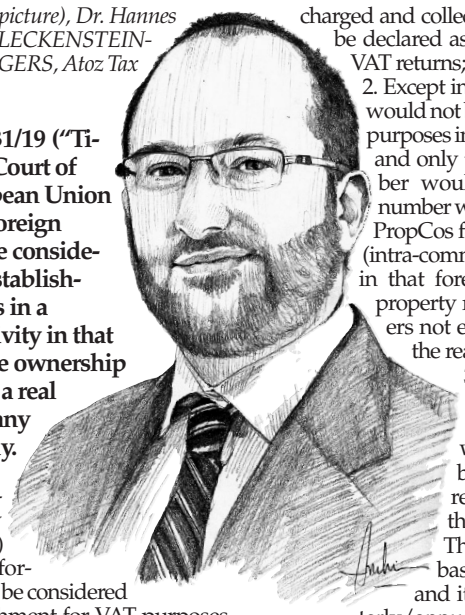
CJEU Titanium case: any VAT impacts for Luxembourg PropCos?

*By Thibaut BOULANGÉ (picture), Dr. Hannes GURTNER, Dr. Barbara FLECKENSTEIN-WEILAND & Martijn JAEGERS, Atoz Tax Advisers **



In its decision C-931/19 ("Titanium case"), the Court of Justice of the European Union ("CJEU") ruled that a foreign company should not be considered as having a fixed establishment for VAT purposes in a Member State if its activity in that country is limited to the ownership and the exploitation of a real estate without having any human resources locally.

Consequently, a Luxembourg property company (hereafter "PropCo") owning and exploiting foreign real estate should not be considered as having a fixed establishment for VAT purposes in this foreign jurisdiction if it does not have human resources in the country in which the real estate is situated to operate the underlying asset.

While this case is in continuity of settled case-law on the concept of fixed establishment, it might have specific impacts for Luxembourg PropCos operating foreign buildings. Based on the current practice, ProCos are often registered for VAT purposes in Luxembourg as well as in the jurisdiction where the real estate is located. As real estate transactions are located from a VAT perspective at the place of the property, VAT on rents or on sales is charged by the PropCos and remitted to the foreign VAT authorities following the filing of their foreign VAT returns. Input VAT incurred in relation to the property (immovable works, valuation, etc.) is also deductible in these foreign VAT returns.

The purpose of this article is to provide an overview of the potential VAT implications of the Titanium case with a specific focus on some of the jurisdictions where Luxembourg PropCos own and exploit real estate.

Potential impacts for the future

In case of a "strict" application of the Titanium case in foreign jurisdictions, the consequences could be as follows for Luxembourg PropCos renting real estate:
1. VAT on the rents would no longer have to be charged by the Luxembourg PropCos but would have to be declared as due by the tenants in their local VAT returns. The EU VAT Directive grants the option to Member States to implement a specific extended reverse charge mechanism for these services. VAT on the rents would therefore no longer be charged and collected by the lessor but would be declared as due by the tenants in their VAT returns;
2. Except in specific situations, PropCos would not be entitled to register for VAT purposes in the country of the real estate and only the Luxembourg VAT number would remain. A foreign VAT number would only be required for the PropCos for some specific transactions (intra-community acquisitions of goods in that foreign jurisdiction, receipt of property related services from suppliers not established in the country of the real estate);
3. Foreign input VAT incurred by the PropCos (e.g. VAT on construction work) would remain recoverable but through the filing of VAT refund claims and no longer through foreign VAT returns. The refund claim procedure is based on Directive 2008/9/EC and it requires the filing of quarterly/annual claim(s) through the Luxembourg VAT refund portal. Following its submission, the claim is forwarded by the Luxembourg VAT authorities to the foreign VAT authorities that ultimately grant the refund.

Austria: homeland of the Titanium case

The Austrian VAT law has implemented an extended reverse charge mechanism whereby Austrian VAT taxable customers are liable to self-assess Austrian VAT if the supplier is a foreign taxable person because he has neither established his business nor has a fixed establishment in Austria that is involved in the supply. However, according to the Austrian tax authorities VAT guidelines[1], a foreign property company owning an immovable property in Austria rented out to another taxable person is deemed not to be a "foreign" taxable person. The consequence is that the extended reverse charge mechanism should not apply and the lessor still has to charge VAT on rents.

Despite the Titanium case, the Austrian tax authorities have not (yet) changed their opinion or published any amended guidelines. The next chance to do so will be when the annual update of the VAT guidelines are published, which is usually to be expected in November or December of each year.

