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Berlin Chemie A. Menarini (Case C-333/20): A Subsidiary Cannot Be a Fixed Establishment under EU VAT in (Almost) Any Case

Giorgio Beretta (Editor) (Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam; Lund University) · Thursday, June 2nd, 2022

A subsidiary cannot be a fixed establishment (FE) under EU VAT in (almost) any case. This is a (quite) reassuring takeaway for VAT businesses from the much-awaited decision by the Court of Justice of the European Union (CJEU) in *Berlin Chemie A. Menarini* (Case C-333/20). With its ruling on 7 April 2022, the CJEU (re?)affirmed (*see Daimler and Widex* (Joined Cases C-318/11 and C-319/11, para. 48)) that a subsidiary is not, *per se*, a FE of its parent or an affiliated company of the same group. Neither can it create a FE, by itself, a close relationship between the parent and the subsidiary due to majority shareholding control and/or exclusive service agreement.

That's good news, nearly two years after *Dong Yang Electronics* (C-547/18), where the CJEU quite unexpectedly revamped its (allegedly) buried case law in *DFDS* (Case C-260/95) and found a subsidiary as a FE of the parent company. With *Berlin Chemie A. Menarini* (Case C-333/20), VAT businesses can slyly smile while looking at the operative part of the judgment: no (sub)FE (para. 57).

However, a closer and full reading of the CJEU's judgment might invite taxable persons not to break out the champagne just yet. *Berlin Chemie A. Menarini* (Case C-333/20) rules out any automatic equation between a wholly owned or controlled subsidiary and its parent or controlling entity (paras 38 and 40). What remains, instead, is a much less reassuring 'consideration of the economic and commercial reality', which in *Berlin Chemie A. Menarini* (Case C-333/20) the CJEU reinstates (*see Dong Yang Electronics* (C-547/18), para. 31) as a fundamental criterion in EU VAT (paras 38, 39 and 41). This criterion (also a fundamental principle of EU VAT? [1]) provides the interpretative lens to assess (all?) the 'substantive conditions' for a FE to exist under Article 11 of Implementing Regulation No. 282/2011 (IR) (para. 39).

At this juncture, the reader might take note of the factual background of the CJEU's judgment in *Berlin Chemie A. Menarini* (Case C-333/20). The author would also suggest insightful comments on this case from leading VAT experts (*see*, in particular, I. Lejeune, *Berlin Chemie A. Menarini. Place of Supply of Services. Concept of 'Fixed Establishment'. Court of Justice, Highlights and Insights on European Taxation*, No. 6, 2022). VAT literature on FE is indeed extensive (*see*, e.g., K. Spies, *Permanent Establishment in Value Added Tax* (IBFD 2020); M. Merckx, *Establishments in European VAT* (Kluwer Law International, 2013)). The author has also contributed to it in this blog (*see*, in particular, *Dong Yang Electronics* (Case C-547/18): *Oh Yes, a Subsidiary Can (also)*

Be a Fixed Establishment under EU VAT, but Information Asymmetries May Save You!; *Dong Yang Electronics (Case C-547/18): Can a Subsidiary Be (also) a Fixed Establishment under EU VAT?*). However, the following paragraphs only reflect on specific moot points of the CJEU's judgment in *Berlin Chemie A. Menarini (Case C-333/20)* and the FE in general.

Own resources

In *Berlin Chemie A. Menarini (Case C-333/20)*, the CJEU observed that VAT rules ‘do not provide any details as to whether human and technical resources must belong to the company that receives the services and is established in another Member State in its own right’ (para. 35). Absent a legislative clarification, the EU Court resorted to economic and commercial reality to establish whether a taxable person has human and technical resources amounting to a FE in another Member State. Notably, the CJEU clarified that ‘it is not a requirement for a taxable person itself to own the human or [!, GB] technical resources’. Still, the taxable person must ‘have the right to dispose of those human and technical resources in the same way as if they were its own’ (para. 41) [2]. To this end, the CJEU uses economic and commercial reality as a benchmark of ‘VAT reality’ to realize a purposeful application of VAT beyond any legal classification [3]. However, the author submits that consideration of the economic and commercial in VAT is problematic to legal certainty. Indeed, in *Berlin Chemie A. Menarini (Case C-333/20)*, the CJEU referred to the right to dispose of human and technical resources only by way of examples, such as the case of ‘employment and leasing contracts which make those resources available to the taxable person and cannot be terminated at short notice’ (para. 41) (see AG Kokott in *Welmory, Case C-605/12, point 51*). Notably, the EU Court neither defined ‘resources available to the taxable person’ nor the concept of ‘employment and leasing contracts [capable of being] terminated at short notice’. Also, in this regard, it is not clear which party – i.e., the supplier, the customer, or both – should have the right to terminate the relevant agreements at short notice.

