

Without own staff, no fixed establishment for VAT purposes in the case of let property

On June 3, 2021 the Court of Justice of the European Union ('CJEU') rendered judgment in the Titanium Ltd case (case no. C-931/19). The referring Austrian court wanted to know from the CJEU under what conditions a foreign taxable person has a fixed establishment in Austria for VAT purposes. The CJEU ruled that a foreign taxable person that does not have its own staff in situ in a Member State cannot have a fixed establishment for VAT purposes in that Member State either.

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 management activities in respect of the property.

Titanium did not charge any Austrian VAT on the rent received. Titanium believes that the let property in Austria is not a fixed establishment for VAT purposes, because it does not have any of its own staff 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 the reverse charge mechanism does not apply.

2. Questions for which a preliminary ruling was sought

The Austrian court is 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 staff 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 staff (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 human and technical resources to perform or receive services. According to the referring court, it is unclear whether both characteristics, i.e. staff and technical resources, must be complied with cumulatively or whether that is only necessary when the business activity is not possible without staff 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 day-to-day management 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. CJEU judgment

According to settled case law of the CJEU, a fixed establishment must, for the purposes of VAT, have a certain degree of permanency by having permanent human and technical resources necessary for certain services. Thus, there must be a certain degree of permanence and an appropriate structure – in terms of staff and technical equipment – to enable the services in question to be performed (or procured) independently. The CJEU emphasizes that a structure that does not have its own staff cannot fall within the scope of the concept of a fixed establishment. According to the CJEU, a building for which there is no staff available so that it cannot act independently does not meet the criteria to be regarded as a fixed establishment.

5. Practical consequences

With few words, the CJEU comes to a clear conclusion. Moreover, the judgment is consistent with the Supreme Court's judgment referred to above. In practice, however, the question may arise as to the definition of 'own staff'. We believe that this can in principle include 'hired staff'. What matters, in our view, is whether a VAT taxable person has staff at its disposal with a certain degree of permanency.

We therefore recommend that, even subsequent to this judgment, you nevertheless examine whether your presence abroad may qualify as a fixed establishment, even if the staff are not directly employed but are hired on a permanent basis.

What played a role in this case is that the rental activity could not take place locally without staff. In practice, we also increasingly hear the question whether a technical infrastructure can qualify as a fixed establishment when no staff are required to perform services independently. The answer to this question appears to be becoming more important due to the ever-increasing digitalization. Although the CJEU emphasizes the importance of own staff, we note that this refers back to case law from 1997, which was thus rendered against the background of a different prevailing mindset. In the judgment, the CJEU states that a building cannot act independently without staff. We do not rule out the possibility that the outcome would be different if there were a technical infrastructure that could act independently without staff.

The judgment is in line with Dutch practice, but we know from experience that other EU Member States are quicker to conclude that a fixed establishment exists. We also see that the concept of fixed establishment for VAT purposes [is constantly changing](#). On July 22, 2020, a Romanian court in the Berlin Chemie case (C-333/20) sought a preliminary ruling from the CJEU about the fixed establishment concept. The CJEU has not yet ruled on the case.

We also see that the definition of fixed establishment is also increasingly 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 would naturally be pleased to help you identify your foreign tax obligations. Feel free to contact one of them or your regular advisor for more information.

KPMG Meijburg & Co
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