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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 791

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN: Italy

REFERENCES: Articles 44, 45, 56(2), 58 and 192a of the VAT Directive
Articles 11 and 53 of the VAT Implementing Regulation

SUBJECT: Clarifications of the concept of fixed establishment

1. INTRODUCTION

Italy submitted to the VAT Committee three questions of a general nature with regard to the implementation of the concept of fixed establishment as referred to in the VAT Directive¹ and defined by the VAT Implementing Regulation².

The questions and analysis submitted by Italy are attached in annex.

2. SUBJECT MATTER

The request submitted seeks for clarification of general scenarios involving the concept of fixed establishment.

In the first place, the VAT Committee is required to take a position on the possibility to apply the concept of ‘fixed establishment’ as defined in Article 11 of the VAT Implementing Regulation to the supply or acquisition of goods.

In the second question, Italy enquires whether the value of transactions is a relevant criterion that should be taken into account when studying the existence of a ‘purchasing fixed establishment’ in a Member State or if, on the contrary, any, even negligible, purchase of services would be sufficient for a Member State to conclude to the presence of such a ‘purchasing fixed establishment’.

The third point addresses the question whether a fixed establishment falling into the scope of Article 11(1) of the VAT Implementing Regulation (a ‘passive fixed establishment’) can be considered to be intervening, within the meaning of Article 192a of the VAT Directive, in a supply carried out by the main place of business in the event where:

- the purchasing fixed establishment supplies services exclusively to the main place of business (supplies which fall outside the scope of VAT);
- those services are used by the main place of business to carry out, in turn, supplies in the country in which the fixed establishment is located.

3. THE COMMISSION’S OPINION

In order to clarify the VAT treatment applicable in each of the circumstances listed above, the three questions submitted by Italy shall be separately examined below.

¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

² Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (recast) (OJ L 77, 23.3.2011, p. 1)

3.1. Qualification of fixed establishment and supply of goods

For the implementation of the harmonised VAT system, the concept of fixed establishment is used, firstly, for the purposes of establishing the place of taxable transactions and, secondly, for the purposes of determining the person liable for the payment of VAT to the relevant tax authorities.

With regard to the first objective – establishing the place of taxable transactions – under the current regime, the place of supply of goods is defined by reference to the geographical location of the goods. Unlike the rules on the place of supply of services, the relevant provisions on the place of supply of goods do not refer to the concept of fixed establishment³.

As a matter of principle, the Commission services consider that legal concepts and general principles of law should be applied in a consistent and uniform manner through the whole VAT legislation.

However, it should be observed that under the current transitional VAT system, the concept of fixed establishment appears to be irrelevant for the purposes of determining the place of supply of goods with the exception of supplies of gas, supplies of electricity and supplies of heat or cooling energy through heating and cooling networks (Articles 38 and 39 of the VAT Directive).

This is the reason why the wording of Article 11 of the VAT Implementing Regulation not only suggests but clearly defines the scope of the provision by reference to the supply of services only.

3.2. Relevance of the value of purchased services for the qualification of a fixed establishment?

Article 11(1) of the VAT Implementing Regulation provides that ‘*a ‘fixed establishment’ shall be any establishment (...) characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs*’.

The value of the purchased services or the intensity of the purchasing activity of the structure is thus not included in the criteria allowing to ascertain or to reject the existence of a fixed establishment.

In the Commission services’ opinion, the use of such quantitative criteria alone, as element of decisive importance, would not be appropriate and would not correspond either to the spirit or to the letter of Article 11.

The tools that Member States should use when assessing the existence of a fixed establishment are the criteria of permanence and suitable structure set by Article 11.

³ With the exception of the supply of gas, supply of electricity and supply of heat or cooling energy through heating and cooling networks, referred to in Articles 38 and 39 of the VAT Directive.

Moreover, these criteria which are cumulative should be examined together.

Since the intensity of an economic activity can vary over time, it is crucially important that the existence of 'suitable structure in terms of human and technical resources' is examined over a period of time long enough to characterise the sufficient degree of permanence required by Article 11 of the VAT Implementing Regulation.

Thus, a punctual purchase of services of negligible or small value should not be sufficient to conclude to the existence of a 'purchasing fixed establishment'. Rather than searching for a threshold or other means of evaluating the importance of the economic activity carried out in that Member State, tax authorities have to focus, in compliance with the criteria set under Article 11 of the VAT Implementing Regulation, on the existence of suitable human and technical resources present on a permanent basis and enabling the structure to receive and use the services supplied to it for its own needs.

