



AG Kokott delivered her Opinion in Case C-547/18, *Dong Yang Electronics*, concerning the characterization of a subsidiary as VAT fixed establishment of its parent company

On 14 November 2019, AG Kokott delivered her Opinion in Case C-547/18, *Dong Yang Electronics*, referred to the Court of Justice of European Union ("CJEU") by the Polish tax Court and concerning the existence of a VAT fixed establishment ("FE") of a foreign company in an EU Member State.

The question referred to the CJEU stemmed from an audit started by the Polish Tax Authorities on Dong Yang Electronics ("Dong Yang"), a company established in Poland, for the failure to apply Polish VAT on supplies of services consisting in the assembly of printed circuit boards, which Dong Yang rendered to LG Display Co. Ltd. ("LG Korea"), a company established in the Republic of Korea. Such printed circuit boards were then assembled into LCD modules by LG Korea's local subsidiary, LG Display Polska sp. z o.o. ("LG Poland Production"). Finished products were then sold by LG Korea both in Poland and in Countries other than Poland.

LG Korea, was registered for VAT purposes in Poland through a tax representative. In this respect, Dong Yang issued invoices for assembling services to LG Korea, which were not subject to Polish VAT. The Polish Tax Authorities argued that Polish VAT should have been applied, at the standard rate, to the services in question because Dong Yang's services had not actually been supplied to the head office of LG Korea in Korea, but its FE in Poland, i.e. LG Poland Production. In this respect, the Polish Tax Authorities found that, based on the contractual relationship between LG Korea and LG Poland Production, the latter was meant to be LG Korea's FE in Poland.

The case was brought before the Polish tax Court, which stayed the proceedings and referred to the CJEU two preliminary questions, asking in essence whether:

- I. it can be inferred, from the fact that a company established outside the EU has a subsidiary in the territory of an EU Member State, that a FE exists in such Member State according to Art. 44 of the VAT Directive and Art. 11(1) of the Regulation no. 282/2011;
- II. if the first question is answered in the negative, whether a third party is required to examine the contractual relationships between a company established outside the EU and its subsidiary in the relevant Member State in order to determine whether the former company has a FE in the latter Member State.

As far as the first question was concerned, AG Kokott pointed out that Art. 44 of the VAT Directive and Art. 11 of the Regulation no. 282/2011 do not provide for a subsidiary of a parent company established outside the EU to be deemed the FE of the latter. As stated by the CJEU in Case C-605/12, *Welmory*, the principle of legal certainty, which applies to the supplier of services who has to establish his tax obligations, does not allow a legal person with its own legal personality to be regarded at the same time the FE of a different legal person.

According to AG Kokott, that principle might be disregarded if the contractual relationships between the parties led to an abusive practice (see Case C-260/95, *DFDS*). However, in the case concerned, it was clear that the contractual relationships between LG Korea and LG Poland Production were not aimed at achieving abusive advantages for VAT purposes. Indeed, AG Kokott correctly argued that, if LG Korea were deemed to be established in Poland by means of its FE (LG Poland Production), any VAT charged by Dong Yang to LG Korea would be in any case fully recoverable by the latter, since it carried out taxable transactions with right of deduction in Poland. The argument brought by AG Kokott seems to prove the absence of any rationale result if a claim for the presence of FE in a Member State just imply a change in the place of supply rule where it cannot be demonstrated what VAT burden had been abusively evaded (which brought the CJEU in case *DFDS* to conclude for the relevance of the FE as provider of services).

With regard to the second question, AG Kokott highlighted that it could not be asked to a supplier (Dong Yang) to undertake complex and far-reaching checks on the contractual relationships between its clients and their related parties in order to ascertain whether those clients were acting through a FE in the Member State concerned.

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