

Federal tax court broadens concept of permanent establishment

Storage of personal items in designated locker at work site created permanent establishment

In a decision dated 7 June 2023 (and published on 17 August 2023), Germany's federal tax court (BFH) ruled that a UK resident individual's use of a designated locker for personal clothing and items in connection with the provision of aircraft maintenance services at a German airport, even if not used to store tools or other business equipment, was a sufficient nexus to create a permanent establishment under domestic legislation and the Germany-UK tax treaty.

Background

In the case, a UK resident individual who acted under a subcontractor arrangement for a UK resident company provided aircraft maintenance services at a German airport. The customer of the UK company was a German resident company, and the work by the UK individual was performed at the facilities of the German company at the airport. The UK individual and other freelancers were contractually granted access to certain areas of the airport including changing rooms and common areas that were leased by the UK company. In addition, every employee and freelancer of the UK company had a personal and designated locker with their name on it. To access the working areas of the airport, all individuals had to pass a security check before reaching their designated area of work.

The German tax authorities were of the opinion that the services performed by the UK individual taken together with the contractually granted access to the rented facilities of the UK company and the availability of personal locker space resulted in the creation of a PE in Germany. As a result, the tax authorities assessed income tax on the activities of the UK individual. During the appeals procedure, the lower tax court of Saxony concluded that a locker that is used only for personal items does not qualify as a fixed place of business, as it is only suitable to store personal items and, therefore, does not serve any business purpose. In addition, the lower tax court argued that the mere use of the common areas and facilities rented by the UK company at the premises of the German company at the airport is not sufficient by itself to qualify as a PE. As a result the lower tax court of Saxony decided in favor of the UK individual.

BFH decision

The BFH overruled the decision of the lower court of Saxony and decided in favor of the German tax authorities by reaching the conclusion that a PE had been established. According to the BFH, it is not decisive that business equipment is actually stored in a personal locker. The mere fact that the personal locker can be used for business purposes (e.g., storing personal clothing and items during working hours and work clothes outside of working hours) is sufficient for the creation of a PE. Furthermore, the BFH noted that a personal locker specifically designated to an individual provided a sufficient link to a fixed place (i.e., the rented facilities and common areas).

Comments

The decision of the BFH is yet another PE decision in a line of BFH decisions and shows a certain trend in broadening the interpretation of sufficient nexus in a PE context through service activities at the premises of a customer; in particular, at airport facilities in Germany. In a decision from 2019 with a similar fact pattern involving aircraft maintenance services at a German airport, the BFH decided that a personal locker that was used to store tools and other business equipment was a sufficient nexus to create a PE. In the aftermath of the decision, there was uncertainty as to whether storing business equipment in the personal locker was decisive for the creation of a PE or if the mere fact of the existence of a personal and designated locker without necessarily storing business equipment is sufficient nexus to create a PE.

The decision of the BFH also must be seen in connection with a case decided in 2008

involving a Dutch cleaning company that was performing cleaning services at a US airbase in Germany. The BFH decided that a PE is not created where activities by a service provider are carried out at the premises of a contracting partner and not sufficiently linked to a certain fixed base. In the 2008 case, the employees of the Dutch company were allowed to use common areas at the airbase, e.g., a lounge including kitchen equipment, shower facilities, and lockable lockers. Based on the BFH explanation in the case at hand, the difference between the two cases is that in the 2008 case there was no designated personal link to a fixed place, whereas in the case of the current decision there was a sufficient link in the form of the personal designated locker.

As a result of the BFH decision, nonresident companies rendering or planning to render services at facilities of their customers in Germany should review and reassess whether the facts and circumstances of their work and contractual arrangements might cause a PE risk based on this decision. Increased scrutiny of the German tax authorities in relevant cases can be expected. The analysis of PE risks is highly dependent on facts and circumstances, and the decision of the BFH demonstrates that a weak nexus can lead to the creation of a PE. It remains to be seen whether the BFH will continue its trend in broadening the interpretation of sufficient nexus in a PE context.

Your Contacts

Andreas Maywald

Client Service Executive | ICE - German Tax Desk

anmaywald@deloitte.com

Tel.: +1 212 436 7487

Merten Zenker

mezenker@deloitte.com

Tel.: +1 212 436 3947

Diese Mandanteninformation enthält ausschließlich allgemeine Informationen, die nicht geeignet sind, den besonderen Umständen eines Einzelfalles gerecht zu werden. Sie hat nicht den Sinn, Grundlage für wirtschaftliche oder sonstige Entscheidungen jedweder Art zu sein. Sie stellt keine Beratung, Auskunft oder ein rechtsverbindliches Angebot dar und ist auch nicht geeignet, eine persönliche Beratung zu ersetzen. Sollte jemand Entscheidungen jedweder Art auf Inhalte dieser Mandanteninformation oder Teile davon stützen, handelt dieser ausschließlich auf eigenes Risiko. Deloitte GmbH übernimmt keinerlei Garantie oder Gewährleistung noch haftet sie in irgendeiner anderen Weise für den Inhalt dieser Mandanteninformation. Aus diesem Grunde empfehlen wir stets, eine persönliche Beratung einzuholen.

This client information exclusively contains general information not suitable for addressing the particular circumstances of any individual case. Its purpose is not to be used as a basis for commercial decisions or decisions of any other kind. This client information does neither constitute any advice nor any legally binding information or offer and shall not be deemed suitable for substituting personal advice under any circumstances. Should you base decisions of any kind on the contents of this client information or extracts therefrom, you act solely at your own risk. Deloitte GmbH will not assume any guarantee nor warranty and will not be liable in any other form for the content of this client information. Therefore, we always recommend to obtain personal advice.