

Administrative Court – Appeal decision on US branches

On 12 March 2026, the Luxembourg Administrative Court of Appeal (the “Administrative Court” or the “Court”) rendered two appeal decisions concerning whether a taxpayer’s US branch constituted a permanent establishment (“PE”) for FYs 2015-2018 under the Luxembourg-United States double tax treaty (the “Luxembourg-US DTT”) (Cour administrative, 12 Mars 2026, n° 53207C; Cour administrative, 12 Mars 2026, n° 53208C). Given the similarity of the facts and the conclusions reached by the Court, this article will focus solely on decision n° 53207C.



The taxpayer set up a US branch in early 2014 to manage and administer intra-group financial assets. It entered into a services agreement with its US parent under which “personnel” (i.e. a single branch manager) was seconded and “adequate office space” was provided at the parent’s New York premises.

In addition, an internal management arrangement contemplated that the Luxembourg head office would assume, for a fee, a substantial share of the US branch’s functions (including general management and advisory support, finance and accounting) to support day-to-day operations and compliance. The taxpayer later signed a Global Services Agreement with the parent for management and technical services.

This led the tax office to consider that most of the US branch’s intended activities were contractually transferred to the taxpayer, who in turn delegated part to its US parent. As a result, in January 2020, the tax office decided to initiate a post-assessment review (“contrôle ultérieur”) under § 100a(2) of the General Tax Law (Abgabenordnung, “AO”), requesting detailed information on the US branch and intra-group financing. Following exchanges with the taxpayer that clarified key points, the tax authorities ultimately decided to deviate from the position taken in the taxpayer’s returns. The authorities refused to recognize the US branch as a PE under Article 5 of the Luxembourg-US DTT¹⁾, notably because:

- They considered that key functions and decision-making were effectively handled by the Luxembourg head office and/or the US parent.
- The branch lacked autonomous on-the-ground activity and authority.

In short, the treaty’s two key criteria – (i) fixed place of business and (ii) business actually carried on through that place – were at the heart of the dispute.

As a result, the related income and assets were treated as fully taxable in Luxembourg.

In February 2021, the taxpayer filed an administrative claim. The Director of the direct tax authorities rejected it, concluding that there was no US PE. The taxpayer then brought the case before the Administrative Tribunal (the “Administrative Tribunal” or “Tribunal”), which dismissed the case on 6 June 2025 (Tribunal administratif, 6 juin 2025, n°47426) for the same reasons.

- On one hand, the Tribunal considered that internal documents alone were not sufficient to prove the existence of a fixed place of business in the US. The Tribunal also found that the photos of the office space (taken after the closure of the branch) lacked probative value, as they failed to establish a clear link between the premises and either the taxpayer or its branch.

- On the other hand, the Tribunal considered that the taxpayer had not provided sufficient evidence of any effective activity being carried out in the US through the branch during the relevant years.

Dissatisfied with the outcome, the taxpayer ultimately lodged an appeal with the Administrative Court.

Decision of the Court

The Administrative Court framed the case around the two above-mentioned criteria: first, whether a fixed place of business existed; second, if so, whether it carried on any activity. The case therefore mainly revolved around the interpretation of Article 5 of the Luxembourg-US DTT and § 16 (5) of the Tax Adaptation Law (Steueranpassungsgesetz, “StAnpG”) which define the PE concept. It is worth noting that, in the event of divergence, the judges gave precedence to the former over the latter, in accordance with the principle of prevalence of international law over domestic law. The judges also disregarded arguments based solely on the provisions of the StAnpG. Because the taxpayer sought a treaty exemption, it bore the burden of proof under Article 59 of the law of 21 June 1999²⁾.

With respect to the fixed place of business

On the first criteria – the existence of a fixed place of business – the Court sided with the taxpayer (disagreeing with the Tribunal’s stricter view). Leaning on the OECD Commentary, it confirmed that a place of business can exist within another enterprise’s premises (the US parent in the case under review) if space is at the taxpayer’s disposal with some degree of permanence; ownership or a direct lease isn’t required. For intra-group financing and asset-holding, the Court also acknowledged that limited physical means could suffice: a contractually provided, equipped office may satisfy the “place of business” test – subject to proving that business was actually carried on through that place.

In the case under review, the judges observed that:

- the services agreement with the US parent provided an “adequate office space” in New York and seconded personnel who remained employed and paid by the US parent (later recharged on a cost-plus basis) but worked under the branch’s supervision.
- the branch address was regularly mentioned on internal documents and annual accounts, and the Court declined to discard ex-post photos and office plans merely because they were prepared for the dispute, noting no “manifest inconsistency” between them.
- finally, a bank letter misdated “2013” was credibly presented as a 2014 confirmation shortly after the bank account was opened and was accepted as evidence that a US bank account existed for the branch.

By contrast, the EIN (Employer Identification Number) application which the appellant also put forward in its defense carried little weight because it didn’t mention the branch, and the absence of US tax assessments was not probative given there was no US filing obligation. Nevertheless, as noted above, several other documents submitted by the taxpayer were sufficient in this case to allow the Court to conclude that the ap-

pellant had a fixed place of business in the US during the relevant fiscal years.

With respect to the carrying on of business

On the second condition however – whether the business was actually carried on through that place – the Court agreed with the Tribunal and the tax authorities: form did not match substance.

Notably, the judges observed that:

- a significant share of day-to-day and support work (management, administration, accounting, bank liaison, cash management, reporting) had been shifted to the Luxembourg head office under the internal management arrangement. They highlighted that there was a “contradiction” between the establishment of the US branch to manage assets allocated to it (with the US parent providing resources) and the subsequent commitment for the Luxembourg head office to provide most of the services required for that management.

