Case C-547/18, *Dong Yang Electronics*

The CJEU upholds that a fully owned subsidiary incorporated in a given Member State cannot be regarded as a VAT fixed establishment of the non-resident parent.

The Court of Justice of the European Union ("CJEU") issued its judgment in the case C-547/18, *Dong Yang Electronics*, concerning the existence of a VAT fixed establishment ("FE") of a foreign company in an EU Member State.

Dong Yang Electronics ("Dong Yang") is a company established in Poland that had been assessed by the Polish Tax Authorities for the failure to apply VAT on the supply 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 sold by LG Korea both in Poland and in other countries.

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. LG Korea assured Dong Yang that it was not established in Poland by means of any FE. The Polish Tax Authorities argued that VAT should have been charged 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 to 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 qualified as LG Korea's FE in Poland.

The CJEU stated that, in principle, the characterization of a subsidiary as FE of its parent cannot be ruled out by the fact that a subsidiary is an independent legal entity from a company law perspective, with its own VAT registration number. However, the conditions for the existence of a FE as laid down by Art. 11 of the Regulation no. 282/2011 should be evaluated based on economic realty and commercial relationship.

In this respect, the CJEU recalled Article 22 of Regulation no. 282/2011, which lays down the criteria that a supplier should take into account in order to identify the customer's FE to which the service is provided. With reference to the case at stake, the CJEU stated that Article 22 of the Regulation does not require the supplier to assess the contractual relationship between the formal recipient of the services and its local subsidiary in order to identify whether the latter is the FE of the former. As pointed out by the Advocate General in her opinion, imposing to the supplier to investigate and verify the contractual relationships existing between the formal recipient of the services and its local subsidiary would go

beyond the level of diligence that may be reasonably required to a service supplier, given that those contracts are generally inaccessible to the supplier.

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