Connected business activities

Not only must the taxable person have the human and technical resources of another company at its disposal as if they were its own. To have a FE, the taxable person must also ‘use them for its own business needs’ (para. 49). The moot point here is the importance of the business activity of the subsidiary vis-à-vis that of the parent or controlling company. In *Berlin Chemie A. Menarini (Case C-333/20)*, the question concerned whether connected business activities, in particular, ‘marketing services’, are capable of having a direct influence on the volume of the goods sold by the parent in the subsidiary’s territory (para. 50) [4]. By referring to *Welmory (Case C-605/12, para. 64)*, the CJEU excluded any FE risk in the case of business activities merely connected one to the other. Notably, the EU Court observed that ‘it is important to distinguish the services supplied by the [subsidiary] to the [parent] company from the goods which the [parent] company sells and supplies in [the subsidiary’s Member State]. They are distinct supplies of services and goods which are subject to different schemes of VAT’ (para. 52). The CJEU also deemed irrelevant for FE purposes examining the decisions that the subsidiary is authorized to take (para. 53) [5]. This is a reassuring statement insofar as it departs from the approach taken by the CJEU in *DFDS (Case C-260/95, para. 26)*, where it was held that, in light of ‘the various contractual obligations imposed on the subsidiary by its parent’, the subsidiary merely acted ‘as an auxiliary organ of its parent’ [6]. However, the author wonders whether a distinction between the two supply flows would also hold where the connected supplies at stake relate to services rather than goods and services [7]. Services are much more ‘volatile’ than goods. Therefore, it might not always be easy to assess who supplies what to whom [8]. The factual background in *Dong Yang Electronics (C-547/18)* provides a case in

point.

Internal supplies

In *Berlin Chemie A. Menarini* (Case C-333/20), the CJEU provided a third level of reassurance for VAT businesses. Notably, the EU Court considered that *'the same means cannot be used both to provide and receive the same services'* (para. 54). This is not possible since it would mean that the sub(FE) would be deemed to perform services to itself. A similar issue was addressed by AG Kokott in *Welmory* (Case C-605/12, point 53) and *Dong Yang Electronics* (C-547/18, point 43), where a foreign supplier was deemed to have a FE through a subsidiary or controlled company by the tax authorities of that company's territory. The reassurance provided by the CJEU in *Berlin Chemie A. Menarini* (Case C-333/20) might be helpful for many VAT businesses, such as those entering into toll manufacturing agreements in another Member State. However, the author highlights some caveats to this conclusion. Notably, the safe harbor for VAT businesses applies only to the extent that the human and technical resources used (i.e., 'the means') are effectively the same. In other words, there must be an exact coincidence between the resources used by different companies to supply and receive the services. Instead, it cannot be excluded that a subsidiary or controlled company acts as both a supply and receiving party if the human and technical resources do not coincide precisely. This point was stressed by AG Kokott in *Welmory* (Case C-605/12, points 52 and 53).

After the CJEU's judgment in *Berlin Chemie A. Menarini* (Case C-333/20), VAT businesses may no longer be caught between a rock and a hard place to establish a (wholly) owned or controlled company in another Member State. However, it might not be appropriate for them to sit back and relax on this matter. To be sure, with another case (*Cabot Plastics Belgium*, Case C-232/22) already pending before the CJEU, the 'FE saga' will continue.

[1] In its case law, the CJEU has referred to the concept of economic and commercial reality quite a few times, however, without clearly defining this or other similar expressions.

[2] Through the term 'right to dispose', the CJEU apparently approached the concept of possession over human and technical resources in light of the definition of 'supply of goods' under Article 14(1) of the VAT Directive and the relevant CJEU's case-law on this matter (see *SAFE*, Case C-320/88, para. 9; *Fast Bunkering Klaipėda*, Case C-526/13, paras 50-51).

[3] See A. van Doesum & F. Nellen, *Economic Reality in EU VAT*, 29 EC Tax Review 5 (2020), p. 217, who observe that *'economic reality does not serve as an external benchmark of normality, but rather as a combination of judiciary instruments that is aimed at realizing a purposeful application of VAT through the selection of the relevant facts and their fiscal classification for VAT purposes'*.

[4] In this regard, the referring court stipulated that the marketing services provided by the subsidiary *'appear to be intrinsically linked'* to the parent's economic activity (para. 23).

[5] See, however, *Titanium* (Case C-931/19, para. 44), stipulating that the foreign supplier *'reserved for itself all important decisions'* concerning the business activity at stake.

[6] See also AG La Pergola in *DFDS* (C-260/95, point 3), who recalls various contractual obligations by the subsidiary towards its parent (e.g., obtaining the approval of the parent company before concluding any major contracts and for the appointment of advertising and public relations agents; promoting its commercial image in accordance with the parent company's strategies and

within the financial constraints specified by it).

[7] In *Berlin Chemie A. Menarini* (Case C-333/20), the CJEU also admitted it somehow, stating that a FE might exist where a taxable persons ‘cover[s] its staffing and material needs by having recourse to various service providers’ (para. 45).

[8] Admittedly, the CJEU distinguished two supply flows of services in *Welmory* (Case C-605/12, para. 64). However, in that case, the two companies were linked through a cooperation agreement rather than majority shareholding control.

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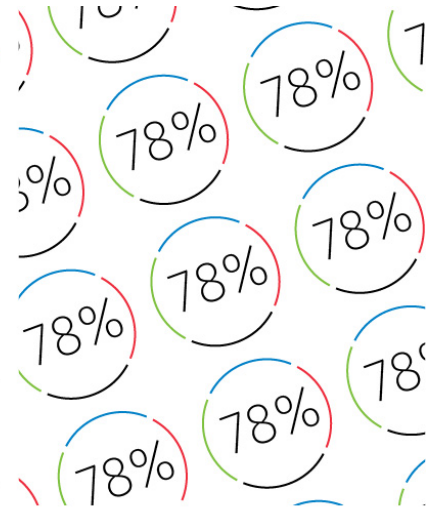
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