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Treatment of a fixed establishment for VAT purposes

An entrepreneur who has a branch in another country may have a fixed establishment there. Having a fixed establishment has possible VAT implications. For example, you may have liability for VAT and with that there are invoicing and administrative requirements that must be satisfied, such as the requirement to file VAT returns. But you may also be able to deduct or get a refund VAT. As well, you would have to pay particular attention to the services you provide to third parties and the services you purchase from third parties to determine where they are subject to VAT and whether you are liable for the payment of VAT. If you have a fixed establishment for VAT purposes this may also affect VAT grouping and your VAT position as regards international trade. At the end of 2020, the State Secretary of Finance published a new decree related to the VAT implications of having a fixed establishment. In this article we discuss this Decree.

VAT rules applicable to services supplied to third parties

For entrepreneurs who supply services to parties other than entrepreneurs (for example, private individuals), the main rule is that the service is taxed in the country where the entrepreneur providing the service is established. Exceptions may apply. In principle, the services are taxed where the entrepreneur has his/her main establishment. If a service is provided by a branch that can be regarded as a fixed establishment for VAT purposes, however, the service is taxed in the country of that fixed establishment.

A fixed establishment is deemed to exist when a branch is sufficiently permanent and the entrepreneur has at his/her disposal where the branch is located personnel and technical resources to provide services to third parties. This interpretation of the concept of a fixed establishment is relevant for all VAT rules where the concept of a fixed establishment plays a role, except for the determination of where a service is taxed in the case of services between entrepreneurs (see below).

When you provide services to an entrepreneur, it may also be important to determine whether there is a fixed establishment for VAT purposes. However, what is relevant is whether there is a fixed establishment of the customer, not whether the entrepreneur supplying the services has a fixed establishment. In the case of services between entrepreneurs, the main rule is that services are taxed in the country where the customer is established. When the service is provided to a fixed

establishment of an entrepreneur, the service is taxed where the customer's fixed establishment is located. For this purpose, a broader interpretation of the concept of fixed establishment is applied. We will discuss this in the next section.

VAT rules applicable when procuring services from third parties

When services are purchased by an entrepreneur from third parties, determining whether the purchaser has a fixed establishment is also important. Here too, the rule applies that the branch must be sufficiently permanent. The entrepreneur must have at his/her disposal where the branch is located personnel and technical means that enable the entrepreneur to purchase and use the services on site. The branch need not be able to supply goods or services to third parties. A branch that performs ancillary or preparatory work can be considered a fixed establishment. This is referred to as a purchase-fixed establishment. The concept of a purchase-fixed establishment is only relevant for the application of the principal rule for the place of supply of services between entrepreneurs.

If your customer has a fixed establishment in another country, it is important to determine whether the service is taxed in the country where the customer's head office is located or in the country of their fixed establishment. For this purpose, the VAT legislation sets out a step-by-step plan for determining where the service is taxed.

Step 1: First consider whether you can establish from the nature or the use of the service where the customer will use the service. We can imagine this would be possible, for example, if you were to provide training for staff at the customer's fixed establishment. But, there are many situations where it is not possible to establish who will use the service. You may then go to step 2.

Step 2: Determine from the contract, the order, the customer's VAT identification number, and the payment whether the fixed establishment is the entity that has purchased the service. If you are unable to tell from this information, go to step 3.

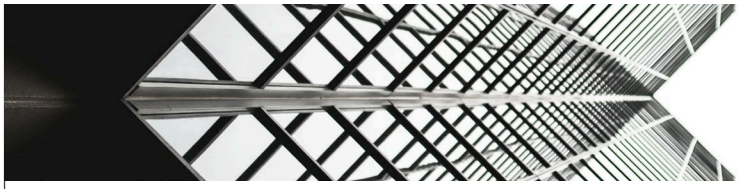
Step 3: If you are unable to attribute the service to the fixed establishment on the basis of steps 1 or 2, you may assume that the service has been provided to the head office.

