Case C-931/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

20 December 2019

Referring court:

Bundesfinanzgericht (Austria)

Date of the decision to refer:

20 December 2019

Appellant:

Titanium Ltd

Respondent authority:

Finanzamt Wien 1/23

Subject matter of the case in the main proceedings

Appeal against decisions of the Finanzamt Wien 1/23 (Tax Office 1/23, Vienna) concerning turnover tax for 2004 to 2010

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Question referred

Is the term ‘fixed establishment’ to be interpreted as meaning that the existence of human and technical resources is always necessary and therefore that the service provider’s own staff must be present at the establishment, or can — in the specific case of the letting, subject to tax, of a property situated in national territory, which constitutes only a passive tolerance of an act or situation — that property, even without human resources, be regarded as a ‘fixed establishment’?

Provisions of EU law cited

Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, Article 21

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'), Articles 192a to 205 (in particular, Articles 192a, 193, 194, 196)

Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services

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 ('the CIR'), Articles 11, 53

Provisions of national legislation cited

Austrian Umsatzsteuergesetz 1994 (Law on turnover tax 1994, 'the UStG'), Paragraphs 1, 3a, 11, 19, 28

German Umsatzsteuergesetz (German Law on turnover tax), Paragraph 13b

Brief summary of the facts and the proceedings to date

1 The appellant is a company dealing with property, asset management and housing and urban development, which has its registered office and management in Jersey. Since 1995, it has owned a property in Austria which it let to two domestic traders subject to turnover tax. The turnover generated by the letting was its only domestic turnover. The appellant tasked the management of the property to an Austrian property management company which primarily carried out support and administrative tasks. The appellant retained authority to make key decisions (such as entering into or terminating tenancy agreements or decisions relating to capital expenditure and repairs). For its business, the property management company used its own office facilities and technical infrastructure, which had no geographical and/or functional connection with the appellant's property.

The tax authorities assessed the appellant's VAT for, inter alia, 2009 and 2010, and required the appellant to pay the corresponding amounts of tax. The appellant challenged those decisions in an appeal before the Bundesfinanzgericht (Federal Finance Court).

Principal arguments of the parties in the main proceedings

2 The appellant takes the view that, in the absence of human resources, the property it let is not a fixed establishment and that therefore the tax liability is transferred to the persons to whom the services were supplied in Austria, in accordance with Article 196 of the VAT Directive or Paragraph 19(1) of the UStG. Accordingly, the appellant did not account for any VAT in its accounts. Conversely, the tax authorities take the view that a property that is let in Austria does indeed constitute a fixed establishment in Austria.

Brief summary of the basis for the reference

3 Under Paragraph 19 of the UStG, the tax liability is transferred to the person to whom the services are supplied if the trader providing the services does not have a permanent address (registered office) or usual place of residence in Austria (which was the legal situation until 14 December 2012) or does not carry on a business or have another permanent establishment which intervenes in the provision of services in Austria (which has been the legal situation since 15 December 2012). In conformity with the VAT Directive, the term 'permanent establishment' is interpreted as a 'fixed establishment' within the meaning of the VAT Directive or the CIR. In its ruling of 29 April 2003, 2001/14/0226, the Austrian Verwaltungsgerichtshof (Supreme Administrative Court) interpreted the term 'permanent establishment' in conformity with EU law: the characteristic feature is having a sufficient minimum level of human and technical resources which are necessary to provide the service, and a sufficient degree of stability in the sense of the human and technical resources being permanently present.

Whereas the basic rule, laid down in Article 193 of the VAT Directive, is that any taxable person carrying out a taxable supply of goods or services is liable, in principle, for the VAT, certain cases involve the optional or compulsory transfer of tax liability to the person established in the national territory to whom the services are supplied, in accordance with Article 194 et seq. of the VAT Directive. In the version of the VAT Directive amended by Directive 2008/8/EC (which does not apply *ratione temporis* to the present case), a new Article 192a was inserted, which redefines the concept of a non-established taxable person for the purposes of applying the provisions on liability to tax. As regards the fixed establishment, that provision introduced the requirement that the fixed establishment does not intervene in the supply of goods or services. However, even before the insertion of Article 192a (or rather under Directive 77/388/EEC already), the fact that the service provider was not, in principle, established in the national territory meant that there was a transfer of tax liability. Regard was therefore had to the fact that in the national territory there was neither a registered office nor a fixed establishment (which, following the insertion of Article 192a into the VAT Directive, must be an establishment that does not intervene in the supply of goods or services). Before that, Article 21(1)(b) of Directive 77/388 required that, for the

tax liability to be transferred to the person to whom the services were supplied, the services were to be carried out by a 'taxable person resident abroad'.

The term 'fixed establishment' used in the VAT Directive is not defined in the directive itself, but has been interpreted broadly in the ECJ's case-law; this interpretation has found its way into the CIR (not applicable *ratione temporis* to the present case) in Article 11 and, in Article 53, for the implementation of Article 192a of the VAT Directive.

The explanatory notes on the 'EU VAT place of supply rules on services connected with immovable property' that came into force in 2017 specifically address the case of letting property. When a service connected with immovable property is supplied, explanatory note 28 states that VAT is due in the Member State where the immovable property is located. Consequently, it is irrelevant, for the purposes of determining the place of supply of services, whether or not the provider has a fixed establishment in that Member State. The mere fact that a business owns immovable property in a Member State does not allow the conclusion that it has a fixed establishment in that country. Although those explanatory notes are not legally binding and were only published after the period at issue in the present case, in light of the fact that all the EU Member States agreed on that interpretation being published, that interpretation must be given appropriate weight.