It appears also necessary to stress that although the same terminology has been used to present the criteria for qualifying a fixed establishment both under Article 11(1) and Article 11(2) for the sake of consistency (i.e. '*by a sufficient degree of permanence and a suitable structure in terms of human and technical resources*' being used in both paragraphs), the presence of a 'passive fixed establishment' (paragraph 1) or an 'active fixed establishment' (paragraph 2) should be separately assessed in each individual situation. A structure that would have the necessary human and technical resources to receive and use services supplied to it for its own needs would not necessarily have sufficient resources to provide those services on its own. Therefore, a structure that qualifies as a 'passive fixed establishment' must not be automatically treated as an 'active fixed establishment', nor should it be automatically considered to intervene in supplies made by the main place of business.

Finally, with regard to the fulfilment of VAT registration requirements, it is the responsibility of each operator who puts in place a structure benefiting from human and technical resources on a permanent basis in a new Member State to ensure that it is properly identified for VAT purposes.

3.3. Intervention of a fixed establishment in the supplies made by the 'main place of business'

3.3.1. Recalling the requirements set in the current legislation

Article 53 of the VAT Implementing Regulation sets two main requirements in order for a fixed establishment to be qualified as the person liable for the payment of VAT on supplies in which it intervenes.

According to paragraph 1 of that provision, the first requirement is that the fixed establishment must be '*characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to make the supply of goods or services in which it intervenes*'.

According to paragraph 2 of Article 53, the second requirement is that '*the technical and human resources of that fixed establishment are used by him for transactions inherent in*

the fulfilment of the taxable supply of those goods or services made within that Member State, before or during this fulfilment’.

Therefore, in order to be liable for the payment of VAT on a concrete supply, the fixed establishment must have a permanent structure and resources that would have allowed it (hypothetically, by comparison) to supply the goods or services itself, i.e. the technical and human resources that were in fact needed by the supplier to carry out the transaction.

It is also required that these technical and human resources are actually used for the purposes of the given supply or that their use is specifically provided for in the contract.

Moreover, the input of its human and technical resources must have constituted an inherent, essential part of the taxable supply. The second subparagraph of Article 53(2) thus provides that *‘Where the resources of the fixed establishment are only used for administrative support tasks such as accounting, invoicing and collection of debt-claims, they shall not be regarded as being used for the fulfilment of the supply of goods or services’.*

3.3.2. Relevance of the ‘active’ or ‘passive’ character of the fixed establishment in previous transactions?

Determining the person who is liable for payment of VAT on a given supply relies on an assessment that should be carried out independently for each individual supply in compliance with the requirements set in Article 53 of the VAT Implementing Regulation as outlined above.

The distinction between an active and a passive fixed establishment made in Article 11 of the same Regulation is therefore irrelevant for the purposes of determining the person liable for the payment of VAT.

Whereas the definitions provided for in Article 11 aim at fixing the criteria needed to qualify a structure as a (active or passive) fixed establishment, they are of no use when it comes to the assessment of who the person liable for the payment of VAT is because this last assessment would need to examine the involvement of the fixed establishment in each particular transaction. In other words, the fact that a fixed establishment has played only a passive role in previous contractual situations is irrelevant given that for the purposes of the assessment of who the person liable for payment is the fixed establishment must have necessarily played an active role by effectively using its human and technical resources. Also, in the opposite scenario, it is not because a fixed establishment has intervened in many previous supplies that it can be considered to have intervened in a specific transaction where the conditions for its intervention are not fulfilled.

Therefore, in the example given by Italy, it is not relevant whether the fixed establishment has previously provided or only received services from third parties. The essential elements to be assessed with regard to that particular supply for which the person liable for payment is being sought are:

- whether the fixed establishment has a suitable structure of human and technical resources that would have enabled it to make itself the supply at stake;

- whether this suitable structure is characterised by a sufficient degree of permanence;
- whether the technical and human resources of that fixed establishment have been actually used in that concrete case to provide (before or during the supply) input inherent to the fulfilment of the given taxable transaction.

Any shortcuts to the above-mentioned assessment steps that would lead to circumventing that priority resulting from the letter of the provisions would be inconsistent with the VAT legislation.

4. DELEGATIONS' OPINION

Delegations are invited to express their views on the matters raised by Italy and on the observations made by the Commission.

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Questions from Italy

Subject: Clarifications on the concept of fixed establishment

Question No 1

The question concerns the possibility of applying the concept of fixed establishment under Article 11 of Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (hereinafter VAT Directive), to the supply or acquisition of goods.

