Downloaded from Blogs on 06.11.2026 11:09h

By PwC Deutschland | 23. Mai 2022

ECJ and VAT: No fixed establishment through subsidiary providing marketing and representation services

In a recent judgment the European Court of Justice (ECJ) held that a German company does not maintain a fixed establishment through its Romanian subsidiary where the latter actively promoted the products of the German company in Romania based on marketing, advertising and regulatory strategies established and developed by the German parent.

Downloaded from Blogs on 06.11.2026 11:09h

Background

Under Article 44 of the VAT Directive 2006/112/EC, the place of supply of services to a taxable person is the place of establishment of its business, unless the services are provided to its fixed establishment elsewhere.

The German company and its Romanian subsidiary entered into a marketing, regulatory, advertising and representation services contract, governed by German law, under which the Romanian company undertakes to promote actively the products of the German company in Romania through, inter alia, marketing activities and in accordance with the strategies and budgets established and developed by the German company. In particular, the Romanian company is required to establish and maintain a legally qualified advisory service to deal with advertising, informational and promotional issues, in the name of and on behalf of the German company. The German company undertook to pay a monthly fee for the services provided by the Romanian company calculated on a cost-plus basis. The local tax office took the view that the services supplied by the Romanian company to the German company were received by the latter in Romania, where the German company had a fixed establishment.

ECJ decision

Summary conclusion of the ECJ: *"A company with its registered office in one Member State does not maintain a fixed establishment by way of its subsidiary in another Member State that makes available to it human and technical resources under contracts by means of which that subsidiary provides, exclusively to it, marketing, regulatory, advertising and representation services that can have a direct influence on the volume of its sales."*

The yardstick for maintaining a fixed establishment are the economic and business circumstances. In this respect, the classification of a branch as a "fixed establishment" does not depend solely on the legal form of the entity concerned. In the case of a legal entity (here: the subsidiary), even if it has only one customer (here: the German parent), it had first to be assumed that it uses the technical and personnel equipment at its disposal for its own needs.

To make the existence of a permanent establishment subject to the condition that the staff of that establishment be bound by an employment contract to the taxable person itself and that the material resources belong to it would be a very restrictive interpretation of the criteria set out in Article 11(1) of Implementing Regulation No 282/2011 of the VAT Directive. A fixed establishment is characterized by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.

Based on documentary evidence it was apparent for the ECJ that the human and technical resources which were made available to the German company by the Romanian company are also those through which the Romanian company supplies the services to the German company. However, the same staff and means cannot be used both to provide and receive the same services.

Takeaway

Downloaded from Blogs on 06.11.2026 11:09h

After somewhat confusing and unclear statements in previous judgments (i.a. in the cases **C- 547/18**, *Dong Yang* and **C-931/19**, *Titanium*) the ECJ, in the current *Berlin Chemie* case, provided a more detailed interpretation and clarified the concept of fixed establishment for VAT purposes. As outlined above, the ECJ confirmed in the present case that a subsidiary which provides exclusive marketing and publicity services through the availability of its human and technical resources to its parent company, does not automatically constitute a fixed establishment of the parent. This decision of the ECJ – in essence – was also in line with previous case law of the German Supreme Tax Court on this subject, last in a judgment of February 2017: There, a German entrepreneur had arranged sports bets for a sports betting operator (A) based in another EU country: In its decision XI R 21/15 of 15 February 2017 the Supreme Tax Court held that the betting transactions were not carried out by a permanent establishment of A in Germany – the place of performance of the service was abroad and thus no German VAT arose. The Supreme Tax Court also mentioned that it is not necessary for a taxable person to own the personnel and technical equipment under every circumstance - although in the case of external equipment, the taxpayer must have a comparable power of disposal over the personnel and material resources (due to the requirement of a sufficient level of consistence of the establishment).

Source:

The ECJ case reference is **C-333/20** *Berlin Chemie A. Menarini SRL* judgment of 7 April 2022.

Schlagwörter

marketing subsidy, permanent establishment (PE)