Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 14 November 2019[1]

Case C-547/18

Dong Yang Electronics Sp. z o.o.
v
Dyrektor Izby Administracji Skarbowej we Wrocławiu

(Request for a preliminary ruling from the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court, Wrocław, Poland))

(Request for a preliminary ruling — Tax law — VAT — Services — Place of supply of services — Concept of 'fixed establishment' within the meaning of Article 44 of the VAT Directive 2006/112/EC — Subsidiary (established in a Member State) of a parent company established in a third country)

I. Introduction

1. In this reference for a preliminary ruling, the Court of Justice is asked to determine the place of supply of services under VAT law. In this case, the Court has been requested to give a preliminary ruling on the question of where the place of supply of services is located under VAT law. This place determines which State is entitled to impose tax.

2. The background to the request for a preliminary ruling is that a Korean company commissioned a Polish undertaking to supply assembly services. As this contract was performed with the involvement of the Polish subsidiary of the Korean contractor, it is disputed whether the service was provided to the Korean contractor or to the Polish subsidiary as a fixed establishment of the contractor. In the latter case, the place of performance would be in Poland and Polish VAT would have been incurred, which would then have to have been collected and paid by the contractor. This did not take place.

3. It is worth noting here that the present case concerns 'only' the correct treatment under VAT law and not the amount of (Polish) tax revenue. If the services were supplied to a fixed establishment in Poland, the Korean contractor would indisputably have been able to deduct that VAT. This is because the goods manufactured were sold from Poland on the European market, such that they are subject to tax. Either way, the VAT would result in neither a tax charge for the Korean contractor nor an increase in Polish tax revenue.

4. Nevertheless, the question is relevant as the contractor's liability to pay VAT in Poland depends on whether or not a subsidiary can be regarded as a fixed establishment of a parent company. Under certain circumstances, this question could be vitally important to that contractor if it is subsequently unable to collect the VAT from its contracting partner.

1 Original language: German.

5. The Court has indeed previously expressed its view several times on the question of when a fixed establishment exists within the meaning of VAT law. However, it is not possible to find a clear statement on the assessment of a subsidiary as a fixed establishment of a parent company. In the *DFDS* decision,[2] the Court of Justice lent towards the view that a subsidiary can also be regarded as a fixed establishment. It distanced itself from this view again in the *Daimler*[3] decision, however. In the *Welmory* case,[4] most recently, it was able to avoid giving an answer. The Court must now provide a clear answer to this question.

II. Legal framework

A. EU law

6. The framework of the case in EU law is formed by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[5] ('the VAT Directive').

7. Article 44 of the VAT Directive[6] provides as follows:

'The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.'

8. Regarding the interpretation of the second sentence of Article 44 of the VAT Directive, Article 11(1) of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax ('the Implementing Regulation') provides as follows:[7]

'For the application of Article 44 of Directive 2006/112/EC, a "fixed establishment" shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised 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.'

9. Article 21 of the Implementing Regulation contains the following clarification on the relationship between taxation at the place of establishment or at the place of a fixed establishment of a taxable person:

'Where a supply of services to a taxable person, or a non-taxable legal person deemed to be a taxable person, falls within the scope of Article 44 of Directive 2006/112/EC, and the taxable person is established in more than one country, that supply shall be taxable in the country where that taxable person has established his business.

2 Judgment of 20 February 1997 (C-260/95, EU:C:1997:77, paragraph 26).

3 Judgment of 25 October 2012 (C-318/11 and C-319/11, EU:C:2012:666, paragraph 47 et seq.).

4 Judgment of 16 October 2014 (C-605/12, EU:C:2014:2298).

5 OJ 2006 L 347, p. 1.

6 In the relevant version of Article 2(1) of Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services (OJ 2008 L 44, p. 11).

7 OJ 2011 L 77, p. 1.

However, where the service is provided to a fixed establishment of the taxable person located in a place other than that where the customer has established his business, that supply shall be taxable at the place of the fixed establishment receiving that service and using it for its own needs. …'

10. Article 22(1) of the Implementing Regulation defines the supplier's obligations in identifying the place of supply of services:

'In order to identify the customer's fixed establishment to which the service is provided, the supplier shall examine the nature and use of the service provided.