Notwithstanding the fact that some articles and contributions in literature are of the opinion that, based on the CJEU decision, the Austrian Tax Authorities may no longer uphold their position, one may still rely on the existing wording of the VAT guidelines – if more favorable – and await further changes (to be introduced either by the legislator or by the Tax Authorities) before taking any action.

Germany: where many Luxembourg PropCos own real estate

Under German VAT law, reverse charge applies in general to services rendered to taxable persons if the supplier is not established in Germany nor has a fixed establishment in Germany that is involved in the supply. However, the guidelines of the German tax authorities[2] stipulate that an entrepreneur who owns real estate located in Germany and rents it out *«is to be treated as a resident of Germany"* for VAT purposes.

The question could be raised whether these guidelines are in line with the Titanium case and will have to be changed. However, they do not mention that the PropCo has, as such, a fixed establishment for VAT purposes in Germany, but merely create a fiction based on which such a PropCo is to be treated as if it had such a fixed establishment. Therefore, it is currently unclear whether the German tax authorities will change their current administrative practice because of the Titanium case, as it could be defended that their guidelines are not inconsistent with the settlements of this case. However, should the guidelines be finally amended, it is very unlikely that the German VAT authorities will introduce these changes with retroactive effect for the past. It is far more likely, and would be much more in line with the usual approach of the German tax authorities, that they will apply a non-objection period when amending the German VAT law.

The German Federal Ministry of Finance is currently analysing the impact of the Titanium case on foreign companies holding and operating German real estate. Administrative and/or legal changes are therefore expected in the coming months to clarify the German VAT obligations of such foreign PropCos. It is therefore advisable to await these clarifications before taking any action.

The Netherlands

Before the CJEU published its Titanium case, the Dutch Supreme Court already issued a ruling in a very similar case. In 2019, the Supreme Court concluded that a fixed establishment for VAT purposes cannot exist without own personnel being locally present. From the perspective of the Netherlands, the CJEU's Titanium case is in fact a confirmation of existing Dutch case law as well as a continuation of the Dutch market practice and tax authority policy.

Within the long-standing Dutch market practice, Luxembourg PropCos were already considered non-resident VAT taxable persons and are generally VAT registered as such. This implies that the consequences of this judgment are rather limited. Also, the Titanium case does not lead to a different VAT treatment of the lease services rendered by non-resident lessors. So far, and as expected, the Dutch tax authorities have not announced any changes following the Titanium case.

From an input tax recovery perspective, it is debatable whether non-resident taxable persons, such as Luxembourg PropCos, should be entitled to maintain their Dutch VAT registration. However, even if the tax authorities were to change their policy and cancel VAT registrations for Luxembourg PropCos following the Titanium case, such PropCos would still be entitled to recover Dutch VAT incurred through an EU VAT refund request, filed in their country of establishment or directly with the Dutch tax authorities. Considering that the Netherlands accept VAT refund requests for a 5-year retrospective period, an unexpected cancellation of non-resident VAT registrations should not negatively affect the right to reclaim Dutch VAT incurred retrospectively. Non-resident taxable persons that are leasing out Dutch properties are therefore advised to remain VAT registered in the Netherlands going forward.

External staff?

The Titanium case could trigger additional discussions as to whether it might be considered as creating distortions and, with that, impact the neutrality of the VAT system. For example, the case raises the question of whether staff hired from external employment agencies could qualify as "own" staff for assessing the presence of a VAT fixed establishment. Would there not be situations in which such hired staff could be considered as sufficiently comparable to own staff and, with that, allow the conditions of the fixed establishment to be met? This question has not yet been answered...

Conclusion: time will tell...

Once these new regulations/guidelines have been published, it will be possible to determine accurately the foreign VAT obligations of Luxembourg PropCos and the related potential impacts. Indeed, Luxembourg PropCos will maybe have to review their VAT set-up (foreign VAT de-registration, issuance of invoices without VAT, etc.) and anticipate potential adverse impacts (VAT pre-financing before receiving the refunds of the foreign input VAT through the VAT refund claims, additional formalities, etc.).

**Thibaut BOULANGÉ (picture), Partner – Atoz Tax Advisers*
thibaut.boulange@atoz.lu

Dr. Hannes GURTNER, Partner – LeitnerLeitner
Hannes.Gurtner@leitnerleitner.com

Dr. Barbara FLECKENSTEIN-WEILAND, Partner - Flick Gocke Schaumburg
barbara.fleckenstein-weiland@fgs.de

Martijn JAEGERS, Partner – Taxand Netherlands
Martijn.Jaegers@taxand.nl

1) Recital n°2601
2) Section 13b.11 (2) sentence 2 of the German VAT Application Decree (UStAE)