

ATOZ ALERT

VAT deduction right of Lux PropCos owning/exploiting German real estate - VAT changes

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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 real estate without having any human resources locally.

Consequently, a Luxembourg property company (hereafter “**PropCo**”), with legal seat and place of management in Luxembourg, owning and exploiting German real estate should not be considered as having a fixed establishment for VAT purposes in Germany if it does not have human resources in Germany to operate the underlying asset.

While this court case is in continuity of settled case-law on the concept of fixed establishment, it might have specific impacts for Luxembourg PropCos operating German buildings, considering the specific German administrative practice.

Current German administrative practice

In Section 13b.11 (2) sentence 2 of the German VAT Application Decree (UStAE), the German tax authorities stipulate that an entrepreneur who owns a property located in Germany and rents it out *“is to be treated as a resident of Germany”* for tax purposes.

Some say these guidelines are not in line with the settlement of the CJEU’s Titanium case. However, our view is that, contrary to what some comments suggest, these German administrative guidelines do not mention that the PropCo has a fixed establishment for VAT purposes in Germany as such, 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 completely 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.

Potential impacts for the future

In case the German tax authorities would change their current administrative practice and the fiction to consider the PropCo as having a fixed establishment in Germany would therefore be abolished, the consequences would be as follows:

- German VAT on the rents would no longer have to be charged by the Luxembourg PropCo but it would have to be declared as due by the tenants in their German VAT returns (based on a specific extended reverse charge mechanism);
- Except specific situations, the PropCo would not be entitled to register for German VAT purposes and only the Luxembourg VAT number would remain. A German VAT number would only be required in case the PropCo (a) performs intra-community acquisitions of goods in Germany, or (b) receives property related services connected to the German real estate from non-German suppliers [architect, construction firm, etc];
- German input VAT incurred by the PropCo would remain recoverable but the exercise of the VAT deduction right would be achieved via the filing of VAT refund claims and no longer through German 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 German VAT authorities that ultimately grant the refund (generally after having raised questions in order to assess the VAT deduction right). Based on the Directive, refund claims must be filed by 30 September of the subsequent year at the latest (i.e., 2020 refund claims must be filed by 30 September 2021).

Potential impact for the past?

In practice, German VAT due on rents as well as real estate related German input tax incurred by the PropCo were duly declared in the PropCo's German VAT returns. This treatment is in line with Sec. 13b.11 (2) sentence 2 UStAE that is still to be applied.

We have noticed that some Luxembourg advisors consider that a risk exists to have the German VAT authorities denying the VAT deduction right of Luxembourg PropCos in their German VAT returns on the grounds that such PropCos are not considered as established in Germany in the light of the Titanium case. As a "precautionary measure", they recommend to file, without delay, a VAT refund claim in relation to the year 2020 (by 30 September 2021 at the latest) although periodical/annual VAT returns have been filed in Germany for the same period (and the German input VAT has already been deducted in these returns). Such a dual use of the VAT deduction right would have to be proactively disclosed to the German Federal Central Office to avoid penalties (input VAT cannot be deducted twice).

One can submit such refund claims. However, we do not advise to file 2020 claims as a "precautionary measure". Indeed, we consider that it is very unlikely that the German VAT authorities will change their position and administrative guidelines with retroactive effect for the past, challenging the VAT deduction right of these PropCos already exercised through 2020 periodical VAT returns filed in Germany. It is far more likely, and would be much more in line with the usual approach of the German tax authorities, that they apply a non-objection period when amending the UStAE.

Actions to be taken

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.

In our view, it is advisable to await these clarifications before taking any action. Once these new regulations guidelines will be published, the following actions would have to be undertaken:

- A review of the German VAT obligations of the PropCos should be performed. It will be key to analyse the activity of the PropCos in Germany in order to determine whether they should keep a German VAT number or if they should de-register from German VAT;
- In case the PropCos would no longer have to be VAT registered in Germany, the PropCos will have to:
 - Implement the relevant changes in both their invoicing process and reporting process for their Luxembourg VAT returns/EC Sales lists (if required);
 - Use the VAT refund claim procedure to request, quarterly or annually, the refunds of the German VAT incurred. It should be noted that access to the online portal of the Luxembourg VAT authorities requires a LuxTrust card and an e-TVA access. The access process can take a while and it usually generates a quite important administrative burden;
 - Anticipate questions from the German VAT authorities in the framework of the VAT refund claims. In practice, various information and documents can be requested by the German VAT authorities to grant the refunds (rental agreements, VAT option forms, tenancy schedule, etc).

In our view, it is important not to overreact in the short term and to review the VAT impact of the Titanium case in light of the new German regulations/guidelines to be published.

Do you have further questions?

Our VAT experts, Thibaut Boulangé (Partner ATOZ – Luxembourg side) and Barbara Fleckenstein-Weiland (Partner Flick Gocke Schaumburg – German side) are available to discuss the VAT impacts of the Titanium case on your activities and to handle any questions you may have.



THIBAUT BOULANGÉ

Partner, Head of Indirect Tax
ATOZ Tax Advisers
thibaut.boulange@atoz.lu
T +352 26 940 270



BARBARA FLECKENSTEIN-WEILAND

Partner,
Flick Gocke Schaumburg
barbara.fleckenstein@fgs.de
T +49 69/717 03-0



LIONEL VAN DER NOOT
Director, Indirect Tax
ATOZ Tax Advisers
lionel.vandernoot@atoz.lu
T +352 26 940 609



SILVIN LEIBENGUT
Director, Indirect Tax
ATOZ Tax Advisers
silvin.leibengut@atoz.lu
T +352 26 940 534



JUSTINE GUILLUY
Director, Indirect Tax
ATOZ Tax Advisers
justine.guilluy@atoz.lu
T +352 26 940 294