

Court of Justice of the European Union: toll manufacturer not a fixed establishment for VAT purposes

On June 13, 2024 the Court of Justice of the European Union (hereinafter: CJEU) rendered judgment in the Adient case (C-533/22) concerning the question whether a group company that performed manufacturing services (toll manufacturer) for the parent company must be regarded as a fixed establishment of the parent company for VAT purposes. The CJEU ruled that – special circumstances notwithstanding – this is not the case.

The facts of the case

The German SC Adient Ltd & Co KG (hereinafter: Adient DE) is a member of the Adient group, a worldwide supplier to car manufacturers. Adient DE had concluded an agreement with the group company SC Adient Ltd Automotive România SRL (hereinafter: Adient RO) for the manufacture of upholstery components, including the cutting and sewing of the raw materials for those upholstery components. Throughout the entire process, Adient DE remains the owner of the raw materials and the finished products. Adient RO acts as toll manufacturer. In addition, it performs support activities, such as managing and storing those goods. Adient DE, as owner, supplies the finished products directly to the car manufacturers from the Adient RO locations in Romania.

Adient RO applied the reverse-charge mechanism to the services it provided to Adient DE in the belief that the services were not taxable in Romania, but in Germany, the country of establishment of Adient DE. The Romanian tax authorities contended that Adient DE has a Romanian fixed establishment and that the services are therefore taxable in Romania. The argument put forward by the Romanian tax authorities was that Adient DE has uninterrupted access to the human and technical resources of Adient RO and that Adient RO employees liaise with customers and suppliers and represent Adient DE vis-à-vis third parties. The Romanian tax authorities contended that Adient DE thus in fact has employees of Adient RO permanently at its disposal and therefore has a fixed establishment for VAT purposes in Romania.

The Romanian referring court had doubts about the Romanian tax authorities' interpretation and therefore asked the CJEU for a preliminary ruling.

Consideration of the questions referred for a preliminary ruling

Firstly, the CJEU ruled that a fixed establishment cannot be assumed solely on the ground that two companies belong to the same group or that they are bound to one another as a result of a contract to supply services. Adient RO normally acts for its own account and in its own economic interest as independent contract partner and not as a controlled component of the other contracting party Adient DE. This has now become an established principle in CJEU case law on the fixed establishment concept. The CJEU added that the fact that the employees of Adient RO use the administrative systems of Adient DE and the fact that Adient RO provided Adient DE with a storage facility to store the goods that Adient RO manufactures for it does not change this conclusion. These are normal circumstances that do not make a group company a controlled component of the parent company.

The CJEU then addressed whether it is important that Adient RO also helps with the sale of the finished products of Adient DE. As a result of this support, Adient DE could

potentially have a fixed establishment in Romania as regards these *sales*. The CJEU explained that there are two different concepts of fixed establishment: one for determining the place of business of the purchaser of the service (the 'purchase fixed establishment') and one for determining the place of business of the supplier of the goods or services (the 'sales fixed establishment'). The two concepts must be considered completely separately from one another. This means that, even if it turns out that Adient DE has a sales fixed establishment in Romania for its sales activities, this does not say anything about whether a purchase fixed establishment also exists for the purposes of determining the place of supply of the manufacturing services that Adient RO performs for Adient DE (and vice versa).

Lastly, the CJEU reiterated that the same human and/or technical resources cannot be used both by a company, established in one Member State, to provide services and by a company, established in another Member State, to receive the same services. In order to have Adient RO be a fixed establishment of Adient DE for the purchase of services from that same Adient RO, the resources of Adient RO would thus have to be split. For this to happen, the CJEU emphasized that it is not sufficient that services for managing the raw materials and products are performed by employees of Adient RO on behalf of Adient DE (that remains the owner of these goods), because these are only *support services* for the manufacturing service and cannot substantiate *the use of* the manufacturing service in Romania.

Conclusion

The CJEU judgment is in accordance with previous judgments rendered in the Berlin Chemie and Cabot Plastics cases, about which we had already [informed](#) you. The CJEU even emphasized that it is repeating itself. That is understandable. We have seen that discussions about fixed establishments in situations involving the provision of services by group companies are still ongoing in several EU countries (generally not in the Netherlands). This new judgment is thus a welcome and useful confirmation of the line taken by the CJEU.

This also applies to the clear distinction made by the CJEU between purchase fixed establishments and sales fixed establishments and its conclusion that these are two completely separate concepts. This had been unclear.

We recommend that companies that use toll manufacturing and other services of group companies use this judgment to assess whether the group companies act sufficiently independently so that they cannot be regarded as a (purchase or sales) fixed establishment for VAT purposes, and based on the outcome of that assessment determine what the correct VAT treatment should be. The advisors of KPMG Meijburg & Co's Indirect Tax group would be happy to help you with this.

KPMG Meijburg & Co
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