Please note: this step-by-step analysis only applies to the service provider who must determine to which establishment the service is provided. The recipient may not use it. To avoid double taxation, it is advisable to properly communicate to the service provider which establishment is the recipient of the service.

Liability for payment of VAT

The basic rule is that the VAT is collected and remitted to the government by the entrepreneur who performs the service. If the entrepreneur is not established in the Netherlands, but the supply is taxed in the Netherlands and the customer is a Dutch entrepreneur, the reverse-charge mechanism applies. This means that the VAT is owed by the recipient who declares the VAT owed in its VAT return and they also deduct it to the extent they are entitled to deduct input VAT. A foreign entrepreneur can also shift the VAT to a Dutch fixed establishment. This applies both in the case of a fixed establishment that supplies goods or services to third parties and in the case of a purchasing fixed establishment as described above.

It may also be the case that a foreign establishment of an entrepreneur performs a service for a Dutch customer, whereby this entrepreneur has a fixed establishment in the Netherlands. The question then arises as to whether the reverse charge mechanism can still be applied when the service is taxed in the Netherlands.



The reverse charge mechanism can be applied even if the fixed establishment in the Netherlands does not intervene in the service provided. A fixed establishment is considered to be intervening if the fixed establishment's personnel and/or technical resources are used for the supply of goods or services, whether before or during the supply. Accounting or administrative support tasks are not considered intervention. If the VAT identification number of the fixed establishment is stated on the invoice, then intervention is presumed and the entrepreneur must prove that there was no intervention of the fixed establishment. A purchasing fixed establishment that does not itself supply services to third parties cannot be an intervening fixed establishment. The presence of a purchasing fixed establishment in the Netherlands does not preclude the application of the reverse charge mechanism, however.

The December 2020 decree contains the following example of an intervening fixed establishment: if a foreign entrepreneur transfers goods from his/her principal place of business to his/her fixed establishment in the Netherlands and the goods are then delivered from his/her fixed establishment to an entrepreneur in the Netherlands. In this case, the reverse charge mechanism cannot be applied because the fixed establishment has intervened.

If an entrepreneur has his/her principal place of business in the Netherlands, the reverse charge mechanism cannot be applied, even if that principal place of business is not involved in the supply and the supply is made by a foreign fixed establishment.

Declaration, administrative, and invoicing obligations

An entrepreneur who has a fixed establishment through which he/she supplies goods or services to third parties must register in the Netherlands with the Tax Authorities at the local office in the area where the fixed establishment is situated. The entrepreneur will file a tax return just like a Dutch entrepreneur and will have to comply with the administrative and invoicing obligations in the Netherlands.

If a foreign entrepreneur only has a purchasing fixed establishment in the Netherlands and the fixed establishment does not provide services to third parties, one of two situations may occur:

1. The fixed establishment only buys services from Dutch entrepreneurs. In this case, the Dutch entrepreneurs will charge VAT to the fixed establishment. To reclaim this VAT, the foreign entrepreneur must submit an electronic application to his/her own tax authority for the refund of foreign VAT. If the entrepreneur has no establishments in the EU, the refund application must be submitted in writing to the Dutch Tax Authorities, kantoor Buitenland.
2. The fixed establishment purchases services from entrepreneurs who are not established in the Netherlands. In this case, the fixed establishment owes the VAT on these services based on the reverse charge rule. The fixed establishment then registers for VAT with the Dutch Tax Authorities, kantoor Buitenland. Here, the entrepreneur will declare the reverse-charged VAT and deduct it via the same return if the entrepreneur is entitled to deduct input tax. In this case, the administrative obligations that apply under Dutch VAT legislation must also to be met.

