



KMLZ VAT NEWSLETTER

Fixed establishment even in the absence of own human and technical resources?

By judgment of 16 October 2014, in the case of *Welmory* (C-605/12), the ECJ decided, for the second time within a short period, on questions regarding fixed establishments (see decision in case of *Skandia*, our newsletter 21/2014).

1. Facts of the case *Welmory*

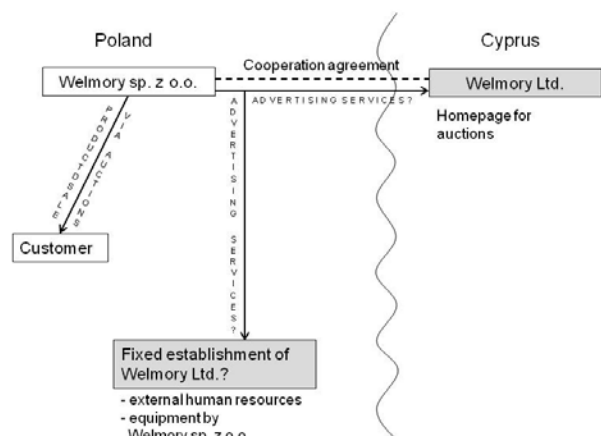
The Polish company *Welmory sp z o.o.* (“*Welmory*”) and the Cypriot company *Welmory Ltd.* (“*Ltd.*”) signed a cooperation agreement. Based on this contract, the *Ltd.* provided a Polish language homepage for *Welmory*. For this purpose, the *Ltd.* used *Welmory*’s technical equipment and employees who were not employed by the *Ltd.* Via this homepage, *Welmory* sold products in its own name and on its own account to its customers (online auction). In order to submit a bid, the customers needed to obtain prior authorization from the *Ltd.* By selling products via the homepage, *Welmory* provided e.g. advertising services in 2010 to the *Ltd.* The place of supply for these advertising services was questionable. It was unclear whether it was the seat of the *Ltd.* (Cyprus) or a fixed establishment in Poland, if in fact, one existed. In this case, the place of supply for the services rendered by *Welmory* to the *Ltd.* would be Poland. The

Services to a fixed establishment?

If a taxable person supplies services, within the meaning of sec. 3a para. 2 of the German VAT Act (Art. 44 of the VAT Directive), to a fixed establishment of another taxable person, the place of supply shall be where the fixed establishment is set up. Determining the existence of a fixed establishment is not always straight forward, especially in cases where the recipient uses external human and technical resources. In the recent legal case of *Welmory*, the ECJ was tasked with deciding this question. In the ECJ’s opinion, even in a case like this, a fixed establishment may possibly exist.

ECJ only needed to determine the place of supply for the services of *Welmory*, not for the services of the *Ltd.*

The main question was whether there is a fixed establishment if the recipient of these services uses external human and technical resources (of the person supplying the services).





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2. Opinion of the ECJ

In the ECJ's opinion, the rules regarding the place of supply exist to avoid conflicts of jurisdiction between the Member States, which otherwise may result in double taxation or non-taxation. The place of supply of services, according to Article 44 of the VAT Directive, is to be primarily determined by the seat of the recipient's economic activity. This enables the authorities, as well as the person supplying the services, to determine the place of supply more easily. It is an objective criterion which may be more easily checked than the question of whether there is a fixed establishment. Only in exceptional cases will the place of the fixed establishment be decisive.

According to Article 11 of the Council Implementing Regulation, 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. Even though the Implementing Regulation has only been in force since 01 July 2011, according to the ECJ, it is also of importance for the application of law for previous periods. This is a result of the fact that the Implementing Regulation takes previous ECJ case law into consideration.

However, the ECJ did not provide a clear answer as to whether the structure given in the case at hand qualifies as a fixed establishment. If the appropriate equipment (server, software etc.) for obtaining these services is located outside Poland, there would not be a fixed establishment for the Ltd. in Poland. Without the appropriate equipment, the Ltd. would not be able to receive or use Welmory's services in Poland. Only this seems to be decisive for the ECJ.

The issue of whether the establishment in Poland would be able to supply services on its own, does not seem to be decisive for the ECJ. Although the ECJ states that human and technical resources of the establishment should enable it to receive the services supplied to it *for its business*, it remains unclear whether the ECJ intends to require that an establishment receiving services needs to be able to render services, on its own behalf, to a third party. In the reasoning of the judgment, the ECJ speaks of the services being received for the purposes of the business of the Ltd. (see note 59, 61). Due to the particular situation in the *Welmory* case, the fixed establishment for receiving services, if there was one, would, at the same time, be a fixed establishment for the supply of services. Generally applicable statements may not be derived from the ECJ's decision.

The ECJ does not state clearly if, and in what circumstances, external human and technical resources would be sufficient for the finding of a fixed establishment. If the ECJ deemed external resources not to be sufficient the ECJ would have given appropriate hints to the court, as it did with regard to its comments on the technical resources, should they be located outside of Poland.

3. Conclusion

Whether there is a fixed establishment or not is always determined by the facts of the individual case. Also, in cases where an entrepreneur uses external human and technical resources, this issue should be taken into consideration. For the person supplying the services, it is decisive when determining whether he is required to charge VAT to the customer or if the reverse-charge procedure is applicable. For the recipient of the services it is decisive for the VAT deduction.