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"Fixed establishment" concept for VAT purposes

The problem of determining the place of supply of services and determining VAT payers has long been a current problem of European legislation in the field of VAT taxation, and in this context the **fixed establishment concept for VAT purposes** appears important. Although the term "fixed establishment" for VAT purposes (hereinafter: **FE**) has been present for many years, the problem of its interpretation by national tax administrations and courts is still present.

The term FE is defined in Art. 11 of the Council Implementing Regulation (EU) 282/2011, which regulates measures necessary to implement certain provisions of Council Directive 2006/112/EC. FE is a concept of the European VAT legislation, and FE is not left to the Member States to interpret it according to their discretion.

Also, the concept of FE is significantly different from the perhaps more frequently mentioned concept of permanent establishment for corporate income tax purposes (hereinafter: **PE**), which is defined in regulations on corporate income taxation, including bilateral agreements on the avoidance of double taxation. Namely, while PE is a concept of corporate income tax, i.e., direct tax, and is applied to determine the right of a state to tax the income of non-residents that could be attributable to non-residents' business activities in that state, FE is a concept of VAT, i.e., indirect tax, and it is mainly applied to determine the place of supply of services in the context of VAT. Given that these are the concepts of different tax forms with different criteria and different purposes of application, determining the (non-)existence of one concept does not automatically lead to the (non-)existence of another concept, but taxpayers should be aware of the consequences of determining the existence of any of the concepts: FE and/or PE.

In its Art 11, the Implementing Regulation defines that FE shall be any establishment, other than the place of establishment of a taxpayer, which has 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 (so called *passive* FE) or which enable it to provide the services which it supplies (so called *active* FE), while the mere existence of a VAT ID number

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Koncept „stalne poslovne jedinice" za potrebe PDV-a

Problem određivanja mjesta pružanja usluga i obveznika plaćanja PDV-a već dugo je aktualan problem europskog zakonodavstva na području oporezivanja PDV-om, a u tom kontekstu kao bitan pojavljuje se i **koncept stalne poslovne jedinice za potrebe PDV-a** (engl. ***fixed establishment***). Iako je pojam stalne poslovne jedinice za potrebe PDV-a (u nastavku: ***FE***) prisutan duži niz godina, i dalje je prisutan problem njegova tumačenja od strane nacionalnih poreznih uprava i sudova.

Pojam FE je definiran u čl. 11. Provedbene uredbe Vijeća (EU) 282/2011, kojom se uređuju mjere za provedbu nekih odredaba Direktive vijeća 2006/112/EZ. Riječ je o konceptu europskog PDV zakonodavstva za koji nije ostavljena mogućnost državama članicama da ga tumače prema svojoj diskrecijskoj ocjeni.

Također, koncept FE je različit od možda nešto češće spominjanog koncepta stalne poslovne jedinice za potrebe oporezivanja porezom na dobit (engl. ***permanent establishment***, u nastavku: ***PE***), a koji je definiran propisima o oporezivanju dobiti uključujući i bilateralne ugovore o izbjegavanju dvostrukog oporezivanja. Naime, dok je PE koncept poreza na dobit, tj. direktnog poreza, i primjenjuje se za utvrđivanje prava države da oporezuje dobit nerezidenata koja se može pripisati poslovanju nerezidenta u toj državi, FE je koncept PDV-a, tj. indirektnog poreza, i uglavnom se primjenjuje za potrebe određivanja mjesta pružanja usluga u kontekstu PDV-a. S obzirom da je riječ o konceptima različitih poreznih oblika s različitim kriterijima i različitom svrhom primjene, utvrđivanje (ne) postojanja jednog koncepta ne dovodi do automatskog (ne) postojanja drugog koncepta, međutim porezni obveznici svakako trebaju voditi računa o posljedicama koje na njihovo poslovanje može imati utvrđivanje (ne)postojanja bilo kojeg koncepta: FE-a i/ili PE-a.

U čl. 11. Provedbene uredbe definirano je kako FE označava svaku poslovnu jedinicu, različitu od mjesta sjedišta poreznog obveznika, koja ima ***dostatan stupanj stalnosti*** i ***primjerenu strukturu osoblja*** i ***tehničkih sredstava*** koja joj omogućuju primanje i korištenje usluga koje su joj dostavljene za vlastite potrebe (tzv. *pasivni* FE) ili koje joj omogućavaju isporuku usluga koje pruža (tzv. *aktivni* FE), dok samo postojanje PDV ID broja samo po sebi nije

is not in itself sufficient to consider a taxpayer to have a FE.

Although this provision was introduced in the Implementing Regulation to resolve ambiguities about when an FE exists, in practice, there are problems in the interpretation of this provision and erroneous conclusions on the existence of the FE by national tax administrations and courts, resulting in the initiation of numerous proceedings before the Court of Justice of the European Union to ensure uniform application of EU VAT law.

Thus, on 3 June 2021, the Court of Justice of the European Union decided in the case Titanium, C-931/19, which discusses whether property located in another Member State (Austria) and rented out, in circumstances in which the owner of that property (a Jersey's taxpayer) does not have his own staff to provide services relating to letting but has appointed an Austrian real estate management company to carry out rental activities, constitutes FE. In the present case, the Court decided that a property leased in a Member State in circumstances where the owner of that property does not have his own staff to provide services relating to letting - is not FE.

That decision of the Court was made in relation to the definition of FE in specific circumstances and should not apply to situations other than those in the present case. Nevertheless, the comment from paragraph 42 of the Judgment is quite interesting, stating that a structure without its own staff cannot fall within the scope of the concept of FE. However, it should be noted that neither Article 11 of the Implementing Regulation nor this decision define the notion of *own* staff or *own* technical resources.