Deduction of input tax

When a foreign entrepreneur has a fixed establishment in the Netherlands, he/ she must submit a VAT return in the Netherlands and they can deduct input VAT. The starting point for the analysis requires examination of whether the activities of the fixed establishment itself give rise to a right of deduction. However, if the fixed establishment performs activities for the foreign head office, or if goods or services purchased by the fixed establishment are also used by the foreign head office, the activities of the head office must also be considered. A double test applies here. You must consider the VAT legislation of the EU Member State of the fixed establishment and you must consider the VAT legislation of the EU Member State of the foreign head office. The VAT can be deducted only if the VAT legislation of both EU Member States allows the deduction (see the table below).

Deductibility of input VAT when an expense incurred by a Dutch fixed establishment also relates to activities of a foreign head office

	VAT is deductible when supplies were subject to VAT in the EU Member State of the head office	VAT is not deductible when supplies were subject to VAT in the EU Member State of the head office
VAT is deductible when supplies are subject to VAT in the Netherlands	Deduction	No deduction
VAT is not deductible when supplies are subject to VAT in the Netherlands	No deduction	No deduction

It is not yet clear how to deal with the situation where the foreign head office is located outside the EU. Questions about this are still pending before the European Court of Justice. In our opinion, only the Dutch VAT legislation can be taken into account for deductibility.

If costs are incurred for activities for which there is a right of deduction and costs are incurred for which there is no right of deduction, then the VAT is only partly deductible. (We call this the deductible proportion.) The deductible proportion is calculated by dividing the turnover for which VAT can be deducted by the total turnover. It follows from the State Secretary's decree that in such a situation, all turnover generated by the foreign head office and the fixed establishment must be included in the calculation of the deductible proportion. Contrary to the State Secretary's decree, it could be deduced from the Morgan Stanley decision that only the turnover generated for which the goods and services were used needs to be included.

Obviously, what has been discussed above also applies when a Dutch head office wishes to deduct VAT on costs that also relate to the activities of a foreign fixed establishment.

An entrepreneur who provides exempt financial services is, in principle, not entitled to deduct input VAT. However, the right to deduct input VAT does exist when this entrepreneur provides services to customers located outside the EU. If he/she supplies services to a fixed establishment outside the EU, the right to deduct input VAT exists. For the manner in which services can be attributed to a fixed establishment of the customer, refer to the discussion under the heading 'VAT consequences when procuring services from third parties'.

Fixed establishment and international trade in goods

In respect of the international trade in goods, it is also important to determine whether there is a fixed establishment in the Netherlands. If a foreign entrepreneur has a fixed establishment in the Netherlands, he/she can apply for a VAT deferment license. A VAT determent license allows the entrepreneur to declare the import VAT in their periodical VAT returns instead of directly when the goods enter the Netherlands. The advantage of this is that the entrepreneur does not have to pre-finance the import VAT. The entrepreneur declares it in the periodical VAT return and deducts it immediately if, and insofar as, he/she is entitled to deduct input VAT.

A foreign entrepreneur with a fixed establishment in the Netherlands can also apply for a permit for a VAT warehouse. Such a permit allows certain goods to be supplied at zero rate/exemption with a right to deduct VAT.

A fixed establishment in the Netherlands may also have consequences for the application of the simplification for call-off stock. This simplification cannot be applied in the Netherlands if the supplier has a fixed establishment in the Netherlands. In another recently published decree, the State Secretary made it clear that a warehouse or depot is not automatically a fixed establishment. What is important is whether that warehouse or depot has staff and resources that supply goods to third parties. However, other EU countries may take a different view. We refer you to our perspective and update on the quick fixes.

BDO Comment

The rules around fixed establishments were in dire need of an update as a result of case law of the European Court of Justice and a change to the rules for the place of supply. It is good that the State Secretary of Finance has updated the policy so that entrepreneurs can understand the consequences of having - or of not having - a fixed establishment. Much needed clarity has also been provided as a result of the judgments in Skandia America Corporation and Morgan Stanley.
It is important to check whether the Secretary of State of Finance's December 2020 decree will affect your situation. Naturally, we will be happy to help you with this. Please contact one of our VAT specialists.

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