The question of interpretation not only has particular relevance for the present appeal (the years at issue being 2009 and 2010), but is of general importance for the uniform application of EU law, since the term 'fixed establishment', at least in Austria and Germany, has not previously been given a uniform interpretation. It is true that the Court of Justice of the European Union has on several occasions already dealt with the interpretation of the term 'fixed establishment' (see, for example, judgments of 4 July 1985, *Berkholz*, 168/84, EU:C:1985:299; of 20 February 1997, *DFDS*, C-260/95, EU:C:1997:77; of 17 July 1997, *ARO Lease*, C-190/95, EU:C:1997:374; of 28 June 2007, *Planzer Luxembourg*, C-73/06, EU:C:2007:397; see also judgment of 16 October 2014, *Welmory*, C-605/12, EU:C:2014:2298) and the interpretation given by the Court of Justice reflected, inter alia, in Article 53 CIR (not applicable *ratione temporis* to the present case), but reasonable doubts remain as to the interpretation of the term in conformity with EU law. According to the existing interpretation, a fixed establishment has, for the purposes of VAT, a sufficient degree of permanence and, in addition, a structure which, by reason of its human and technical resources, enables it to supply services. However, the issue that has not yet been definitively resolved is whether those two characteristics (that is to say, human and technical resources) are always cumulative or whether both are necessary only if they are required for the proper functioning of the economic activity in question.

Article 196 of the VAT Directive goes on from there to state that the service is supplied by a taxable person not established in that Member State. In relation to

the issue of establishment, Article 192a of the VAT Directive requires, inter alia, the existence of a 'fixed establishment' which intervenes in the supply of services.

It follows from the judgments in *ARO Lease BV* and *Lease Plan Luxembourg SA* that the staff must specifically belong to the business supplying the service; it is not sufficient that the staff belong to another undertaking concerned. That is especially the case where the staff of the property management company carry out only support and administrative tasks.

Circumstances militating against the existence of a fixed establishment

It is clear from both the Court of Justice's case-law and from the definition in Article 53 CIR that the existence of a fixed establishment requires human (and technical) resources. The Court of Justice speaks of the permanent presence of the human and technical resources necessary for the supply of the services concerned. Since the present case concerns the mere letting of a domestic property and the appellant's 'own' staff are not deployed at the property, the human resources requirement is not met, which is why it may be found that there is no fixed establishment in Austria. From a staffing perspective, in order to provide such letting services only a lessor is needed to take decisions, sign contracts or instruct a property management company. There is no human resources component at the place where the leased property is located in the present case. Consequently, even if the activities of the national property management company were taken into account, that would not lead to a different outcome, since, first, that company uses its own employed staff and not the appellant's staff and, second, it only carries out support and administrative tasks in any event.

Circumstances in favour of the existence of a fixed establishment

(a) Interpretation by the Austrian tax authorities

The Austrian tax authorities issued the 'Guidelines on turnover tax 2000' in order to ensure uniform interpretation. Under those guidelines, traders who own immovable property situated in Austria and who let property subject to tax are to be regarded (in relation to the turnover from the letting) as domestic traders. They are to declare that turnover in the tax assessment procedure. The person to whom the services are supplied is not liable to pay the tax on that turnover. The Austrian tax authorities always assume, therefore, that in relation to a property that is let, there is a fixed establishment or residence at the place where the property is located, so that the letting of the property does not involve a transfer of tax liability.

(b) German case-law and the interpretation given by the German tax authorities

According to case-law of the German Finanzgerichte (FG) (Finance Courts) on the operation of wind turbines by a company whose business is established

abroad, the wind turbines taken alone constitute a permanent establishment situated in Germany, even though no staff are employed there (see, for example, FG Münster 5 September 2013, 5 K 1768/10 U; FG Köln 14 March 2017, 2 K 920/14; FG Schleswig-Holstein 17 May 2018, 4 K 47/17). According to that case-law, the wind turbines constitute fixed installations of significant value, which exhibit the highest possible degree of permanence. The fact that the wind power station does not have its own staff in situ does not preclude the finding that it is a fixed establishment. While, in principle, having human resources is one of the essential elements of a fixed establishment, that does not mean, however, that the criteria of human and technical resources must always be satisfied to the same extent. On the contrary, human resources which are less developed or, in exceptional cases, non-existent could be compensated for by particularly highly-developed material resources. Regard does not necessarily have to be had, therefore, to the existence of an undertaking's own staff in order to determine the issue of establishment.

As far as can be ascertained, there has been no case-law of the German Bundesfinanzhof (Federal Finance Court, 'the BFH') on this specific issue. In decision BFH 19 November 2014, V R 41/13, the question was left open. Similarly in its decision of 9 May 2017, XI B 13/17, the BFH offered no clarification of the issue, which is comparable to the point of law at issue in the present case, as to whether, in the case of a letting subject to tax, immovable property located in Germany is to be regarded as a fixed establishment of the trader (since the business was already established in Germany). Finally, reference can also be made to the German Umsatzsteueranwendungserlass (Decree on the Application of Turnover Tax) and to Paragraph 13b of the German Law on turnover tax, pursuant to which human resources are negligible in the context of passive services in the form of tolerance of an act or situation.