As the concept of FE was quite relevant during the changes in VAT regulations from 1 January 2020, when the new so-called simplification in the case of call-off stock arrangements were introduced, the European Commission has published documents in which VAT Committee were examining the various scenarios in which taxpayers may have ended up, which included taxpayer's own (or rented) warehouse managed directly by the supplier using its own resources in that country, in comparison to scenarios where the warehouse is managed by a third party, all with the aim of determining in which situations the FE is created. It is interesting that, according to the interpretations of the VAT Committee, in the case of the warehouse, it is irrelevant whether it the taxpayer has own warehouse, or the warehouse is rented, while the lack of the taxpayer's own staff managing the warehouse excludes the possibility of having FE in the above scenarios. Such an approach would be in line with the Judgment C-931/19, in which the absence of its own staff to provide services relating to letting has led to the conclusion that there was no FE.

The question arises as to whether a different criterion has been applied to staff (who must be their own staff) than to a warehouse (which may be their own or hired). However,

dovoljno da bi se smatralo da porezni obveznik ima FE.

Iako je ova odredba uvedena u Provedbenu uredbu kako bi se razriješile nejasnoće oko toga kada postoji FE, u praksi se javljaju problemi u tumačenju ove odredbe i pogrešnim zaključcima o postojanju FE-a od strane nacionalnih poreznih uprava i sudova, što rezultira pokretanjem brojnih postupaka pred Sudom Europske unije, kako bi se osigurala ujednačena primjena prava EU-a u području PDV-a.

Tako je Sud Europske unije 3. lipnja 2021. godine donio svoju odluku u predmetu Titanium, C-931/19, u kojem se raspravljalo o tome može li nekretnina koja se nalazi u drugoj državi članici (Austriji) i koja se daje u najam, u okolnostima u kojima vlasnik te nekretnine (porezni obveznik iz Jerseyja) nema svoje osoblje za obavljanje usluga u vezi s iznajmljivanjem, nego je za aktivnosti povezane s iznajmljivanjem opunomoćilo austrijsko društvo za upravljanje nekretninama, činiti FE. U navedenom predmetu, Sud je zaključio kako nekretnina dana u najam u državi članici u okolnostima u kojima vlasnik te nekretnine nema vlastito osoblje za pružanje usluge u vezi s najmom - nije FE.

Navedena odluka Suda je donesena u vezi s definicijom FE-a u konkretnim okolnostima, te se ne bi trebala primjenjivati na druge situacije različite od onih u tome predmetu. No, bez obzira na to, zanimljiv je komentar iz točke 42. Presude da **struktura bez vlastitog osoblja ne može potpadati pod pojam FE-a**. Međutim, treba uočiti da sam članak 11. Provedbene uredbe niti ova presuda ne definiraju pojam *vlastitog* osoblja niti *vlastitih* tehničkih sredstava.

Kako je koncept FE-a bio dosta aktualan i prilikom izmjena PDV propisa od 1.siječnja 2020. godine, kada se uvodilo tzv. novo pojednostavljenje u slučaju aranžmana za premještanje, Europska komisija je objavila dokumente Odbora za PDV u kojima su razmatrani razni scenariji u kojima su se porezni obveznici mogli naći, a koji su uključivali vlastito (ili unajmljeno) skladište koje vodi direktno dobavljač pomoću vlastitih sredstava koja se nalaze u toj državi u odnosu na scenarije kada skladište vodi treća osoba, a s ciljem utvrđivanja u kojim situacijama nastaje FE. Zanimljivo je da, prema tumačenjima Odbora za PDV, u slučaju skladišta nije bitno je li riječ o vlastitom skladištu ili iznajmljenom, dok nedostatak vlastitog osoblja koje vodi skladište isključuje mogućnost FE-a u navedenim scenarijima. Takav stav bi bio u skladu s presudom C-931/19, u kojoj je nepostojanje vlastitog osoblja za pružanje usluge u vezi s najmom dovelo do zaključka da ne postoji FE.

Postavlja se pitanje, je li primijenjen različit kriterij za osoblje (koje mora biti vlastito osoblje) u odnosu na skladište (koje može biti vlastito ili unajmljeno). Međutim, smatramo da takvo tumačenje ne bi bilo ispravno. Naime, smatramo da bi ispravno bilo tumačiti

we believe that such an interpretation would not be correct. Namely, we believe that it would be correct to interpret that "own" staff should consider all forms of use of persons who are not formally legal employees of a particular taxpayer, if he has the right to use their work capacity in a way that is economically comparable to the use of work capacity of its own employees. In the said judgment, the Court did not explicitly state this, but in fact did not enter into a more detailed interpretation of the term "own" staff, given that in this case it was clear that the taxpayer does not have the working capacity of persons who are not its formal legal employees. Therefore, we believe that also when applying this judgment in practice, the specific economic circumstances should be carefully considered.

da bi se pod „vlastitim" osobljem trebali smatrati i svi oblici korištenja osoba koje nisu formalno-pravno zaposlenici određenog poreznog obveznika, ako on ima pravo koristiti se njihovim radnim kapacitetom na način koji je gospodarski usporediv korištenju rada vlastitih zaposlenika. U navedenoj presudi Sud to nije izričito naveo, ali zapravo nije niti ulazio u detaljnije tumačenje pojma „vlastito" osoblje s obzirom da je u konkretnom slučaju bilo jasno da porezni obveznik nema na raspolaganju radni kapacitet osoba koje formalno-pravno nisu njegovi zaposlenici. Stoga, smatramo da i kod primjene ove presude u praski treba biti pažljiv vodeći računa o tome kakve su konkretne gospodarske okolnosti.

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