

VAT Alert: The French Supreme Court refers to the international definitions of permanent establishment



The French Supreme Court has just refined its definition of permanent establishment in France for VAT and corporate income tax (CIT) purposes (CE, December 11, 2020, No. 420174, Min. c/ Société Conversant International Ltd).

In this case, an Irish company, named Valueclick International Ltd. at the time of the dispute, carried on an online advertising business in France through its sister company then named Valueclick France.

The two companies had entered into a service agreement under which the French company provided marketing assistance services consisting of acting as a representative of Valueclick International by identifying, prospecting and reporting potential customers.

The French tax authorities considered that Valueclick International carried on an activity in France subject to VAT and CIT through a permanent establishment set up by Valueclick France.

The French Supreme Court, ruling on the case, confirms the position of the French tax authorities.

With respect to VAT, it should be recalled that pursuant to article 192a of the VAT Directive, and articles 53.1 and 53.2 of the Council implementing regulation (282/2011), and the case law of the ECJ *Berkholz* (July 4, 1985, C-168/84) and *Welmory* (October 16, 2014, C-605/12), in order for a permanent establishment to be set up in France, the French company must have the human and technical resources enabling it to provide services autonomously.

The French Supreme Court states that these two conditions are met since the employees of the French company could decide to sign a contract with the advertiser and that they have access to the data centers of the group located in the US (creation, configuration and management of the customer account), which allow them to conclude contracts with the advertiser customers of the Irish company, without the specific intervention of the foreign companies of the group.

With respect to CIT, has a permanent establishment in France within the meaning of the Franco-Irish Convention of March 21, 1968 a company resident in Ireland, which uses the services of a non-independent person ordinarily exercising powers in France enabling it to engage in a commercial relationship relating to transactions constituting its own activities.

The French Supreme Court rules that a French company constitutes a permanent establishment of the Irish company if, as presented by the Irish company, it has the power to negotiate contracts with the Irish company's customers, which enables it to decide in the usual way on transactions that the Irish company merely endorses (by a signature that is automatic in nature), even if the French company does not formally conclude the contracts.

The French Supreme Court refers to the definition of permanent establishment in paragraphs 32, 1 and 33 of the commentaries to the OECD Model Convention published respectively on January 28, 2003 and July 15, 2005, which state that a permanent establishment is a dependent agent who has powers that it habitually exercises that enable it to conclude contracts in the name of the foreign company, even if those contracts are not actually concluded in the name of the foreign company.

This decision makes it possible to consider that companies in the digital sector may, in certain cases, have a permanent establishment in France, within the framework of current French and international tax law.

While this case has similarities with the Google case (CAA Paris, April 25, 2019, No. 17PA03067 and No. 17PA03068), it nevertheless presents differences, since the employees of Google France were contractually prohibited from negotiating contracts with the Irish company's customers. Moreover, in the Google case, the French tax authorities had not demonstrated that the signing of the contracts by the Irish company was purely formal.

Authors



Dominique Villemot
dominique.villemot@villemot-wts.com
T +33 1 45 08 44 07

Villemot WTS
60 rue Pierre Charron
75008 Paris
www.villemot-wts.com



Nathalie Lay
nathalie.lay@villemot-wts.com
T +33 1 45 08 44 07

Villemot WTS
60 rue Pierre Charron
75008 Paris
www.villemot-wts.com



Claire Orange
claire.orange@villemot-wts.com
T +33 1 45 08 44 07

Villemot WTS
60 rue Pierre Charron
75008 Paris
www.villemot-wts.com

About WTS Global

With representation in over 100 countries, WTS Global has already grown to a leadership position as a global tax practice offering the full range of tax services and aspires to become the preeminent non-audit tax practice worldwide. WTS Global deliberately refrains from conducting annual audits in order to avoid any conflicts of interest and to be the long-term trusted advisor for its international clients. Clients of WTS Global include multinational companies, international mid-size companies as well as private clients and family offices.

The member firms of WTS Global are carefully selected through stringent quality reviews. They are strong local players in their home market who are united by the ambition of building a truly global practice that develops the tax leaders of the future and anticipates the new digital tax world.

WTS Global effectively combines senior tax expertise from different cultures and backgrounds and offers world-class skills in advisory, in-house, regulatory and digital, coupled with the ability to think like experienced business people in a constantly changing world.

For more information please see: wts.com

Imprint

Villemot WTS
60 rue Pierre Charron – 75008 Paris
France
T +(33) 1 45 08 44 07 | F +(33) 1 45 08 44 24
www.villemot-wts.com / cabinet@villemot-wts.com

The above information is intended to provide general guidance with respect to the subject matter. This general guidance should not be relied on as a basis for undertaking any transaction or business decision, but rather the advice of a qualified tax consultant should be obtained based on a taxpayer's individual circumstances. Although our articles are carefully reviewed, we accept no responsibility in the event of any inaccuracy or omission. For further information, please refer to the author.