

## Fixed establishment for VAT purposes

**A fixed establishment (hereinafter: “FE”) determines the place where services are subject to VAT. Determining whether an FE has formed can be crucial from a tax security perspective for both foreign entities doing business in Poland and their counterparties.**

### Importance and implications of correct determination of a fixed establishment

- Despite the extensive jurisprudence of the Court of Justice of the European Union (“CJEU”) and national courts, the interpretation of the concept of the FE by tax authorities is not uniform and in many cases entails the risk of entering into a dispute in this regard.
- Depending on the tax standing of the entity in question, the tax authorities may question the lack of VAT taxation on certain transactions or challenge the right to deduct VAT.
- Tax arrears must then be expected, as well as the possibility of fiscal ad penal sanctions being imposed on those responsible.
- Importantly, as of July 2024, taxpayers with their FE in Poland will be required to use the National e-Invoicing System on a mandatory basis.

### What is a fixed establishment?

- The Polish VAT Law does not define the term FE. According to Council Implementing Regulation (EU) No. 282/2011, a **‘fixed establishment’ shall be any establishment**, other than the taxpayer’s place of business, 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** supplied to it for its own needs.
- **Technical resources** shall be understood as the foreign entity’s infrastructure to carry out its business activities, such as a warehouse, technical equipment, machinery. **Human resources** is the human capital that is required to carry out activities.
- It is important to remember that an FE is a concept that operates only under VAT and is independent of the concept of a “permanent establishment” under income tax law.

### Interpretation of the concept of a fixed establishment

- Tax regulations for regarding the FE are very general. When analyzing the risk of having an FE in Poland and the obligations associated with it, it is therefore necessary to refer to European jurisprudence and verify the approach presented by the Polish tax authorities in analogous factual situations.
- The CJEU indicates to taxpayers certain criteria that should be taken into account when analyzing an FE, while giving guidance on how such criteria should be analyzed to safeguard one’s tax position.
- In particular, it is worth referring to the following groundbreaking rulings in the following cases Titanium Ltd (C-931/19), Berlin Chemie A. Menarini SRL (C-333/20) and Dong Yang Electronics (C-547/18), which show that:
  - **An FE cannot be built solely on technical infrastructure without personnel.** If the owner of a rental property does not have their own personnel

	<p>to provide rental services, the property does not constitute a fixed establishment for VAT purposes;</p> <ul style="list-style-type: none"> <li>■ <b>the parent company does not have an FE</b> in another member state due to the fact that it has a <b>subsidiary</b> there;</li> <li>■ <b>it is not necessary for human or technical resources to be owned by the taxpayer in order to form an FE.</b> It is essential that they dispose these resources in the same way as if they were their own. In this case, the degree of control over personnel or assets should be as close as possible to the degree of control over own funds.</li> </ul>
<p><b>Practice of Polish tax authorities with examples</b></p>	<ul style="list-style-type: none"> <li>■ The interpretation presented by the CJEU so far is more favorable than that resulting from the practice of Polish tax authorities, although recently some relaxation of the approach in this regard has been noticeable.</li> <li>■ Examples of situations in which taxpayers turn to the tax authorities to resolve the issue of an FE forming include: <ul style="list-style-type: none"> <li>■ owning real estate located in Poland and renting it out;</li> <li>■ use of warehouses or infrastructure (machinery, equipment, personnel) of other entities located in Poland;</li> <li>■ delivery and assembly of production lines in the territory of Poland.</li> </ul> </li> </ul>
<p><b>What to do in order to minimize tax risks?</b></p>	<ul style="list-style-type: none"> <li>■ Foreign entities operating in Poland should each time <b>conduct an analysis of the possible forming up of an FE, taking into account the individual circumstances.</b> In particular, it is necessary to take into account the structure of the business activity performed, the contractual provisions between the contractors, the extent of each party's responsibility, etc.</li> <li>■ Given the inconsistent line of interpretation and jurisprudence in this area, conducting such an analysis will help <b>minimize possible tax risks (arrears, penal and fiscal sanctions).</b></li> <li>■ Depending on the facts, in order to secure one's tax position, one may <b>consider requesting a tax interpretation to confirm:</b> <ul style="list-style-type: none"> <li>■ <b>non-existence (or existence) of the FE in Poland and</b></li> <li>■ <b>validity of the VAT accounting method used.</b></li> </ul> </li> </ul>
<p><b>OUR ASSISTANCE</b></p>	
	<ul style="list-style-type: none"> <li>■ <b>We are available to discuss the implications that the above issue may have on the VAT taxation of your business in Poland.</b></li> <li>■ <b>We are at your disposal to discuss the implications that the above issue may have on the VAT taxation of your business in Poland.</b></li> </ul>
	<p><b>This document has been prepared for information purposes only and covers general nature. Before taking any action based on the above information, we recommend that you obtain a valid opinion of TPA experts.</b></p>



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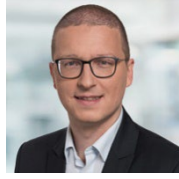
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