Where the nature and use of the service provided do not enable him to identify the fixed establishment to which the service is provided, the supplier, in identifying that fixed establishment, shall pay particular attention to whether the contract, the order form and the VAT identification number attributed by the Member State of the customer and communicated to him by the customer identify the fixed establishment as the customer of the service and whether the fixed establishment is the entity paying for the service.

Where the customer's fixed establishment to which the service is provided cannot be determined in accordance with the first and second subparagraphs of this paragraph or where services covered by Article 44 of Directive 2006/112/EC are supplied to a taxable person under a contract covering one or more services used in an unidentifiable and non-quantifiable manner, the supplier may legitimately consider that the services have been supplied at the place where the customer has established his business.'

B. Polish law

11. Article 44 of the VAT Directive was transposed into Polish law by Article 28b(1) and (2) of the Ustawa o podatku od towarów i usług (Law on the Tax on Goods and Services) of 11 March 2004, which provides that where services are supplied to a taxable person's fixed establishment which is in a place other than the place where he has established his business or has his permanent address, the place where those services are supplied is the place of the fixed establishment.

12. Article 13(3) of the Ustawa o swobodzie działalności gospodarczej (Law on Freedom of Commercial Activity) of 2 July 2004 provides that foreign nationals other than those mentioned in paragraphs 1 to 2a have the right to take up and pursue commercial activity exclusively in the form of a limited partnership, limited joint-stock partnership, limited liability company or joint-stock company unless international agreements provide otherwise.

13. No such provision exists in the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part.[8] The Republic of Poland stipulated in that agreement that market access for Korean undertakings would be provided solely to subsidiaries of the latter incorporated as individually specified types of companies.[9]

III. Dispute in the main proceedings

14. On 27 October 2010, Dong Yang Electronics sp. z o. o. — the applicant in the main proceedings ('Dong Yang') — established in Poland, concluded, with LG Display Co. Ltd. (Korea) ('LG Korea'), established in the Republic of Korea, a contract to provide services consisting in the assembly of printed circuit boards from certain materials (sub-assemblies, components) owned by LG Korea.

8 OJ 2011 L 127, p. 6.

9 See Article 7.11(1) in conjunction with Article 7.13 and Annex 7-A-2 (OJ 2011 L 127, pp. 1201 and 1202) of the agreement.

15. These materials were provided to Dong Yang by LG Display Polska sp. z o.o. ('LG Poland Production') — a subsidiary of LG Korea. Dong Yang in turn provided LG Poland Production with the processed printed circuit boards after assembly. While Dong Yang coordinated the total quantity of material required with LG Korea, it received information on the daily quantity required from LG Poland Production.

16. The relevant relationships within the 'LG Group', which were not known to Dong Yang, are as follows:

17. LG Poland Production assembled ready-to-use TFT-LCD modules from components owned by LG Korea on the basis of contractual obligations with LG Korea. LG Poland Production provided further services to LG Korea in connection with the storage and logistics for the finished products, which were also owned by LG Korea. The finished products were sold by LG Korea to another subsidiary affiliated by capital in Poland ('LG Poland Sales'), which then sold them on the European market.

18. LG Korea, which was registered for VAT purposes in Poland and had a tax representative, assured Dong Yang that it did not have a fixed establishment in Poland, did not employ staff, did not own property, and did not have technical equipment there.

19. Dong Yang therefore issued invoices in 2012 for its assembly services to LG Korea which did not include VAT. Instead, the invoices contained the annotation: 'Grounds for tax treatment — Article 28b(2) of the Law on VAT.' The invoices showed that the service recipient was LG Korea and that company also paid them.

20. The competent Polish tax authorities nevertheless fixed the VAT for Dong Yang for the services in question for 2012. According to the authorities, the tax was incurred at the basic rate in Poland because Dong Yang's services had not actually been supplied to the seat of LG Korea in Korea, but to the place of its fixed establishment in Poland — LG Poland Production.

