Real Estate Tax Services News

Keeping you informed

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German Federal Fiscal Court decided on the prerequisites under which a domestic service provider can constitute a permanent establishment of a non-resident landlord

In brief

Non-resident real estate investors in Germany usually rely on a longstanding jurisprudence that by managing German real estate from abroad no permanent establishment (PE) is established in Germany. Now, the German Federal Fiscal Court (BFH) has published its decision on the question whether and under which prerequisites a service provider's presence in Germany can constitute a permanent establishment of a non-resident landlord in Germany (ruling of 23 March 2022, III R 35/20). By rejecting the decision of the Lower Tax Court of Brandenburg (FG Berlin-Brandenburg, ruling of 21 November 2019, 9 K 11108/17) the BFH confirmed that in such cases a PE may only be assumed under exceptional circumstances.

In detail

In its ruling the BFH reiterated the general principles that a mere ownership of German real estate does not constitute a permanent establishment of the non-resident landlord in Germany for corporate income tax and trade tax purposes as long as the non-resident landlord does not perform other services or operations from a permanently available German place of business.

According to the ruling, contractual or de facto arrangements with a third party as a service provider (property/asset manager), can only constitute a permanent establishment of the non-resident landlord under certain circumstances:

- The premises of such a service provider can constitute a permanent establishment of the non-resident landlord if the landlord is authorised to utilise the premises (offices or any other facilities) of the service provider for the operation of his own business or where employees of the landlord operate from this premise on behalf of the owner.
- If no right of utilisation is agreed, the premises of the service provider can still qualify as permanent establishment of the non-resident landlord if the landlord is able to operate its business from such premises of the service provider by contractually assigning tasks via the service provider's personnel and infrastructure. However, such operation of the landlord's business requires a lasting supervision. This supervision can be exercised by having the same persons act as management body of both the landlord and service provider, or if the landlord exercises this supervision on the premises of the service provider.
  In contrast, a mere supervision of the quality of services rendered by such a non-resident landlord from its own premises outside of Germany would not constitute such a permanent establishment in the facilities of a service provider.
- However, even when respecting the different roles and spheres in a contractual arrangement with a service provider, it has to be analysed whether the non-resident owner de facto manages the asset from a German place of business, i.e., where a place of business outside of Germany is not available (letter box entities) or not actually being used when making the business decisions.
- In order to determine whether the business of the respective landlord was operated from within Germany for other reasons, the BFH referred the underlying case back to the lower court as the facts of the underlying case had not been sufficiently explored. The FG will have to make a new decision considering the BFH guidelines.

Our view

The decision of the Federal Fiscal Court confirms the practice established over the last decades, describes however clear principles for rather exceptional circumstances in which a non-resident landlord runs the risk to constitute a German PE. These principles should be strictly adhered to.

Non-resident landlords should always closely monitor and document their contractual and factual arrangements and the execution of decisions from their own office to prevent any PE issues.

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