

## THE FRENCH ADMINISTRATIVE SUPREME COURT CLARIFIED THE NOTION OF PERMANENT ESTABLISHMENT

The French Supreme Court ruled recently on the **characterization of a French permanent establishment when a French entity, without formally signing the contracts itself, usually decides whether or not to conclude such contracts, that a foreign company merely endorses and which, when so endorsed, commit it.** (*Valueclick CE, 11th December 2020, N°420174, Min. c/ Société Conversant International Ltd*),

This case presents a particularity as it concerns VAT the digital activities and the remote process and must be analysed in detail in order to prevent reassessments with potential penalties This case law could imply modification of organisation in international groups carrying out digital activities

### The Case:

The case involves two companies. The first one, Valueclick International Ltd, carries out an activity of digital marketing. It has its headquarter in Ireland, and thus, is not subject to corporate tax and VAT in France.

The second one, Valueclick France, has a contract with the Irish company for the provision of the following services: marketing assistance, management and back office services, administrative assistance including accounting and human resources. The French company is paid according to cost plus contract, i.e. receives reimbursement plus 8% of those expenses.

### Regarding Corporate Income Tax:

The decision stated that can be considered as a permanent establishment an entity settled in France that has the usual power to decide to contract in the name of an Irish company, the latter only ratifying those decisions.

The French Administrative Supreme Court stated that the French-Irish Double Tax Treaty must be interpreted in the light of OECD commentaries that provide that a dependant agent soliciting and receiving orders, as well as a person authorized to negotiate all the details of a contract, can constitute a permanent establishment.

This decision shows the possibility to interpret provisions of a double tax treaty in the light of OECD commentaries published after the adoption of such treaty in certain circumstances and as an exception.

Considering OECD commentaries, the French Administrative Supreme Court considered that although the Irish company was setting the standard forms of contract and the pricing terms, the decision to conclude a contract with a client and all the work relating to the negotiation and the establishment of the contracts was carried out by the French entity, the Irish company was merely approving these contracts automatically on a routine basis.

### **Regarding Value Added Tax:**

The French Administrative Supreme Court stated that the French entity had sufficient human and technical resources to provide services to the Irish company autonomously and without any help coming from the Irish company, and considered the existence of a VAT French PE of the Irish company through its French subsidiary.

In this case, and unlike usually, the French Administrative Supreme Court did not look for the location of the provider but for the location of the provision of services, to establish whether or not the VAT was accountable for in France.

The Paris Administrative Court of Appeal will have to review the matter in the next months in the light of the interpretation given by the French Supreme Court.

Given this decision, some of companies that were not, so far, considered as permanent establishments can now be considered as such. It is important to note that the requalification in a permanent establishment can lead in France to the payment of penalties that can go up to 80% of the tax considered as due by the French tax authorities.

However, the case-by-case analysis of the existence of a permanent establishment remains necessary to insure a proper legal characterization.





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