21. On the basis of the contractual relationships between LG Korea and LG Poland Production, the tax authorities found that LG Korea had itself created a fixed establishment in Poland by 'exploiting the economic potential' of LG Poland Production through implementing a suitable business model by way of the agreements. Dong Yang, instead of relying on the statements of LG Korea, should have examined the use of its services as required by Article 22(1) of the Implementing Regulation. Had it done so, it would have been able to see that the actual beneficiary of the services supplied by it was LG Poland Production.

22. By its action, Dong Yang seeks the annulment of the tax assessments. It argues that the requirements for the existence of a fixed establishment within the meaning of Article 44 of the VAT Directive and Article 11(1) of the Implementing Regulation had not been met.

IV. Request for a preliminary ruling and proceedings before the Court

23. By order of 6 June 2018, the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court, Wrocław, Poland) referred the following questions to the Court for a preliminary ruling pursuant to Article 267 TFEU:

'(1) Can it be inferred, from the mere fact that a company established outside the European Union has a subsidiary in the territory of Poland, that a fixed establishment exists in Poland within the meaning of Article 44 of the VAT Directive and Article 11(1) of the Implementing Regulation?

(2) If the first question is answered in the negative, is a third party required to examine contractual relationships between a company established outside the European Union and its subsidiary in order to determine whether the former company has a fixed establishment in Poland?'

24. In the proceedings before the Court, Dong Yang, the Polish tax authority, the Republic of Poland, the United Kingdom and the Commission submitted written observations and attended the hearing on 5 September 2019.

V. Legal assessment

A. Interpretation of the questions referred

25. It is necessary, first, to clarify the questions of the referring court.

26. The subject matter of the first question is expressly only whether the mere fact that a parent company from a third country has a Polish subsidiary (in this case, LG Poland Production) results in it — the parent company from Korea — having a fixed establishment in Poland within the meaning of Article 44 of the VAT Directive.

27. However, it is clear from the order for reference that, if the question is answered in the negative, the referring court would also like to know what other criteria should be relevant to determine whether a subsidiary (LG Poland Production) constitutes a fixed establishment of the parent company (LG Korea). This is because an obligation to verify the contractual relationships referred to in the second question referred would exist only if they were relevant to the determination of the existence of a fixed establishment. Furthermore, at the beginning of the grounds for the questions referred, the referring court expressly states that its concern is with the correct interpretation of Article 44 of the VAT Directive in order to determine the place of supply of services by Dong Yang to LG Korea.

28. Therefore, by its two questions referred, the referring court seeks to ascertain, first, whether a subsidiary as such establishes a fixed establishment of the parent company (see B). Secondly, it would like to know whether — if the first question is answered in the negative — there are other criteria on the basis of which a subsidiary is to be regarded as a fixed establishment of the parent company (see C) If such criteria do exist, a further question that arises for the referring court is what the supplier must check in order to find out whether a subsidiary constitutes such a fixed establishment (see D).

B. Subsidiary as a fixed establishment of the parent company?

29. It is clear from the wording of the VAT Directive alone that a dependent but legally autonomous subsidiary cannot at the same time be regarded as a fixed establishment of its parent company. Article 44 of the VAT Directive refers to *a single* taxable person who has established his business in one place and has a fixed establishment in another. However, a parent company and a subsidiary are not one taxable person, but two.

30. Although Article 11 of the VAT Directive allows Member States, under certain circumstances, to 'regard as a single taxable person' several taxable persons who are closely bound to one another (a 'VAT group'), this possibility is limited to the territory of the Member State concerned ('persons established in the territory of that Member State'). Since LG Korea is indisputably established in South Korea, a VAT group together with its subsidiary in Poland is ruled out from the outset.

31. Nor do the other substantive criteria of Article 44 of the VAT Directive, which are set out in more detail in Article 11(1) of the Implementing Regulation, allow the conclusion that a connection under company law with another taxable person alone can constitute a fixed establishment of the parent company.

32. In this context, Article 11(1) of the Implementing Regulation mentions criteria such as a sufficient degree of permanence of the establishment and a structure enabling it to receive and use services. These are all criteria which have no connection with company law and can therefore only relate to the fixed establishment of *a single* taxable person who has established his business elsewhere.

