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Tax Department

EU Court of Justice – VAT: no permanent establishment in case of rental activity without local personnel and technical resources (Titanium case)

Case C-931/19 (Titanium)

On 3 June 2021 with reference to C-931/19 (the “Titanium Case”), the Court of Justice of the EU (the “ECJ”) held that a property which is leased in a Member State in the circumstance where the owner of that property, resident in another State, does not have its own staff to perform services relating to the lease does not constitute a permanent establishment within the meaning of EU VAT Law (Article 43 of the Council Directive 2006/112/CE of 28 November 2006 on the common system of VAT and of Articles 44 and 45 of Directive 2006/112/CE, as amended by Council Directive 2008/8/EC of 12 February 2008).

Facts and legal background

Titanium Ltd. (the “Company”) is a company whose registered office and management are located in Jersey and whose corporate purpose consists of carrying out the following activities:

- i. property management;
- ii. asset management;
- iii. management of housing and accommodation.

During tax periods 2009 and 2010, the Company entered into a lease agreement with two Austrian traders regarding an immovable property owned by the Company and located in Vienna (Austria).

To this end, the Company appointed an Austrian real estate management company to act as service provider for the management of the assets, including activities related to day-to-day management (e.g., to invoice rental payments and operating costs, to maintain business records and to prepare the VAT return). The Company retained the key decision-making (e.g., *inter alia*, the power to determine the economic and legal conditions of the agreements).

With reference to those transactions, the Company held not to be subject to VAT in respect of such rental activity, since they it did not have a permanent establishment ("PE") for VAT purposes in Austria.

On the contrary, the Austrian Tax Authority stated that the mere rental of an immovable property constitutes a PE and, consequently, the rental income deriving from such activity should be subject to VAT in Austria. In a nutshell, according to the Austrian Tax Authority an entity who owns and leases immovable property in Austria must be treated in the same way as a company resident in Austria (i.e., a VAT taxable person resident in Austria): on this basis the Austrian Tax Authority stated that such activity should entail the existence of a PE where the immovable property is leased.

In light of the above, the referring Court asked to the ECJ, whether a property leased in a Member State (i.e., Austria) constitutes a PE within the meaning of EU VAT Law, in the circumstance where the owner of said property does not have its own staff to perform services relating to the lease.

The ECJ judgement

The concept of PE for VAT purposes, in light of the ECJ case law, requires a minimum degree of stability derived from the permanent presence of both the human and technical resources necessary for the supply of given services. Thus, it entails a sufficient degree of permanence and an adequate structure, in terms of human and technical resources, to supply the services at issue on an independent basis (ECJ, judgment of 28 June 2007, *Planzer Luxembourg*, C-73/06, para. 54; ECJ, judgment 20 February 1997, *DFDS C-260/95*, para. 23; ECJ, judgment of 4 July 1985, *Berkholz*, C-168-84, para. 18).

The ECJ stated that a structure without its own staff does not entail a PE for VAT purposes (ECJ, judgment of 17 July 1997, *ARO Lease*, C-190/95, para. 19).

The abovementioned case law is also supported by Article 11 of Implementing Regulation No. 282/2011, according to which a PE is characterized, *inter alia*, by a suitable structure 'in terms of human and technical resources' (par. 43).

In this context, with reference to the case at stake, the ECJ held that, from the documentation provided in the national proceeding, it is evident that the Company does not have any personnel or staff in Austria and that the independent persons in charge of certain management activities (*i.e.*, Austrian real estate management company) were contractually appointed by the Company, which retained for itself the key decision-making related to the lease of the property (par. 44).

The ECJ did not analyze in-depth the relationship between the local real estate asset management company and the foreign real estate investor (*i.e.*, Titanium Ltd.). In particular, the decision does not address explicitly the independence of the local asset manager from the foreign investor.

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