

**Case C-547/18**

**Request for a preliminary ruling**

**Date of receipt:**

23 August 2018

**Referring court:**

Wojewódzki Sąd Administracyjny we Wrocławiu (Poland)

**Date of issue of the decision on the request for a preliminary ruling:**

6 June 2018

**Applicant:**

Dong Yang Electronics Sp. z o.o.

**Defendant:**

Dyrektor Izby Administracji Skarbowej we Wrocławiu

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[...]

**DECISION**

**On 6 June 2018,**

the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court in Wrocław)

[...]

having examined [...] [...]

the appeal lodged by Dong Yang Electronics Sp. z o.o., established in Biskupice Podgórne, against the decision of the Director of the Tax Administration Chamber in Wrocław

of 20 December 2017                      [...]

concerning the tax on goods and services (VAT) for the months from January to December 2012,

**decides:**

**I.** to refer the following questions concerning the interpretation of the provisions of EU law to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU [...]:

1. Can it be inferred, from the mere fact that a company established outside the European Union has a subsidiary in the territory of Poland, that a fixed establishment exists in Poland within the meaning of Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [...] and Article 11(1) of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (recast [...])? **[Or. 2]**
2. If the first question is answered in the negative, is a third party required to examine contractual relationships between a company established outside the European Union and its subsidiary in order to determine whether the former company has a fixed establishment in Poland?

**II.** to stay the proceedings in the case pursuant to Article 124(1)(5) of the Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi [...] (Law of 30 August 2002 — Law on Proceedings before Administrative Courts) pending the answer to the above question[s] referred for a preliminary ruling.

[...]

**[Or. 3] GROUNDS**

1. Legal framework — legal situation in 2012

**1.1. The following provisions of Polish law apply to the tax proceedings and administrative judicial proceedings in the present case**

(in their wording in force from 21 August 2011 to 1 January 2013):

- Article 28b(1) of the Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług [...] (Law of 11 March 2004 on the Tax on Goods and Services, ‘the VAT Law’) provides that, in the case of services supplied to a taxable person, the place where those services are supplied is the place where the taxable person who receives such services has established his business, subject to paragraphs 2 to 4 and Article 28e, Article 28f(1) and (1a), Article 28g(1), Article 28i, Article 28j(1) and (2), and Article 28n;
- Article 28b(2) of the VAT Law provides that where services are supplied for a taxable person’s fixed establishment which is in a place other than the place

where he has established his business or has his permanent address, the place where those services are supplied is the place of the fixed establishment;

- Article 19(1) of the VAT Law provides that a chargeable event occurs at the time when goods or services are supplied, subject to paragraphs 2 to 21, Article 14(6), Article 20 and Article 21(1);

- Article 19(4) of the VAT Law provides that, if the supply of goods or services has to be confirmed by an invoice, the chargeable event occurs at the time when the invoice is issued, but not later than seven days after the date on which the goods or services are supplied;

- Article 13(3) of the Ustawa z dnia 2 lipca 2004 r. o swobodzie działalności gospodarczej [...] (Law of 2 July 2004 on Freedom of Commercial Activity) provides that foreign nationals other than those mentioned in paragraphs 1 to 2a have the right to take up and pursue commercial activity exclusively in the form of a limited partnership, limited joint-stock partnership, limited liability company or joint-stock company, and they have the right to become partners of such partnerships or companies or to subscribe for, or acquire, their shares unless international agreements provide otherwise.

## **1.2. The following provisions of EU law are applicable:**

**[Or. 4]** - Article 44 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [...] ('Directive 2006/112/EC') provides that: 'The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.';

- Article 10(1) of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (recast) ([...] 'the EU Regulation') provides that, for the application of Articles 44 and 45 of Directive 2006/112/EC, 'the place where the business of a taxable person is established shall be the place where the functions of the business's central administration are carried out';

- Article 11(1) of the EU Regulation provides that, for the application of Article 44 of Directive 2006/112/EC, a 'fixed establishment' is be any establishment, other than the place of establishment of a business referred to in Article 10 of the Regulation, characterised 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;

- Article 22(1) of the EU Regulation provides that, in order to identify the customer's fixed establishment to which the service is provided, the supplier is to examine the nature and use of the service provided.