As a matter of fact, Article 11 contains a definition of fixed establishment aimed at applying the rules on the place of taxation of services referred to in Articles 44 and 45 of the VAT Directive. In Art. 11 of Regulation No 282/2011 it is provided that:

“1. For the application of Article 44 of Directive 2006/112/EC, a “fixed establishment” shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.

2. For the application of the following Articles, a “fixed establishment” shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to provide the services which it supplies:

- (a) Article 45 of Directive 2006/112/EC;*
- (b) from 1 January 2013, the second subparagraph of Article 56(2) of Directive 2006/112/EC;*
- (c) until 31 December 2014, Article 58 of Directive 2006/112/EC;*
- (d) Article 192a of Directive 2006/112/EC.*

3. The fact of having a VAT identification number shall not in itself be sufficient to consider that a taxable person has a fixed establishment.”

Given the above, the wording of the Article would seem to provide for its application solely to supplies of services.

Proposed solution

The *Agenzia delle Entrate* believes that the concept of fixed establishment could also be applied to transactions relating to goods.

Firstly it is observed that, even in the absence of a definition by the Community legislature, the fixed establishment is repeatedly mentioned in the provisions of the VAT

Directive. The identification of a fixed establishment for VAT purposes is strictly connected to the definition of the place of supply of a particular transaction.

Indeed, when trying to identify the place of taxation of a supply of services, it becomes relevant, pursuant to Articles 44 and 45 of the VAT Directive, to specify the place of establishment of the operators, both on the active side, i.e. of the supplier, and on the passive side, i.e. the customer.

In this context, the fixed establishment becomes relevant from the point of view of VAT if a specific transaction is attributable to it. In fact, the fixed establishment, while being part of a single legal entity together with its main place of business, achieves an independent taxable status of its own for the transactions directly attributable to it.

In order to clarify these concepts while taking into account the significant changes made to the VAT Directive by Directive 2008/8/EC of 12 February 2008 on the place of supply of services, Regulation (EU) No. 282/2011 of 15 March 2011 was enacted, stating in recital 14 that: *“To ensure the uniform application of rules relating to the place of taxable transactions, concepts such as the place where a taxable person has established his business, fixed establishment, permanent address and the place where a person usually resides should be clarified.”*

Thus, it was with Article 11 of the abovementioned Regulation, that an operational definition of the fixed establishment for VAT purposes has been given for the first time.

This definition, however, makes reference solely to the supplies of services, implicitly ruling the relations between fixed establishment and the main place of business as well as their effects.

Article 11 clarifies that for the application of Art. 44, a fixed establishment shall be any establishment, other than the place where the business of a taxable person is established, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it:

- 1) to receive and use the services that are supplied to it for its own needs (in cases where the fixed establishment is the customer of the service, paragraph 1 of Article 11 of the Regulation);
- 2) provide the services which it supplies (in the case of services rendered to non-taxable customers, or other specific types of services, as provided for in paragraph 2 of Article 11 of the Regulation).

Articles 44 and 45 of the VAT Directive lay down rules on the place of supply of services rendered, respectively, to a taxable person (Article 44) or to a non-taxable person (Art. 45). In both cases, the place of supply of services is closely linked to the place where the taxable customer (Article 44) or taxable supplier (Article 45) has established his business.

In those circumstances, it is the opinion of the *Agenzia delle Entrate* that the definition of fixed establishment cannot take on different meanings depending on whether the same establishment carries out transactions relating to the supplies of services or of goods.

Rather, the reference exclusively to services – if we keep to the letter of Article 11 – is justified by the fact that the provision in question was introduced to clarify the interpretation of Articles 44 and 45 of the Directive, placed in the Chapter governing the place of taxation of the supplies of services.

In addition, it is noted that the same Articles also refer to the concept of economic activity. This concept, defined in Article 9 of the Directive, definitely encompasses all transactions which are relevant for VAT purposes, whether they are supplies of services or of goods.

In any case, it is considered that an interpretation that includes transactions in goods is not inconsistent with the scheme of the whole Regulation; actually, it would even allow to uniform its contents.

As further confirmation of this view, reference should be made to Article 53 of the Regulation, interpreting Article 192a of the VAT Directive, under which the concept of fixed establishment should be taken into consideration in order to identify the person liable to pay the VAT.

As mentioned above, if a particular transaction can be attributed to a fixed establishment, also the related accounting and fiscal obligations are attributable to it.

