

VAT fixed establishment non-existing without staff



The European Court of Justice (ECJ) ruled in the highly anticipated Titanium case that own staff is required for a 'fixed establishment' for VAT. In the case at hand, real property used by the owner for leasing activities does not constitute a VAT fixed establishment if the owner does not deploy its own local staff to perform the leasing.

Titanium

Titanium is a real estate investor that is established in Jersey ([read the ECJ's ruling](#)). Titanium owned a real property in Austria, which it leased to Austrian companies. Besides the real property, Titanium did not possess any assets in Austria, nor did it employ any local staff of its own.

Titanium outsourced the day-to-day property management to an Austrian real estate agent. Titanium retained the main decision-making power as entering into or terminating tenancy agreements or decisions relating to capital expenditure and repairs.

Contrary to the Austrian tax authorities, the ECJ held that Titanium did not possess of a fixed establishment by merely owning and leasing real property. The fixed establishment requires a sufficient degree of permanence and a suitable structure, in terms of human and technical resources, to supply services on an independent basis. Since Titanium did not have any own staff in Austria and the real estate agent it appointed to perform certain administrative tasks was not allowed to make key decisions regarding the lease, the local presence of Titanium was not sufficient to act independently and perform the leasing activities. Without deploying own staff, the property of Titanium did not constitute a fixed establishment.

Impact in practice

The ECJ's ruling confirms that having local staff is one of the requirements to have a fixed establishment. Even in cases where relatively limited human effort is required to perform the services, such as in the leasing of real property, that does not take away from the fact that some involvement of staff is necessary in any event. A structure requires own staff to be considered a fixed establishment for VAT. In our view, this confirms the common interpretation of the fixed establishment in practice.

Some of the ECJ considerations may, however, leave some room for a different interpretation. Under this interpretation, a fixed establishment can be found to exist even in the absence of own

staff, in case key business decisions are outsourced to a third-party service provider allowing the local structure to independently perform its activities. This may provide grounds for tax authorities to take different positions, which could potentially lead to cross-border mismatches between EU countries.

What to do?

If your business performs activities in other EU countries by using local assets, technical resources and/or staff, it is always recommended to perform a sanity check on whether the foreign presence constitutes a fixed establishment.