Grant Thornton

Concept of fixed establishment

VAT Alert

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Judgment of the European Court of Justice no. C-232/22 dated June 29, 2023, Cabot Plastics case

By

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1. Introduction

The identification of a fixed establishment for VAT purposes has always been a complex matter, also in consideration of the possible consequences on the taxation of transactions for income tax purposes.

The EU Court of Justice analyses such matter in judgment dated June 29, 2023, no. C-232/22, Cabot Plastics case, with regard to the relationship existing between two companies belonging to the same international group (Cabot), in which a Swiss-law company (Cabot Switzerland), which is the main operating company of the Cabot group for the "Europe, Middle East and Africa" region, concluded a tolling contract with a number of group companies, including the Belgian commercial company Cabot Plastics.

To this regard, it is pointed out that the Belgian company is legally independent of the Swiss one, though they are linked financially, and Cabot Switzerland is identified for VAT purposes in Belgium for its "business of selling carbon-based products".

The case presented to the EU Court derives from the fact that almost the entire activity carried out by Cabot Plastics consists in the use of its own equipment "*exclusively (…) to process, for the benefit and under the direction of Cabot Switzerland, raw materials into products used in the manufacture of plastics*" (see point 8 of the Judgment) and that the same Belgian company provides the Swiss related company with additional ancillary services aimed to facilitate the resale of manufactured products (i.e. "*storage of products, including managing products stored in third-party warehouses, making recommendations aimed at optimising the manufacturing process, carrying out internal and external technical checks and assessments, reporting the results to Cabot Switzerland and making deliveries or providing services needed by other production units*" - see point 10).

Based on the considerations above, the question was whether Cabot Plastics should be qualified as a fixed establishment of the Swiss company, since it uses its own technical resources and structure "exclusively or almost exclusively" to realize the operations of the Swiss company.

2. VAT fixed establishment

The need to determine whether Cabot Plastics can be qualified as a fixed establishment of a foreign entity or not is also aimed to establish the place where the provided or received services should be considered as relevant from a territorial perspective. In this regard, art. 44 of Directive 2006/112/EC (VAT) specifies that "*if services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services is the place where that fixed establishment is located*". Moreover, art. 11, para. 1, of Implementing Regulation (EU) no. 282/2011 specifies that "*a 'fixed establishment' shall be any establishment, other than the place of establishment of a business (…), 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*".

Such regulatory definitions could lead to believe that the presence of an exclusive contract that involves the realization of the operations requested by a foreign entity together with the provision of additional or ancillary services implies the qualification of the provider as fixed establishment of the same foreign entity.

In this regard, the EU Court of Justice specified, also in previous cases (including judgment C-605/12 dated October 16, 2014, Welmory case) that the mentioned EU regulations identify the presence of a fixed establishment if this is characterized "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 provided to it for its own needs". This implies that a foreign entity can be considered as having a fixed establishment in a member State if it has "a sufficiently permanent and suitable structure to enable it to receive the services concerned there and to use them for its business" (see point 31 of judgment C-232/22). The qualification must take into account the taxable person receiving services, on the one hand, and assess whether the technical resources available allow the above taxable person to effectively receive and use such services.

3. The opinion of the EU Court of Justice

First of all, the Court observes that in order to ascertain the presence of a fixed establishment in another member State, the taxable person must not only have a sufficient permanence, but also be able to rely on the human and technical resources of the entity in the other member State as these were their own resources. Also judgment no. C-333/20 dated April 7, 2022, Berlin Chemie A. Menarini case, expresses a similar opinion, i.e.: "*the classification of an establishment as a 'fixed establishment' cannot depend solely on the legal status of the entity concerned*", nor can it be "deduced merely from the fact that that company has a subsidiary there" (see points 38 and 40).

On the other hand, Cabot Plastics judgment (similarly to what is stated under point 48 of the abovementioned Berlin Chemie A. Menarini judgment) points out the fact that, generally, the concerned taxable person, "*even if it has only one customer, is assumed to use the technical and human resources at its disposal for its own needs*". In fact, it provides services to its associated company "at its own risk" and remains responsible for its own human and technical resources, considering that "*the contract for the provision of services, while exclusive, does not in itself mean that the provider's resources become those of its customer*" (see point 39).

Moreover, the fact that the provider also offers ancillary and additional services aimed at facilitating the economic activity of the receiver, which consists in the sale of products derived from the tolling, does not impact the qualification of an entity as fixed establishment.

Therefore, the Court of Justice concludes that an entity established outside the EU which receives services in a Member state pursuant to an exclusive tolling contract, besides a series of ancillary/additional services which facilitate the economic activity of the receiver in that Member state cannot be considered as having a fixed establishment in that Member state unless it has "*a suitable structure in terms of human and technical resources capable of constituting that fixed establishment*".

The declaration, by the Court of Justice, of absence of a fixed establishment even in the case of an exclusive contract entered into with a single customer has, in our opinion, an impact on the interpretation of the domestic regulation when, as stated by the Court, the customer does not become the direct owner of the human and technical resources of the provider, which rather continues to operate within its economic activity.
To this regard, it must be pointed out that in a recent reply to request for ruling (Reply no. 374 dated July 10, 2023), the Revenue Office provided some indications with regard to the activity that a Dutch company would like to carry out in Italy through a series of operations within the automotive industry, for which it would have constituted a fixed establishment.
In fact, the case analysed in the reply to request for ruling could seem similar to the situation pointed out in the judgment, considering that the entity being present in the State (constituted as fixed establishment) materially executes sales agreements in Italy, referring particularly to the management of logistics, organization of deliveries, provision of technical assistance, and quality control.
However, it is specified that the Dutch company directly negotiates purchases of goods and services in Italy and is responsible for the organization of the subsequent sale of such goods to Italian and foreign customers.
The reply to request for ruling however recognizes (though without ascertaining the truthfulness of the assertions of the applicant) that the domestic entity carries out a complex activity, consisting mainly in the following activities: i) account management; ii) logistics and invoicing; iii) technical support and feedback within product development; iv) quality control. The proper nature of the role played by the Italian entity led the Revenue Office to consider it as participating to the operations above, thus integrating the conditions provided by the regulation so that the fixed establishment can be considered as the taxable person for the same operations.
This conclusion raises some doubts on the consistency between the Reply of the Revenue Office and EU Court judgment C-232/22 and therefore implies the need to assess the presence of a fixed establishment on a case-by-case basis, and this could also require an adjustment of the content of the abovementioned Reply.

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