Dong Yang Electronics (Case C-547/18): Can a Subsidiary Be (also) a Fixed Establishment under EU VAT?

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On 14 November 2018, the AG Kokott reasoned in her opinion in Dong Yang Electronics (Case C-547/18) referred to the Court of Justice of European Union (CJEU) by the Regional Administrative Court of Wroclaw (Poland), and concerning the applicability of a VAT fixed establishment (FE) of a multiterminal company in an EU Member State.

As AG Kokott vividly introduced the case, the OE has previously been asked to determine whether a subsidiary can be regarded as a part of a parent company established in another EU country for VAT purposes. However, since a decision at this matter could be found in the existing CJEU’s law in Dong Yang Electronics, the Court has thus made it clear that “nothing new is to be added in a case of this kind.”

Facts and Questions

The background to the referred-to preliminary ruling was that a company established in Korea (LG Electronics) and its subsidiary in Poland (LG Poland) were involved in supply activities amounting to certain repairs for a parent company. The supplies were performed pursuant to a single contract concluded between the parent company and LG Electronics. The processing and assembly of the products was undertaken jointly by Dong Yang Electronics and LG Poland. The processing and assembly of the products was undertaken jointly by Dong Yang Electronics and LG Poland. The processing and assembly of the products was undertaken jointly by Dong Yang Electronics and LG Poland. The processing and assembly of the products was undertaken jointly by Dong Yang Electronics and LG Poland. The processing and assembly of the products was undertaken jointly by Dong Yang Electronics and LG Poland.

The Polish tax authorities argued that the latter situation applied on the ground that the Korean parent company had itself established a FE in Poland to “execute the economic potential of” its subsidiary, “through implementing a common business model of the agreements” concluded with the parties involved in the overall supply. Based on this theory, the place of supply was held to be in Poland and not the Korean parent company due to the absence of a fixed establishment in Korea.

The AG however found a notable exception to the above conclusions, which applies when, in light of the decision established by the CJEU in “DFDS (Case C-340/15)”, the inter-undertakings relationship amounts to an active practice. As an active practice can in particular be found where, through co-operative arrangements, a company manages to reduce its own VAT burden, whereas adherence to economic reality would lead to a more burdensome VAT treatment.

This consideration naturally led the AG to examine the CJEU’s decision in “DFDS (Case C-340/15)”, where the Court found that a subsidiary can actually constitute a fixed establishment for the parent company insofar as it acts as a “generally manager of the tax treatment” and the supply has to be regarded as being made by the parent company.

The AG therefore asked whether the situation in “DFDS (Case C-340/15)” would take place in the case at hand. Within the overall theoretical framework, she thus found that a FE of the Korean parent company acting in Poland might be properly considered a fixed establishment of the parent company, as it acts as a “generally manager of the tax treatment” and hence the supply has to be regarded as being made by the parent company.

The background to the request for a preliminary ruling is that a company established in Korea (LG Korea) commissioned a third-party Polish company (Dong Yang Electronics) to supply assembly services relating to the processing and assembly of products, which were subsequently owned by the Korean parent company (LG Poland Production). The processing and assembly of the products was undertaken jointly by Dong Yang Electronics and LG Poland. The processing and assembly of the products was undertaken jointly by Dong Yang Electronics and LG Poland. The processing and assembly of the products was undertaken jointly by Dong Yang Electronics and LG Poland. The processing and assembly of the products was undertaken jointly by Dong Yang Electronics and LG Poland.
Notably, Advocate General Kokott argued that in DFDS a risk of abuse was present because the relevant rule in that case provided for taxation where the supplier rather than the customer was established (i.e. based on the origin rather than the destination principle) and, further, due to the fact that that decision concerned "blunt" services rather than services that find their way into physical goods, as in the case of hand, which can be more easily monitored. As a matter of fact, in DFDS not only VAT revenues were at stake, but also a risk to distort freedom of competition materialized.

In particular, Advocate Kokott observed that "VAT rules should be formed in such a way that they are not the primary influence on business decisions."

VAT liability is not the only element to consider. For instance, whether or not a foreign company has a FE in a country prior to a sale is the subject of the call-off-stock simplification under the new Article 17a VD, since for that procedure to apply, a foreign supplier can be VAT-registered but not also established in a country.

See, in particular, Guidelines 2.3., stipulating that "VAT rules should be framed in such a way that they are not the primary influence on business decisions."

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