33. Article 11(1) of the Implementing Regulation therefore answers only the question of whether the existing infrastructure of a taxable person in a place other than that where he has established his business is sufficient in itself to constitute a fixed establishment. Contrary to the view taken by the Republic of Poland, Article 11(1) of the Implementing Regulation does not provide any meaningful clarification in relation to the question to be ruled on here, as to whether the infrastructure of a *different* taxable person (that is to say, the place where he has established his business) can also constitute a fixed establishment of a taxable person *who can be distinguished therefrom*.

34. Therefore, in line with the view taken by the Commission, the first question can be answered with a clear 'no'. The mere fact that a company from a third country has a subsidiary in a Member State does not mean that that subsidiary is a fixed establishment within the meaning of the second sentence of Article 44 of the VAT Directive in that Member State.

C. Criteria for a fixed establishment of the parent company via a subsidiary?

35. It must, however, be clarified whether there are criteria according to which, in exceptional circumstances, a subsidiary is also included in the group structure in such a way that it is to be regarded not only as an independent taxable person but also as a permanent establishment of the parent company within the meaning of Article 44 of the VAT Directive.

36. This gives rise to fundamental reservations (see 1), such that an alternative assessment is possible only if an abusive practice is found to exist (see 2). This conclusion also does not conflict with the decision of the Court in the *DFDS* case [10] (see 3).

1. Fundamental reservations

37. Fundamental reservations arise when equating the place where a subsidiary is established to a fixed establishment of a parent company. The 'legal concept' of a fixed establishment consists in attributing a certain 'conduct' of an establishment to a taxable entity. However, if the subsidiary has its own legal personality and is therefore also a taxable entity in its own right, there is a strong argument in favour of generally excluding attribution to another legal entity.

38. As already mentioned (see point 29), the wording of Article 44 of the VAT Directive in conjunction with Article 11(1) of the Implementing Regulation therefore also militates against the assumption that the infrastructure of another taxable person (that is to say, the place where he has established his business) can also be regarded as a fixed establishment of a different taxable person. Accordingly, it has also been argued that a legal person with its own legal personality — for example a subsidiary — 'cannot at the same time be the fixed establishment of a different legal person.' [11]

10 Judgment of 20 February 1997 (C-260/95, EU:C:1997:77).

11 See, expressly, H. Stadie, *UStG*, 3rd edition, 2015, Article 3a, end of paragraph 32.

39. Furthermore, this would lead to conflicts with the provisions on the reverse charge principle (Article 196 of the VAT Directive) and a 'VAT group' (Article 11 of the VAT Directive).

40. This arises where a (controlled) domestic subsidiary enters into, for example, contracts valid under civil law with a foreign undertaking which are performed and taxed at the place where the subsidiary is established. This is because if the subsidiary were to be regarded as a fixed establishment of the parent company, Article 196 of the VAT Directive provides that VAT would be payable by the parent company, and not the subsidiary in the country concerned. This would also be true if the parent company were located in a third country, as is the case here.

41. However, the reverse-charging of the VAT to the service recipient pursuant to Article 196 of the VAT Directive also serves to simplify the collection of tax by the State in which the service recipient is established. This would not be the parent company in this case, however. Moreover, since the latter does not necessarily have to be aware of all the legal transactions of a legal person in its own right — even if it is a subsidiary — this outcome seems strange. The parent company would be liable for VAT against its will for unknown transactions for which it received no consideration. This would hardly be compatible with the taxable person's function as a tax collector on behalf of the State. [12]

42. Moreover, this effect — the transfer of tax obligations to a 'closely bound' company — is provided for only in Article 11 of the VAT Directive. In this respect, the express evaluation in Article 11 of the VAT Directive, which allows several legally independent persons to be grouped together for good reasons [13] within one Member State only — so not with companies from other Member States or third countries — would also be undermined.

43. In my Opinion in the *Welmory* case, [14] I pointed out the overriding importance of legal certainty for the supplier in determining his tax obligations and concluded from this that a legal person with its own legal personality cannot at the same time be the fixed establishment of a different legal person. This aspect of legal certainty is also stressed by the Court in its judgment in this case. [15] The same applies to the legal certainty of the customer which must know whether it, its subsidiary and/or its parent company (see Article 196 of the VAT Directive) is liable for VAT.

