



ECJ: letting of a property in the absence of own staff does not constitute a fixed establishment

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1 Background

According to the legal definition, a fixed establishment requires a permanent structure, which in terms of human and technical resources enables it to autonomously render supplies of services or procure services (see Art. 11 of the Council Implementing Regulation). According to Article 11's wording, both human and technical resources must be available to the permanent structure in order for it to constitute a fixed establishment.

In the past, some German Fiscal Courts have ruled that wind turbines, where the operator did not have its own staff working on site, could also be considered fixed establishments (see in particular, Fiscal Court Münster, judgment of 5 September 2013 - 5 K 1768/10 U). The courts justified their decisions on the grounds that the lack of staff was compensated for by the existence of an above-average amount of technical equipment. In a recent similar case concerning the letting of a property, the Austrian Federal Fiscal Court referred the case to the ECJ for a preliminary ruling.

2 Facts

Titanium Limited ("Titanium"), established in Jersey, let a property, subject to VAT, located in Austria to two Austrian taxable persons. *Titanium* commissioned an Austrian real estate management company to manage the property. This management company essentially acted as an intermediary between the service providers and suppliers. It also invoiced the tenants for rental payments and operating costs, maintained business records, prepared VAT returns and performed other related activities. The real estate management company carried out these supplies of services on its own premises



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using its own staff. However, *Titanium* retained the decision-making power to enter into and terminate leases, to determine the economic and legal conditions of the tenancy agreements, to make investments and carry out repairs, to choose third parties intended to provide supplies of services and to appoint the real estate management company itself.

Titanium did not show any Austrian VAT in its invoices to the tenants. *Titanium* took the view that, in the absence of human resources, it did not maintain a fixed establishment in Austria and that the VAT liability from the supplies of services was thus transferred to the Austrian recipients (see Art. 196 of the VAT Directive). The Tax Office in Vienna, however, took the view that the rental property constituted a fixed establishment and assessed *Titanium* for Austrian VAT. The action, brought by *Titanium* against the assessment was subsequently referred to the ECJ by the Austrian Federal Fiscal Court. The question referred to the ECJ was whether the concept of a “fixed establishment” should be interpreted as meaning that the existence of human and technical resources is always required or whether, as in the present case, the letting, subject to VAT, is to be deemed a fixed establishment, even in the absence of human resources.

3 ECJ judgment

In its judgment of 3 June 2021 (Case C-931/19 – *Titanium*), the ECJ answered the question referred by the Austrian Federal Fiscal Court in the negative. A rented property that lacks any own staff to deal with the supply of rental services does not constitute a fixed establishment. This finding results from the wording of Art. 11 of the Council Implementing Regulation and the jurisprudence on the subject, according to which a fixed establishment always requires both human and technical resources. If, as in the case at hand, there is a lack of own staff, a subsumption under the term “fixed establishment” is not possible. This applies equally to active fixed establishments (supplies of services by the fixed establishment) and passive fixed establishments (procurement of services by the fixed establishment). The ECJ took the view that a fixed establishment requires both its own human and technical resources. Both requirements must be met cumulatively. If one element is missing, the assumption of a fixed establishment is ruled out.

4 Consequences for the practice

Thus, according to the ECJ, the commissioning of an external service provider cannot compensate for the lack of own staff and provide grounds for a fixed establishment. The ECJ's decision is pleasingly clear as regards this statement. Also, with regard to its content, the statement is quite pleasing for taxable persons. At least in the case where the service provider has no decision-making power as regards legal relationships with the recipient, the commissioning of a service provider does not replace own human resources. The earlier decisions of the German Fiscal Courts now seem to be obsolete in light of the new ECJ jurisprudence. Against this background, operators of wind turbines and taxable persons with comparable constellations should, in particular, keep an eye on this judgment. Also, the German Federal Fiscal Court has adopted, in its jurisprudence, the view of the Advocate General in the *Welmory* Case (C-605/12) (see German Federal Fiscal Court, judgment of 15 February 2017 – XI R 21/15). In this case, the German Federal Fiscal Court assumed that also external staff (of a commissioned service provider) could substitute the taxable person's own human resources (although this precondition was not met in the specific case).

Finally, the tax authorities will have to consider how to deal with the ECJ decision. In accordance with sec. 13b.11 para. 2 sentence 2 of the German VAT Circular, a taxable person who owns property in Germany and rents it out, subject to VAT, is deemed to be established in Germany without further differentiation. As a result of the ECJ decision, this statement is no longer tenable in this form.