Where the nature and use of the service provided do not enable him to identify the fixed establishment to which the service is provided, the supplier, in identifying that fixed establishment, is required to pay particular attention to whether the contract, the order form and the VAT identification number attributed by the Member State of the customer and communicated to him by the customer identify the fixed establishment as **[Or. 5]** the customer of the service and whether the fixed establishment is the entity paying for the service.

Where the customer's fixed establishment to which the service is provided cannot be determined in accordance with the first and second subparagraphs of paragraph 1 or where services covered by Article 44 of Directive 2006/112/EC are supplied to a taxable person under a contract covering one or more services used in an unidentifiable and non-quantifiable manner, the supplier may legitimately consider that the services have been supplied at the place where the customer has established his business.

### **1.3. International agreement:**

- Article 7.9(a) of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part ([...], 'the Agreement') provides that establishment means:

- (I) the constitution, acquisition or maintenance of a juridical person; or
- (II) the creation or maintenance of a branch or representative office;

- Article 7.11(1) of the Agreement provides that, with respect to market access through establishment, each Party is to accord to establishments and investors of the other Party treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in the specific commitments contained in Annex 7-A;

- Annex 7-A-2 to the Agreement, third table, provides as follows: 'PL: With the exception of financial services, unbound for branches, Korean investors can undertake and conduct economic activity only in the form of a limited partnership, limited joint-stock partnership, limited liability company, and joint-stock company (in the case of legal services only in the form of registered partnership and limited partnership).'

## **2. Facts of the case**

### **2.1. Tax proceedings.**

**2.1.1.** By the contested decision, the second-instance tax authority upheld the decision of the first-instance authority in which the goods and services tax ('VAT') liability of Dong Yang Electronics Sp. z o.o. in Biskupice Podgórne was determined for individual months of 2012.

**2.1.2.** The tax authorities determined that Dong Yang Electronics sp. z o.o. supplied to LG Display Co. Ltd (Korea), established in Seoul, services consisting in the assembly **[Or. 6]** of printed circuit boards (PCBs) from materials (sub-assemblies, components) owned by LG Display Co. Ltd (Korea). Those materials were issued to Dong Yang Electronics sp. z o.o. by LG Display Polska sp. z o.o., to which Dong Yang Electronics sp. z o.o. also supplied the finished PCBs.

The service was supplied by Dong Yang Electronics sp. z o.o. to LG Display Co. Ltd (Korea) under an agreement of 27 October 2010. Dong Yang Electronics sp. z o.o. received from LG Display Co. Ltd (Korea) the assurance that the latter does not have a fixed establishment in Poland, does not employ staff, does not own property, and does not have technical resources there. Dong Yang Electronics sp. z o.o. issued to LG Display Co. Ltd (Korea) VAT invoices, treating those services as not subject to VAT within the territory of Poland, with the following annotation: grounds for tax treatment — Article 28b(2) of the VAT Law. On the invoices, LG Display Co. Ltd (Korea) was indicated as the recipient.

The tax authorities took the view that the services provided by Dong Yang Electronics sp. z o.o. were in fact supplied not to LG Display Co. Ltd's seat in South Korea but rather to the fixed establishment of LG Display Co. Ltd (Korea) in Poland. As the place of that fixed establishment, the authorities indicated the seat of its subsidiary — LG Display Polska sp. z o.o. in Biskupice Podgórne. The authorities examined the agreements under which LG Display Polska Sp. z o.o. supplied to LG Display Co. Ltd (Korea) manufacturing services which consisted in the assembly of parts owned by LG Display Co. Ltd (Korea) into ready-to-use TFT-LCD modules and also in the further storage and logistics of finished products. Both the parts and finished modules remain the property of LG Display Co Ltd (Korea) and are subsequently resold by the latter to another related company. On that basis, the tax authorities assumed that:

- LG Display Co Ltd (Korea) created a fixed establishment in Poland by 'exploiting the economic potential' of its subsidiary LG Display Polska through implementing a suitable business model by way of the agreements, and that fixed establishment was available for LG Display Co. Ltd (Korea) as if it were its own. As a result of having arranged its business relationships in that manner, LG Display Co. Ltd (Korea) did not need to maintain any technical or human resources in Poland, that is to say, it did not need to rent or lease any warehouses or employ any staff, which, however, does not preclude the existence of a fixed establishment of LG Display Co. Ltd (Korea) in Poland;

**[Or. 7]** - Dong Yang Electronics sp. z o.o. should have examined the use of its services as required by Article 22 of the EU Regulation; had it done so, it

would have concluded that the actual beneficiary of the services supplied by the company was the structure in Biskupice Podgórne where LG Display Polska is based, whereas Dong Yang Electronics sp. z o.o. relied exclusively on the LG Display Co. Ltd (Korea) statement that that company does not have a fixed establishment in Poland.