44. I would also refer to the grounds for Draft Implementing Regulation No 282/2011, according to which 'it is important that the supplier can (…) correctly establish where the customer is located'. [16] However, he can only do this if he can rule out the possibility that the place where a subsidiary is established may also be considered the fixed establishment of a different taxable person. The legal status as an independent company — in this case, a company with limited liability (sp. z o.o.) — is relatively easy to determine.

45. In addition, it is not always entirely clear from the outside — so for Dong Yang in this case — who controls a subsidiary. In the present case, 20% of LG Poland Production is apparently still held by a third company — as indicated by Dong Yang's statements in the written submissions and at the hearing. If this 20% were to constitute a blocking minority, it would hardly be possible to refer to the company as a (controlled) subsidiary, for example.

12 See, inter alia, judgments of 8 May 2019, *A-PACK CZ* (C-127/18, EU:C:2019:377, paragraph 22); of 23 November 2017, *Di Maura* (C-246/16, EU:C:2017:887, paragraph 23); of 21 February 2008, *Netto Supermarkt* (C-271/06, EU:C:2008:105, paragraph 21); and of 20 October 1993, *Balocchi* (C-10/92, EU:C:1993:846, paragraph 25).
See also, in this regard, my Opinion in the *Di Maura* case, C-246/16, EU:C:2017:440, point 21.

13 See also my Opinion in the *Aviva* case (C-605/15, EU:C:2017:150, paragraph 38 et seq.).

14 C-605/12, EU:C:2014:340, points 29, 30 and 36.

15 Judgment of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298, paragraph 55).

16 Proposal for a Council Regulation laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (Recast), COM(2009) 672 final of 17 December 2009, p. 3.

46. In conclusion, therefore, an independent subsidiary cannot be regarded as a fixed establishment of the parent company.

2. Exception due to the prohibition of abusive practices

47. The conclusion may be different only if the chosen contractual relationships (those between LG Korea and Dong Yang in this case) were to constitute an abusive practice.

48. The principle that abusive practices are prohibited, as applied to the sphere of VAT by the case-law stemming from the judgment in Halifax,[17] is a general principle of EU law.[18]

49. Therefore, this principle could also be applicable in the present situation. However, an abusive practice by LG Korea as a result of having commissioned Dong Yang directly (instead of it being commissioned by LG Poland Production, for example) can quite clearly be ruled out in the present case, in line with the view taken by the Commission.

50. First, Dong Yang not only formally provided the services to LG Korea, it actually provided them to LG Poland Production as well. Nor can the contrary be assumed here after consideration of economic realities ('economic perspective'), which is a fundamental criterion for the application of the common system of VAT.[19]

51. LG Poland Production was neither a contracting partner of Dong Yang nor the owner of the processed goods, and it did not make further use of them (sell them) itself. Rather, LG Korea sold the finished goods to LG Poland Sales. In this respect, and in line with the view taken by the United Kingdom at the hearing, it cannot be said that LG Poland Production used the services of Dong Yang. Both Dong Yang and LG Poland Production cooperated as 'suppliers' in a production process based on the division of labour and work performed for LG Korea. The latter used the services of the two companies by selling the finished goods to LG Poland Sales.

52. Secondly, even if it were assumed that Dong Yang had actually provided the services to LG Poland Production, this would not have any effect whatsoever on the amount of Polish tax revenue and the amount of the tax charge for LG Poland Production under VAT law. In this case, LG Poland Production would have a right to deduct the appropriate amount of input VAT when the invoice is issued.[20]

53. Nor would the situation be any different if it were assumed that LG Korea had a fixed establishment in Poland via its subsidiary LG Poland Production. In such a case, LG Korea would have a right to deduct input tax in Poland and would therefore not have a VAT burden in Poland either. For both points of view, neither the Republic of Poland nor the tax authority could demonstrate what VAT burden had been abusively evaded.

17 Judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 67 et seq.).

18 See, in this respect, judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 31), citing the judgment of 15 October 2009, *Audiolux and Others* (C-101/08, EU:C:2009:626, paragraph 50).

