

VAT PE or not -
Topics and implications

WIN DACHLI @HighNoon on Tuesdays
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1. Definition of a fixed establishment for VAT (VAT PE) in EU Law/Legislation

» Art. 11 of EU-VO No. 282/2011 with effect from July 1, 2011

› Prerequisite for the assumption of a fixed establishment for VAT purposes:

- › The establishment must have a sufficient level of permanence and a structure
 - › that has sufficient staff and technical facilities
 - › to independently (autonomously) provide services / receive services for its own needs
- › A VAT registration in the country does not allow the (automatic) conclusion of a VAT PE

» Art. 53 of EU-VO No. 283/2011 with effect from July 1, 2011

› Prerequisite for the assumption of the involvement of a fixed establishment for VAT purposes:

- › Capability of an independent/autonomous provision of services
- › effective use of personnel and technical resources
- › activity must go beyond mere administrative function
- › use of a VAT-ID-No in country of fixed establishment (but counter-evidence possible)

2. Definition of a fixed establishment for VAT (VAT PE) in EU Law/Legislation

» **Art. 11 of EU-VO No. 282/2011 and Art. 53 of EU-VO 283/2011 lack the following:**

- › Time threshold definition
- › Definition of the term “permanence”
- › Definition of the term “sufficient structure”
- › Definition of the term “sufficient staff and technical resource”
- › Definition of independence and autonomy for service provision/receipt

» **Overall consequences for the tax authorities and the taxpayer:**

- › Scope and room for interpretation by individual EU Member States in their VAT Guidelines
- › Increasing number of reference of cases to the ECJ
- › Slow implementation of ECJ decisions in the individual EU Member States
- › Tax authorities tend to assume a fixed establishment for VAT in tax audits and then negotiation starts with the taxpayers (and their tax consultants)
- › Limited readiness of tax authorities to issue unbinding/binding rulings on that issue
- › Legal uncertainty for (foreign) businesses unless they (voluntarily) accept a VAT PE to exist
- › Interference of direct tax and indirect tax definitions of a fixed establishment
- › Potential qualification differences of a fixed establishment for VAT in home and activity country

4. Consequences from deviation of definition of direct tax PE and VAT PE and differing EU Member State interpretation of criteria of EU-VO 282 & 283/2011

› Different VAT registration requirements in country of activity

- › Competent tax office may deviate depending on whether a foreign company is considered VAT resident (with VAT PE) or non-resident
- › if orientation on DTA PE threshold, the PE might already have been established with the start of the activity in the country (retrospective VAT registration possible?)

› Impact on VAT Reporting, Invoicing and VAT recovery

- › VAT reporting to different authorities for VAT residents and non-residents
- › Place of supply of service may be different (wrong reporting, late reporting, double reporting)
- › Applicability and application of reverse-charge mechanisms depend on VAT residency (VAT PE)
- › Different VAT refund mechanism depending on VAT residency (VAT PE), voluntary VAT registration or special conditions (via VAT refund claim with filing deadline! or via periodic VAT filing in the country)

› Risks/Cost

- › Lack of planning possibility and VAT audit risk (including cost for VAT audit assistance and legal steps)
- › Levying of additional VAT including interest/penalties potentially without possibility to take re-course for reimbursement by contract partner (including reputation risk)
- › Risk of denial of input VAT if formalities are not fulfilled or retrospection not accepted

5. Overview of legislation/practice regarding VAT PE in the construction/plant engineering industry in various countries between 2015 and now (2022)

AT

- Earlier reference to § 29 of BAO (definition of a FE) now rather to EU-VO 282/2011 and ECJ Case law
- (no longer) application of a time limit but in practice if PE for direct tax = VAT PE
- sufficient degree of autonomous service provision in case of assembly/installation not recognized for VAT
- ✓ VAT PE risk increased if direct tax PE time threshold exceeded

BE

- Reference to EU-VO 282/2011
- in addition requirement that all criteria of EU-VO 282/2011 must be cumulatively met and concretely that at least 1 person must be present on site on a permanent basis and can decide and negotiate agreements on an autonomous basis and that bookkeeping is made at the fixed establishments location
- container at site (rented/owned) and staff (own/sub-contractor) for installation/assembly only no VAT PE
- ✓ VAT PE risk relatively low

BG

- Reference to time thresholds in the Double Tax Treaties for installation/assembly including supervisory activity, otherwise assumption of a VAT PE already assumed after 6 months onsite presence
- ✓ VAT PE risk high – but if known in advance sufficient planning horizon

5. Overview of legislation/practice regarding VAT PE in the construction/plant engineering industry in various countries between 2015 and now

FIN

- no own VAT definition in the Finnish VAT law but Circular from SKATT (last update:13/3/2014!)
- if 9 months installation/ assembly activity in FI is exceeded, existence of a VAT PE from day 1 assumed
- ✓ VAT PE risk high, but known in advance

FR

- no own Definition in Code General des Impôts (CGI) but reference to EU-VO 282/2011
- Decrees of 04.01.2010 and 06.08.2010 in relation to new place of supply of service rules as from Jan. 1, 2010 with definition of VAT PE (établissement stable) => as an installation/assembly site (chantier) is only maintained for the completion of a contract concluded by the foreign headquarter -> no VAT PE due to lack of autonomy
- ✓ VAT PE risk rather low but ongoing discussions with VAT auditors

UK

- in principle reference to Directive 2006/112/EC, EU-VO 282/2011 and ECJ legislation
- technical resource and staff without a time limitation/threshold
- in case of services in relation to immovable property and long term rental of immovable property always risk of assumption of a VAT PE
- ✓ VAT PE risk medium

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