The authorities ultimately concluded that Dong Yang Electronics sp. z o.o. supplied services in the territory of Poland, and therefore these services were subject to VAT at the basic rate.

## **2.2. Proceedings before the administrative court**

**2.2.1.** In its appeal to the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court in Wrocław), Dong Yang Electronics sp. z o.o. sought the annulment of the contested decision, alleging, *inter alia*, an infringement of:

- Article 11(1) of the EU Regulation, in conjunction with Article 13(3) of the Law on Freedom of Commercial Activity, by issuing a decision in which the lawful presence in Poland of a Korean company (an entity established outside the territory of the European Union) in a form compliant with the Law on Freedom of Commercial Activity (that is, the holding of shares in the Polish LG Display Polska sp. z o.o. company) is interpreted in such a manner that, under VAT provisions, conclusions are drawn from circumstances which could not have arisen under the Law on Freedom of Commercial Activity, namely, from the alleged conduct of business by LG Display Co. Ltd using a fixed establishment, which LG Display Polska is alleged to constitute in that decision;

- Article 11(1) of the EU Regulation, by incorrectly finding that LG Display Polska is a fixed establishment of LG Display Co. Ltd (Korea) (the party's service recipient) under circumstances in which, even if the concept of fixed establishment were applied to the Korean undertaking, the conditions for determining that a fixed establishment exists are not met, namely, there is no basis on which to conclude that LG Display Co. Ltd (Korea) maintains technical and human resources characterised by permanence in Poland, and it is also impossible to claim that LG Display Polska receives and uses the services supplied by Dong Yang Electronics sp. z o.o. for its own purposes;

**[Or. 8] -** Article 28b(1) and (2) of the VAT Law and Article 44 of Directive 2006/112/EC, by erroneously assuming that Dong Yang Electronics sp. z o.o. had allegedly incorrectly determined the place of supply of services to LG Display Co. Ltd (Korea), namely, that it had assumed that this place was not in Poland and, consequently, had issued to LG Display Co. Ltd (Korea) invoices which did not include the 23% VAT due, whereas the party's services were in fact supplied to a taxable person without a seat or fixed establishment in Poland, and the place of their supply should have been deemed to be the country of establishment of the service recipient, namely, South Korea;



- Articles 21 and 22 of the EU Regulation, by taking the view that those provisions applied to the company, whereas they apply to cases in which a foreign entity has several fixed establishments, and LG Display Co. Ltd (Korea) has just one such establishment in South Korea.

**2.2.2.** In its response to the appeal, the tax authority moved for it to be dismissed and upheld the position taken in the contested decision.

**2.2.3.** The court of first instance decided to refer the questions indicated in the operative part for a preliminary ruling to the Court of Justice of the European Union and stayed the proceedings in the case.

### **3. Grounds for the questions referred**

[...] [Admissibility]

#### **3.2. Grounds for the questions referred**

**3.2.1.** In order to resolve the dispute in the present case, Article 44 of Directive 2006/12/EC must be correctly interpreted in order to determine the place where Dong Yang Electronics sp. z o.o., established in Biskupice Podgórne, supplies services to LG Display Co. Ltd, established in South Korea, in the circumstances of the case at issue.

**3.2.2.** In the opinion of the referring court, the case-law of the Court of Justice of the European Union concerning the interpretation of ‘fixed establishment’ has not to date provided a clear answer to the above question. In its judgment of 2 May 1996, *Faaborg-Gelting Linien* (C-231/94, [Or. 9], EU:C:1996:184), the Court held that a vessel on board which meals are supplied is not a fixed establishment for these purposes. The cooperation in question must also take the concrete form of the presence of human and material resources. In other words, in order to conclude that the particular place where services are supplied is of a fixed nature, it is necessary for technical infrastructure (if required in order to supply the services) and human resources to be present there. In its case-law, the Court took the view that such human and technical resources in a fixed establishment must operate on a permanent basis, that is to say, repeatedly and continuously. For that reason, the Court held in its judgment of [4 July 1985], *Berkholz* ([168/84], EU:C:1985:299), that a vessel on board which ‘self-service’ gaming machines are installed, which are not operated by any personnel during voyages, is not a fixed establishment.