19 See expressly to that effect, judgments of 22 February 2018, *T-2* (C-396/16, EU:C:2018:109, paragraph 43); of 20 June 2013, *Newey* (C-653/11, EU:C:2013:409, paragraph 42); of 7 October 2010, *Loyalty Management UK* (C-53/09 and C-55/09, EU:C:2010:590, paragraph 39); and of 28 June 2007, *Planzer Luxembourg* (C-73/06, EU:C:2007:397, paragraph 43).
Along similar lines, see also judgment of 27 March 2019, *Mydibel* (C-201/18, EU:C:2019:254, paragraph 38 et seq.) regarding the assessment of single supply.

20 Regarding the requirement for an invoice with a separate indication of the VAT in order to exercise the right to deduct input VAT, see, inter alia, judgment of 12 April 2018, *Biosafe — Indústria de Reciclagens* (C-8/17, EU:C:2018:249, paragraphs 42 and 43), and my Opinion in *Biosafe — Indústria de Reciclagens* (C-8/17, EU:C:2017:927, point 34 et seq.).

54. The Republic of Poland argues mainly that the creation of added value took place in Poland and should therefore also be subject to taxation there. The question of whether this statement is actually correct can remain open here (the statement is not correct in relation to the production of goods and subsequent tax-exempt, intra-Community supply pursuant to Article 138 of the VAT Directive, for example, since the destination principle is applicable here, meaning that the added value is created in one country and taxed in another).

55. In so far as Dong Yang's services found their way into products sold in Poland, Dong Yang's service is ultimately also taxed at the place of consumption of the products (thus in Poland). The amount paid by LG Korea to Dong Yang without Polish VAT is included in the price of the end product (in this case, the TFT monitor) and is ultimately then subject to Polish VAT when the end product is sold in Poland. Poland therefore receives the tax revenue from the added value that Dong Yang created for LG Korea in Poland when the TFT monitor is supplied in Poland. The fact that the place of supply of Dong Yang's service was previously in Korea under VAT law is a decision of the EU legislature to transfer the place of supply of services to the place of business of a different trader.

56. As correctly pointed out by the Commission, however, this decision made by the EU legislature is not relevant to tax revenue in Poland in this specific case. In this respect, there is no particular risk of abuse under VAT law with regard to services that find their way into physical products. There is therefore also no need to answer the question of whether Dong Yang should have somehow recognised an abusive arrangement on the part of LG Korea.

57. This is a decisive difference from the situations in which services are integrated into other services. The latter situations have already been the subject matter of the case-law of the Court.[21] In this regard, it is theoretically conceivable to reduce the VAT burden through civil law structures, as was apparently attempted in the *DFDS* case[22] — albeit in the context of the old legal framework.

58. Nor does the fact that Dong Yang did not declare and pay South Korean VAT constitute an abusive practice on its part. With regard to the South Korean VAT payable — depending on the legal situation in South Korea — it can be assumed that LG Korea correctly informed its contracting partner Dong Yang. As stated in the hearing, Dong Yang was assured that it would not have to pay tax on the 'importation of these services' in South Korea. It is not ruled out that, under South Korean VAT law, for example, VAT is reverse-charged to the service recipient established in South Korea when a foreign undertaking provides services to it. At least this is what is provided for by the EU's VAT system for many services provided by foreign undertakings to domestic undertakings (See, inter alia, Article 196 of the VAT Directive).

3. Exception based on the decision in the DFDS case?

59. At best, the decision of the Court in the *DFDS* case could preclude this conclusion. The reason for this is that the decision could be interpreted as making it seem possible for a subsidiary to constitute a fixed establishment of the parent company as a mere auxiliary organ of the parent company.[23]

21 See, for example, judgments of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832); of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298); and of 20 February 1997, *DFDS* (C-260/95, EU:C:1997:77).

22 Judgment of 20 February 1997 (C-260/95, EU:C:1997:77).

23 Judgment of 20 February 1997, *DFDS* (C-260/95, EU:C:1997:77, paragraph 26).

60. In this case, the Court ruled that services that are provided by a tour operator established in one Member State to travellers through the intermediary of a company operating as an agent in another Member State are liable for VAT in the latter State. The prerequisite is that that company, which acts as a mere auxiliary organ of the tour operator, has the human and technical resources characteristic of a fixed establishment. [24]

61. However, this decision — on which Poland is largely reliant — concerned the specific sector of tour operators, which are in any case subject to a special VAT scheme (now Article 306 et seq. of the VAT Directive). For this reason alone, the decision is not automatically transferable to other situations.