Article 53 of Regulation No 282/2011 clarifies that, where a taxable person has a fixed establishment within the territory of the Member State where the VAT is due, that establishment shall be considered as not intervening in the supply of goods or services within the meaning of point (b) of Article 192a of Directive 2006/112/EC, unless the technical and human resources of that fixed establishment are used by him for transactions inherent in the fulfilment of the taxable supply of those goods or services.

The fact that Article 53 refers both to transactions in goods and in services, demonstrates that the classification of an entity as a fixed establishment does not differ depending on the type of transaction performed, so that only the exercise of an economic activity is relevant.

Lastly, Working Paper No 761 of the 98th VAT Committee should be recalled, in which the Commission has already expressed its views on the concept of fixed establishment with reference to the type of activity carried out by the taxable person.

Indeed, in this document, the Commission considered that it could share the Italian view, according to which Article 11 not only could be applied to the activities of an enterprise, but also to the activities of crafts and professions. Thus, also on this occasion, the Commission itself has deemed it reasonable to interpret Article 11 of the Regulation in a way that goes beyond sticking to the letter of it.

Question No 2

This question concerns the concept of “*purchasing fixed establishment*” included in paragraph 1 of Article 11 of the Council Implementing Regulation (EU) No 282/2011 of 15 March 2011. Such provision, in fact, states that “*1. For the application of Article 44 of Directive 2006/112/EC, a “fixed establishment” shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of*

human and technical resources to enable it to receive and use the services supplied to it for its own needs.”

With respect to the above, the Italian authorities wish to ask the opinion of the VAT Committee on whether, without prejudice to the requirements of permanence and suitability of the structure, for there to be the so-called “*purchasing fixed establishment*”, it is sufficient that any purchase of services, even if negligible, is made.

Where the presence of a “*purchasing fixed establishment*” is not found, in order to try and achieve a VAT status in that State, the non-established taxable person will have to resort to the rules concerning direct identification or to those relating to the appointment of a tax representative.

In contrast, in the presence of a “*purchasing fixed establishment*”, the non-established taxable person will be identified as such.

Proposed solution

Unlike the above question No 1, it is observed that on the basis of the literal wording of the provision we are in the presence of a “*purchasing fixed establishment*”, even when the purchase is of small value. One would come to this same conclusion even considering that having to assess the value of such purchase would introduce discretionary elements in the application of the rule that would have the effect of creating legal uncertainty for both operators and administrations.

It follows that the distinction between a “*purchasing fixed establishment*” and a non-established taxable person that is identified directly or by appointing a tax representative ultimately depends on whether or not a permanent and suitable structure to receive and use the services in the territory of State does exist.

Furthermore, the above interpretation widely broadens the concept of “*purchasing fixed establishment*” at the expense of mere identification, and this enlargement would be even greater if it were decided that the principles of Article 11 of the Regulation should be extended also to cases in which the fixed establishment purchases and sells good, as outlined in Question 1.

If the VAT Committee does not consider that it could share that view, the question becomes what discretionary criterion would be appropriate to distinguish between cases in which we are in the presence of a “*purchasing fixed establishment*”, and cases in which this situation does not occur.

Question No 3

As illustrated above, Article 11 of EU Regulation No 282/2011 includes two different definitions of fixed establishment for VAT purposes: (i) a fixed establishment for purchase activities (paragraph 1: *any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.”*), (ii) a fixed establishment, distinct from the previous one, destined to supply activities (paragraph 2:

“any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to provide the services which it supplies”).

It is asked whether it would be correct to assume that the concept of “force of attraction”, contained in Article 192a of Directive 2006/112/EC, could also refer to the fixed establishment destined to purchase activities, as defined in Article 11 of Regulation No 282/2011, in the event that:

- the purchasing fixed establishment supplies services exclusively to its main place of business (supply outside the scope of VAT);
- such services are used by the main place of business to carry out, in its turn, supplies of services in the country in which the fixed establishment is situated.

Proposed solution

In our opinion, a “*purchasing fixed establishment*” which renders to its main place of business services which are outside the scope of VAT, but are used by the main place of business to supply goods or services in the country in which the fixed establishment is located, shall be regarded as having intervened in the supply of goods and services made by the main place of business in accordance with Article 53, paragraph 2, of Regulation No 282 of 2011.

It should be noted that, should the Committee accept the proposed solution, the “*purchasing fixed establishment*” would also assume the role of “*selling fixed establishment*”, even though the services supplied by it are not relevant for the purposes of value added tax.