The definition of a fixed establishment is further developed in the Court’s judgment of 17 July 1997, *ARO Lease* ([C-190/95], EU:C:1997:374). In that judgment, the Court emphasised that a place where services are actually supplied is not a fixed establishment if no tangible premises are present in that place (for example, an office) and there are no service personnel there. In that judgment, the Court held that the fact that a leasing company leases cars within the territory of Belgium does not mean that it has a fixed establishment in Belgium if it does not

have any office or any premises within which to store the cars there, since the firm has established its business in the Netherlands and the leasing agreements were also signed in the Netherlands.

In the opinion of the referring court, it follows from the foregoing judgments of the Court of Justice of the European Union that a fixed establishment must, *inter alia*, have an appropriate structure in the form of human and technical resources. In a fixed establishment, an entity must therefore have personnel and technical facilities. Those human and technical resources must be appropriate to enable the entity to receive and utilise services for its own needs or to supply services, respectively. In order for such a place to be recognised as a fixed establishment, two requirements must be met: the presence of personnel and the presence of technical resources. This interpretation of the concept of a ‘fixed establishment’ also follows from the wording of Article 11(1) of the EU Regulation.

Also in its judgment of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298), the Court found that a first taxable person who has established his business **[Or. 10]** in one Member State, and receives services supplied by a second taxable person established in another Member State, must be regarded as having a ‘fixed establishment’ within the meaning of Article 44 of Directive 2006/12/EC in that other Member State, for the purpose of determining the place of taxation of those services, if that establishment is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive the services supplied to it and use them for its business.

A similar approach is to be found in Polish case-law and legal literature.

For example, in its judgment of 30 September 2009, the Wojewódzki Sąd Administracyjny w Olsztynie (Regional Administrative Court in Olsztyn, Poland) [...] found that an undertaking has a fixed establishment within the territory of the country where, by utilising infrastructure and personnel within the territory of that country on an organised and continuous basis, it conducts business in the course of which it carries out transactions which are subject to VAT. The use of technical infrastructure and personnel must be closely linked to the performance of the activities subject to VAT.

Whether the resources available at the given place are adequate for the performance of specific services has to be assessed on a case-by-case basis. The resources and means must be appropriate to enable the undertaking to receive and utilise the services purchased or to supply services [...] [reference to the legal literature].

**3.2.3.** At the same time, in its judgment of 16 October 2014, *Welmory* ([C-605/12], EU:C:2014:2298), the Court stressed that ‘the most appropriate, and thus the primary, point of reference for determining the place of supply of services for tax purposes is the place where the taxable person has established his business. ... Despite its particular character, such a business requires at least a structure that



is appropriate in terms especially of human and technical resources, such as appropriate computer equipment, servers and software.

It is only if that place of business does not lead to a rational result or creates a conflict with another Member State that another establishment may come into consideration.’

**[Or. 11] 3.2.4.** Meanwhile, the facts of the present case differ significantly from those referred to in the judgments cited above. As an entity established outside the European Union, LG Display Co. Ltd (Korea) does not enjoy Treaty freedoms and may not freely pursue its business in the territory of the Member States, including Poland. Therefore, many of the arguments put forward in those judgments cannot be applied to an entity such as LG Display Co. Ltd (Korea).

The freedoms of the European Union, including without limitation the free movement of services or the freedom of establishment (which allows undertakings from one Member State to operate in the territory of another Member State without being obliged to register), have made it important to separate the place where services are taxed from the place where the business is established and to tax services in places which are similar to an establishment in terms of their nature (if the service recipient’s business is carried out in those places). In many cases, however, the freedom of establishment in the European Union leads to concepts such as the place where a taxable person is established or the place where it is present in another country becoming blurred. In exceptional cases, it may even be the case that a taxable person’s direct presence on a given market is difficult to distinguish from the presence of that undertaking through another entity (as a separate taxable person under VAT).