62. Secondly, the Court's answer in those proceedings concerns a subsidiary which has provided services to third parties *as an intermediary* for the parent company. This is not the situation in the present case, however. LG Poland Production does not sell the TFT monitors on behalf of LG Korea. It cannot be said that it acts as a mere auxiliary organ.

63. Thirdly, the *DFDS* decision concerned the opposite case of the place of *supply of services* by the parent company or subsidiary and not the receipt of the service by a third party. This is another reason why the statements are hardly transferable. The reference to an auxiliary organ acting for the parent company is not applicable in the present case. The *DFDS* decision was characterised by the question of who *provided* (not received) the travel services from an economic perspective.

64. Fourthly, as correctly observed by the Commission, the facts of the *DFDS* decision were characterised by the particular circumstances of the risk of abuse of services and by the fact that tax exemption was granted or not granted depending on the place where the services were provided. As stated above, however, VAT is ultimately payable here upon the supply of the goods (monitors), in relation to which the service is only a preliminary stage. There is therefore no such risk of abuse in the present case.

65. Finally, the Court has already distanced itself from the *DFDS* decision and made clear that a wholly owned subsidiary is a taxable legal person on its own account. [25] Furthermore, as I have already stated in point 43, it also serves the purpose of legal certainty in regard to the person liable for tax if a person with its own legal personality cannot at the same time be the fixed establishment of a different person with its own legal personality.

66. As a result, it is not possible to gather from the decision of the Court in the *DFDS* case any indications for the present case.

4. Interim conclusion

67. Therefore, a subsidiary cannot be regarded as a fixed establishment (within the meaning of the second sentence of Article 44 of the VAT Directive) of the parent company. A different conclusion could be conceivable only if the contractual structure chosen by the customer were to infringe the prohibition of abusive practices. This assessment falls within the remit of the referring court. However, based on the facts communicated to the Court, there is no evidence to support this in the present case.

24 See judgment of 20 February 1997, *DFDS* (C-260/95, EU:C:1997:77, paragraph 29).

25 Judgment of 25 October 2012, *Daimler* (C-318/11 and C-319/11, EU:C:2012:666, paragraph 48).

D. In the alternative: service provider's obligations to carry out checks

68. If, however, a case involving an abusive practice (by LG Korea here) can be assumed, the question arises as to what the supplier (Dong Yang here) has to check in order to be able to assess whether its contracting partner is engaging in an abusive practice. This would then have the result that a company with its own legal personality is to be regarded as a fixed establishment of a different company with its own legal personality.

69. The provisions in Articles 21 and 22 of the Implementing Regulation could provide indications in support of this. Pursuant to Article 22(1) of the Implementing Regulation, in order to identify the fixed establishment to which the service is provided, the supplier is to examine the nature and use of the service provided.

70. Article 22 of the Implementing Regulation must be read in conjunction with Article 21 of the Implementing Regulation. However, Article 21 of the Implementing Regulation refers to a taxable person who has established his business in one territory and has a fixed establishment in another. These provisions are therefore concerned with the uncertainty as to the *known place* (fixed establishment or headquarters) *of a taxable person* at which the service is provided.

71. However, the present case is concerned with the question of whether a second taxable person (which has its own legal personality in terms of its outward appearance) could be regarded as a fixed establishment of the first taxable person. It is therefore unclear *whether* a fixed establishment exists at all. The provisions of the Implementing Regulation do not cover such a case. For this reason, Article 22(1) of the Implementing Regulation also does not refer to relationships under company law between undertakings receiving services, but rather refers only to the contractual relationship between the service provider and the service recipient. Thus, the contract and the order form are mentioned, for example, but commercial register extracts or the like are not. In this respect, Article 21 et seq. of the Implementing Regulation is not relevant here.

72. In isolation, however, a taxable person — who merely acts as a tax collector on behalf of the State, as emphasised by the Court in established case-law[26] — may impose certain, yet proportionate, due diligence obligations[27]. In the case of *specific indications* which appear to point to tax evasion or abuse, the taxable person may be expected to obtain certain additional information regarding his supplier in order to ascertain the reliability of the latter.[28] The same applies to the precise determination of the customer's place of establishment — see, inter alia, recital 20 of Implementing Regulation No 282/2011.

