



VAT Permanent Establishment of a non-resident company: tolling and distribution agreement with a Spanish related subsidiary

11 December 2020

Please note that the Spanish Supreme Court has issued a Ruling dated 11 November 2020 in which it analyzes the possibility of a Spanish subsidiary to be deemed as a VAT Permanent Establishment of a non-resident company (a Swiss company).

The facts refer to a non-resident company which considered it was not operating in Spain with a Permanent Establishment, and thus was not charging VAT on its local sales, as the reverse charge mechanism was applicable. The Spanish tax authorities concluded that there was indeed a VAT Permanent Establishment and that the reverse charge was not applicable. The company appealed and finally it has reached the Supreme Court, which has ruled that, indeed, there is a VAT Permanent Establishment and that VAT should have been charged on the local sales made.

The Spanish subsidiary had entered into two different agreements with the Swiss company - one for manufacturing the goods, and a second one for distributing the finished goods.

The main issue was to determine the basis for the Permanent Establishment. The Court concludes that the non-resident company was in fact operating through a fixed business place in Spain -the factory, warehouse and offices of the Spanish subsidiary- due to the activities carried out by the Spanish subsidiary. It says that the non-resident company provides the instructions on how the goods have to be manufactured with the human and material resources of the Spanish subsidiary. It also controls what has to be manufactured and the deadlines for selling the goods and its price, it reimburses for all the costs borne in Spain, it assumes all the risk of the activities carried out in Spain and, basically, all the activities carried out in Spain by the Spanish subsidiary, such as, manufacture, transport, quality control, packaging are done by the Spanish company but on behalf of the non-resident company.

Even though this is just a VAT Ruling, the analysis could also lead to the existence of a Permanent Establishment from a Non Resident Tax perspective. Therefore, it is important for any entity which may have a similar structure to make a joint analysis from both, an indirect and direct tax point of view, as eventually this VAT Permanent Establishment could also be deemed to be a Permanent Establishment for both tax purposes. In fact, the Spanish tax Authorities used criteria from the OECD Model to make their analysis.

Should you have any questions in connection with this matter, please contact Natalia Pastor, Partner in the Indirect Tax Practice of KPMG Abogados in Madrid.



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