The foregoing does not alter the general principle, which remains that a service is subject to VAT at the place where the service recipient is established. Therefore, the EU Regulation stresses that its provisions related to the fixed establishment need to be applied carefully, only in cases where the application of the regulation is necessary to ensure uniform and fair tax treatment; it is pointed out that ‘in view of their formulation, [these provisions] are to be applied restrictively’.

The purpose of concepts such as the seat of a related entity being construed as a fixed establishment is to maintain a level playing field between undertakings, as in the Court’s judgment of [2 May 1996], [*Faaborg-Gelting Linien*] (C-231/94, EU:C:1996:184), or to prevent the emergence of solutions (with respect to the supply of services) the aim of which is to achieve an unreasonable tax treatment with respect to VAT (cf. Court judgments in, inter alia, *Welmory* (C-605/12, EU:C:2014:2298), *Berkholz* ([168/84], EU:C:1985:299) and *Faaborg-Gelting Linien* (C-231/94, EU:C:1996:184)).

**[Or. 12]** For an undertaking which does not enjoy Treaty freedoms, it is in fact only possible to engage in business within a Member State of the European Union by owning a subsidiary that is a company. In this case it is clear that, to a certain

extent, such an undertaking is always able to influence the activities of that company by virtue of its ownership rights. Thus, to some extent, the subsidiary's technical and human resources are at its disposal. The subsidiary is also usually linked to its parent company by numerous agreements and serves the purpose of achieving the parent company's economic objectives, since that was the point of its establishment. At the same time, such an undertaking is unable to pursue its economic objectives in the territory of a Member State in any other form.

**3.2.5.** Having concluded as set out above, the first-instance court has justified doubts as to whether the definition of a fixed establishment for VAT purposes cannot, on the other hand, be regarded as an attempt to circumvent the prohibition on the direct conduct of business activity by an undertaking established outside the [European Union].

At the same time, in order to ensure the coherence of the regulations indicated at the beginning, it would be possible to adopt a concept according to which, owing to the aforementioned relationships and the objectives of establishing subsidiaries, a subsidiary would always be considered a fixed establishment for VAT purposes.

**3.2.6.** Further, it is necessary to consider whether, if it is accepted that a subsidiary may or may not be a fixed establishment (in the factual circumstances described in the present case), the supplier (the party in the main proceedings) is realistically able to examine whether such an establishment is present. In particular, does the mere fact that the materials used to supply the service are provided to, and received from, the supplier by a subsidiary determine the nature and use of the service supplied?

It should be noted that the supplier (the party in the main proceedings) is an independent entity, which is bound only by its agreement with LG Display Co. Ltd (Korea). However, it does not have any relationship with the subsidiary in Poland. Therefore, doubts arise as to how, using objective and available data, the supplier can establish whether a fixed establishment of the service recipient exists which is separate from its place of establishment. The supplier (the Party in the main proceedings) concluded an agreement with LG Display Co. Ltd (Korea) and that was the company which made payments. At the same time, LG Display Co. Ltd (Korea) is registered for VAT purposes in Poland and has **[Or. 13]** a tax representative other than its subsidiary. The amount of materials required for the service to be performed is agreed directly with the customer, while the demand for daily deliveries of processed components is determined by the subsidiary on the basis of its arrangements made with the customer.

It should be stressed that the tax authorities made their findings regarding the fixed establishment by, inter alia, examining the cooperation agreements concluded between LG Display Co. Ltd (Korea) and its subsidiary. Those data were collected in the course of other tax proceedings and were not available to Dong Yang Electronics sp. z o.o. at the time when the services were supplied (the invoices were issued). Since it was necessary to refer to such information in order

to assess whether the service was supplied to a fixed establishment, it appears that the situation described in the third subparagraph of Article 22(1) of the EU Regulation applies.

**3.2.7.** In the opinion of the present court, the case-law of the Court of Justice to date concerning the interpretation of the concept of ‘fixed establishment’ does not remove its interpretative doubts expressed in the question being referred. The Court’s reply will determine whether the services supplied by the applicant, a Polish company, to a Korean company should be taxed in Poland or whether those services should be exempt from tax while the right to deduct input tax is retained.

[...] [relevance to the resolution of the case]

[...] [staying of proceedings]

[...]

WORKING DOCUMENT