

Fixed establishment: Welmory – A never ending story

Contacts

Patricia More

Partner, Indirect Tax
PwC Geneva
patricia.more@ch.pwc.com
+41 58 792 95 07

Bozena Turek

Manager, Indirect Tax
PwC Geneva
bozena.turek@ch.pwc.com
+41 79 742 54 81



The Supreme Administrative Court in Poland ruled yesterday on the Welmory case. Even though the case went through Court of Justice of the European Union (CJEU, C-605/12) back to the final instance in Poland - nothing seems certain whatsoever. Many would have expected the court following CJEU argumentation and probably confirming existence of fixed establishment in Poland. This, however, turned out not to be the case.

Based on oral announcement of the court, both District Administrative Court's judgement (previous instance) and tax authorities' decision have been repealed. According to the Supreme Administrative Court the tax authorities must supplement the decision by factual evidences as to whether the technical infrastructure in Poland is actually allowing to claim creation of fixed establishment (FE). The dossier of the case does not include evidences proving existence of FE in Poland, as it seems the tax authorities did not bring forward sufficient investigation in this area. Therefore, in order to preserve the two-instance separation rule, the Supreme Administrative Court cannot judge upon it. In turn, the court decided to return the case back to tax authorities for further investigation.

Such outcome means for Welmory that the proceedings are not over yet. It raises a question of taxpayer's rights in light of extensive timing of proceedings. As the original decision reaches as far as 2011 and the ultimate conclusion still being remote, one can question the quality of protection of taxpayer's right to certainty of law.

Even though at first glance it may feel disappointing that the verdict was not rendered as per the principles of when a fixed establishment is being created, but focused on procedural deficiencies – it actually brings new perspective into the whole area. The aspect of evidences and proving existence of sufficient infrastructure.

In light of the developments in Poland it may be sensible to anticipate any potential fixed establishment discussions, by for instance preparing so-called defense file. Comprehensive documentation outlining factually the existing setup, aligned with global tax policy and drafted outside of hectic tax audit, can prove helpful. Especially as yesterday's Welmory judgement brings more emphasis on the need for tax authorities to actually prove sufficient levels of infrastructure to claim existence of a fixed establishment. Such exercise may be particularly valid in industries being more and more part of the Digital Economy, where the brick and mortar physical aspects are taken over by the importance of significant digital presence, remote management and IT infrastructure.

We are looking forward to deeper analysis of our colleagues from PwC Poland, together with whom we are closely monitoring the developments in Poland.

We will keep you updated on the subject matter.