73. As correctly emphasised by Advocate General Wahl in this context, however, even in the case of specific indications which appear to point to tax evasion or abuse, the tax authorities may not oblige a taxable person to undertake complex and far-reaching checks, de facto transferring their own investigative tasks to him.[29]

26 See, inter alia, judgments of 8 May 2019, *A-PACK CZ* (C-127/18, EU:C:2019:377, paragraph 22); of 23 November 2017, *Di Maura* (C-246/16, EU:C:2017:887, paragraph 23); of 21 February 2008, *Netto Supermarkt* (C-271/06, EU:C:2008:105, paragraph 21); and of 20 October 1993, *Balocchi* (C-10/92, EU:C:1993:846, paragraph 25).
See also, in this regard, my Opinion in the *Di Maura* case, C-246/16, EU:C:2017:440, point 21.

27 See, in this regard, the case-law of the Court in connection with fraud cases: Judgments of 25 October 2018, *Božičevič Ježovnik* (C-528/17, EU:C:2018:868, paragraph 46 — to a certain extent); of 6 September 2012, *Mecsek-Gabona* (C-273/11, EU:C:2012:547, paragraph 53 — to a certain extent); and of 21 June 2012, *Mahagében* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 59 — to a certain extent).

28 Judgment of 18 May 2017, *Litdana* (C-624/15, EU:C:2017:389, paragraph 39); of 22 October 2015, *PPUH Stehcemp* (C-277/14, EU:C:2015:719, paragraph 52); and of 21 June 2012, *Mahagében* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 60).

29 Opinion of Advocate General Wahl in the Joined Cases *Finanzamt Neuss and Butin* (C-374/16 and C-375/16, EU:C:2017:515, point 61). Similarly, judgments of 31 January 2013, *LVK* (C-643/11, EU:C:2013:55, paragraph 62), and of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 61 et seq.).

74. It follows from this that the impossible cannot in any event be asked of Dong Yang either. It is, however, subjectively impossible for Dong Yang to verify contractual relationships, which are inaccessible to it, between its contracting partner and the (possibly unknown) subsidiaries thereof. Such an obligation of verification and investigation would go beyond the level of diligence that can reasonably be required of it. Therefore, all parties rightly assume that Dong Yang did not have to analyse these contracts.

75. Therefore, unless there are indications to the contrary, a contracting partner can certainly rely on a written assurance from another contracting partner stating that it does not have a fixed establishment in the country concerned (here, in Poland). This is all the more so given that Polish law [30] makes the activities of Korean undertakings via fixed establishments more difficult, such that there is no reasonable reason to doubt the statement of the contracting partner.

76. The fact that a subsidiary is also involved in the performance of the contract is also unable to trigger any further investigation obligations, at least in the present case involving the production of an object owned by the contracting partner in a production process based on the division of labour. This is all the more true given that an independent subsidiary does not in principle constitute a fixed establishment of the parent company (see, in this regard, point 37 et seq. above).

77. As a result, although the taxable person may be required to exercise a reasonable degree of care in determining the correct place of supply, this does not include seeking out and verifying inaccessible contractual relationships between his contracting partner and the subsidiaries thereof.

VI. Conclusion

78. I therefore propose that the Court answer the questions referred by the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court, Wrocław, Poland) as follows:

(1) In principle, a subsidiary of a company (from a third country) is not a permanent establishment of the latter within the meaning of the second sentence of Article 44 of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and Article 11(1) of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax.

(2) A different conclusion is conceivable only if the contractual structure chosen by the customer were to infringe the prohibition of abusive practices. This assessment falls within the remit of the referring court.

(3) Directive 2006/112 requires a taxable person to exercise a reasonable degree of care in determining the correct place of supply. However, this does not include seeking out and verifying inaccessible contractual relationships between his contracting partner and the subsidiaries thereof.

30 Article 13(3) of the Law on Freedom of Commercial Activity (Ustawa o swobodzie działalności gospodarczej) of 2 July 2004.