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By PwC Deutschland | 14 June 2024

ECJ: No fixed establishment of German company on the basis of service contract with Romanian group company

The European Court of Justice held that a German resident company (limited partnership) has no establishment for VAT purposes in Romania under a service contract with a Romanian group company. The court also addressed the question of the place of performance under the circumstances in the case referred.

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Background

The claimant in the main proceedings in Romania is *Adient Ltd & Co. KG* (‘*Adient DE’*) with its residence in Germany. It belongs to the Adient group, a global supplier to manufacturers in the automotive industry. It has a global network of manufacturing and assembly facilities which supply complete seating systems, modules, and components to original equipment manufacturers.

In June 2016, *Adient DE* concluded a contract with SC Adient Automotive România SRL (‘*Adient RO’*) – another company within the Adient group – to provide a comprehensive service consisting of both the manufacture and assembly of upholstery components, as well as ancillary and administrative services. In that respect, *Adient RO* has two establishments in Pite?ti and Ploie?ti (Romania), in which the relevant goods are manufactured for Adient DE.

Adient RO, as the service provider, considered that the place of supply of its services was in Germany at the place of the recipient of those services (*Adient DE*). Hence, it did not calculate and deduct any Romanian VAT. In contrast, the Romanian tax authorities concluded that *Adient RO* was required to collect VAT on its services supplied to *Adient DE*, since it considered the place of supply of those services to be in Romania. It also held that *Adient DE* had technical and human resources in Romania through two branches of *Adient RO* in Romania, with the result that it satisfied the conditions for a fixed establishment for VAT purposes in Romania. The Regional Court had therefore referred the case to the ECJ for a preliminary ruling.

ECJ decision

In answer to the **first two questions**, the ECJ states that, for the purposes of determining the place of supply of those services, it cannot be assumed that *Adient DE* has a fixed establishment in Romania solely because the two companies belong to the same group of companies or because there is a service contract between them (ECJ decision, paragraphs 38 - 54).

As regards the **third and seventh questions** the ECJ does not consider it relevant for the determination of the place of supply of services that a VATable business established in a Member State and receiving processing services supplied by a business established in another Member State has a structure in the latter Member State which is involved in the supply of the finished products resulting from those processing services (ECJ decision, paragraphs 55 – 72).

In the light of all the foregoing considerations, the ECJ answers the **fourth to sixth and eighth questions**: *A taxable person established in a Member State (here: Adient DE) who receives services from a company established in another Member State (Adient RO) does not have a fixed establishment in Romania if the staff and technical resources at his disposal in that Member State are no different from those with which the services are supplied to the first company or if those staff and technical resources only ensure activities of a preparatory or auxiliary nature* (ECJ decision, paragraphs 75 – 81).

The ECJ went on to say that the existence of a fixed establishment of the recipient of the services (*Adient DE*) therefore presupposes that it is possible to identify human and technical resources which are distinct

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from those used by the supplier for the fulfilment of its own supplies of services, and which are made available to the recipient to ensure that they are received and used in accordance with its own needs.

As to whether services ancillary to the manufacturing services may be taken into account, the ECJ has already held that preparatory or auxiliary activities needed for carrying out the undertaking's tasks cannot lead to conclude that a fixed establishment exists (judgment of 28 June 2007, *Planzer Luxembourg*, **C?73/06**). In the present case it appears that those activities, such as accepting delivery, management or inspection of the raw materials and finished products, quality control support or the placing of orders for the dispatch of the finished products, constitute preparatory or auxiliary activities in relation to the manufacturing activity carried out by *Adient RO*.

Note: It should be mentioned that this decision is in line with an earlier ECJ judgment in a similar case (**C-333/20** *Berlin Chemie A. Menarini SRL* judgment of 7 April 2022).

Source:

ECJ judgment of 13 June 2024 **C?533/22** *Adient*.

Keywords

Place of supply of services, fixed place of business, permanent establishment (PE)