on the rent received. It believes that the let property in Austria is not a fixed establishment for VAT purposes, because it does not have any of its own personnel in Austria. As a result of the absence of such a fixed establishment, the VAT liability is reverse-charged to the Austrian tenants. However, the Austrian tax authorities take the view that the property does result in a fixed establishment in Austria. The consequence of this argument is that Titanium should charge VAT to the tenants, because there is no reverse-charged VAT.

2. Questions for which a preliminary ruling was sought

The Austrian court is now asking the CJEU for a more detailed interpretation of the fixed establishment concept. What the referring Austrian court wants to know from the CJEU is whether the fixed establishment concept must involve the use of own personnel and technical resources (the property company does not have those in Austria), or whether there can also be a fixed establishment without the deployment of own personnel (but with the aid of the services of a property manager).

To date, the concept of fixed establishment has been interpreted in such a way that there must be a certain degree of permanence and an appropriate structure of personnel and technical resources to perform services. According to the referring court, it is unclear whether both characteristics, i.e. personnel and technical resources, must be complied with cumulatively or whether that is only necessary when the business activity is not possible without personnel and technical resources.

3. Situation in the Netherlands

In a similar case in the Netherlands, the Dutch Supreme Court confirmed on February 8, 2019 that the let holiday home of a foreign owner cannot in and of itself be regarded as a fixed establishment for VAT purposes. The Supreme Court noted thereby that there is only a fixed establishment if the landlord also has the personnel and technical resources in the Netherlands to draw up rental contracts or to take management board decisions. According to the Supreme Court, using the services of an independent intermediary when letting a property cannot, as such, result in the landlord having a fixed establishment for VAT purposes.

4. Practical consequences

According to the referring Austrian court, previous CJEU judgments show that the basis for the existence of a fixed establishment is that there must be own personnel and that one cannot suffice with the personnel of another contracted business. The referring court noted that this applies all the more if the personnel of the contracted property manager only performs support and technical management activities. If the CJEU follows that reasoning in the preliminary ruling, this case will have a limited impact. However, if the CJEU provides new insights into the scope of the fixed establishment concept, this will potentially affect all VAT taxable persons with activities abroad and not only letting companies with property.

There is currently also another case about the fixed establishment concept pending before the CJEU. In dispute in the Dong Yang Electronics case (C-547/18) is whether a subsidiary that is established in the European Union should, for VAT purposes, be regarded as a fixed establishment of a parent company established outside the European Union. We refer in this respect to our [News Alert](#) on the Opinion issued by the Advocate General in this case, which could also lead to new insights into the fixed establishment concept.

We recommend that in light of the above cases you assess whether your cross-border presence could result in the existence of a fixed establishment, with the associated tax obligations. We can infer from, for example, the Welmory case (C-605/12) that the fixed establishment concept for VAT purposes is constantly evolving and is adapting to modern times. We also see that the definition of fixed establishment is also continually being amended and tightened in other taxes, such as corporate income tax. The aim of this is to achieve an appropriate division of the power to tax between countries and to better reflect developments in the areas of e-commerce and the digital economy. It is therefore important to keep a close eye on tax developments in this area. Our advice is to ensure that the results of your 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.

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