- Moreover, the transfer pricing study, which documented the services to be rendered by the Luxembourg head office to the US branch, indicated that the latter was expected to assume “market, currency and debtor default risks, and to perform the bulk of cash management as well as the financial and tax functions related to its activity” while, by contrast, the head office was to be responsible “for the execution of the group’s strategy, governance, global financial and tax functions, and relationships with third parties, as well as being primarily responsible for the negotiation, conclusion and execution of the financial instruments allocated to the US branch, employment policy, legal and financial regulatory matters, and information systems relating to the management of the company”. The transfer pricing study further portrayed the branch manager as largely “on call.”

- The operational trail in the US was limited: there were no emails or records of regular branch-level decision-making; board minutes and “US Branch Update” decks reflected limited, mostly passive activity tied to allocations decided in Luxembourg; letters signed by branch managers implemented headquarters’ instructions.

- Banking reality reinforced the point: the Court notably observed that the head office opened the branch account and that statements were sent to Luxembourg. It further noted that there was no evidence of US-originated instructions or exercised signatory powers. Assets at the branch were few and often temporary, with long stretches showing no significant loans or transactions. Mere allocations/reallocations, receipts of interest, and cash-pooling/balances did not add up to ongoing asset management on US soil.

The Court summarized that the overall record suggested a formal appearance (“*apparence formelle*”) of US-branch activity without real substance and, in particular, no demonstrated decision-making autonomy³⁾. The Court concluded that the “activity through the fixed place” condition was not met. Hence, the US branch should not be regarded as constituting a PE. It follows that the appeal was dismissed and the Tribunal’s judgment confirmed. The Court accepted that a fixed place existed, thus disagreeing with the judges of first instance on that point, but held that the taxpayer did not prove business was actually carried on through that place.

Takeaways

As discussed in our previous articles, the recognition of a foreign PE is a recurring theme⁴⁾ – and it remains relentlessly fact-driven. Consistent with other recent pieces of case law on the matter, this case confirms that jurisdictions focus on a “*faisceau d’indices*” (a bundle of economic indicators) anchored in economic reality rather than the formal set-up. Labels, internal slides

and formal structures help only insofar as they align with how the business actually operates day-to-day.

The two conditions under Article 5 of the Luxembourg-US DTT are distinct: there must be a fixed place of business and the enterprise must carry on its business through that place. They do not necessarily rise or fall together, however. While each criterion can be decisive on its own (if there is no fixed place of business, the second condition will not be examined), the second is often the harder one: activity, decision-making authority, and an on-the-ground cadence must be evidenced in the jurisdiction where the PE is claimed to sit.

Regarding the fixed place criterion, it remains something of a grey area as the Tribunal and the Administrative Court reached opposite conclusions in this respect (although the latter’s position should logically prevail), showing that reasonable decision-makers can differ on when space is “at disposal” with sufficient permanence. Based on the case at hand, we understand that a fixed place can be proven without a lease in the taxpayer’s name, as long as there are consistent, credible intra-group materials (e.g. services agreement granting office access; recurring address across the file).

Finally, it is important to note that where the record reads like local activity on paper but lacks evidence of decision-making autonomy on the ground, PE recognition fails. The Court’s formal appearance (“*apparence formelle*”) observation is a helpful shorthand for how close the scrutiny can be. It should also be noted that support functions can be partially performed by related parties without negating the PE, as long as the decision-making and control remain at local level.

The case also made it clear that PE positions should line up with transfer pricing analyses, governance documents and banking mandates. If materials portray local personnel as “on-call” – i.e. available as needed – while authority and execution sit at head office, the Article 5 assessment will tend to follow that reality.

Emilien LEBAS,

Partner, Head of International Tax, Tax controversy & dispute resolution leader, KPMG Luxembourg

Valentine PLATEAU,

Manager, International Tax, KPMG Luxembourg

1) Article 5 of the Luxembourg-US DTT: “1. Au sens de la présente Convention, l’expression « établissement stable » désigne une installation fixe d’affaires par l’intermédiaire de laquelle une entreprise exerce tout ou partie de son activité.

2. L’expression « établissement stable » comprend notamment :

a) un siège de direction
b) une succursale,
c) un bureau,
d) une usine,
e) un atelier et
f) une mine, un puits de pétrole ou de gaz, une carrière ou tout autre lieu d’extraction de ressources naturelles.
3. Un chantier de construction ou de montage, une installation de forage ou un navire de forage utilisés pour l’exploration de ressources naturelles ne constitue un établissement stable que si la durée du chantier, ou la durée d’utilisation de l’installation ou du navire dépasse douze mois. (...) »

2) Loi modifiée du 21 juin 1999 portant règlement de procédure devant les juridictions administratives, Mémorial An° 98/1999, p 1892, 26 juillet 1999.

3) Original text in French: « L’impression nette qui se dégage de tous les éléments relevés jusqu’à présent est que le groupe s’est efforcé de donner une apparence formelle de l’existence d’une activité effective réalisée au niveau de la Succursale USA, mais que, finalement, la description sur le papier n’a pas vraiment été suivie d’effet en pratique, l’appelante ne démontrant notamment pas l’« autonomie décisionnelle » dont aurait joui la Succursale USA. »

4) On that topic, please refer to our other articles:

- E. Lebas and V. Plateau, “Administrative court judgment on tax ruling and permanent establishment”, AGEFI Luxembourg, October 2023, Page 8.

- E. Lebas and V. Plateau, “Administrative court of appeal judgment on US branch”, AGEFI Luxembourg, March 2024, Page 40.
- E. Lebas and V. Plateau, “Administrative Court – Judgment on requalification of interest-free loan as hidden capital contributions”, AGEFI Luxembourg, May 2025, Page 38.