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The German-Polish Tax Problems of Cross-Border Workers in the COVID-19 Pandemic – When the Remedy is Worse than the Problem¹

Abstract: The article pertains to the tax issues arising from the COVID-19 pandemic in respect of cross-border workers. The main issue is the impact of the restriction in cross-border movements during the pandemic on the determination of the place of work. The authors refer to two situations. The first is when a Polish worker employed by a Polish employer and working abroad cannot return to Poland. The second is when he or she performs work at home in Poland instead of at the normal place of work abroad. The authors consider the legal fiction of carrying out work in the place where it would have been done before the pandemic as a rational solution. However, they are strongly critical of the introduction of such solution via the Mutual Agreement.

Keywords: COVID-19, double taxation, employment income, mutual agreement procedure (MAP)

1 The article is, inter alia, the result of research carried out by Wojciech Morawski under the grant funded by the National Science Centre (Poland) No. 2019/35/B/HS5/00554 “Interpretation of tax law in the context of passing time”.

Introduction

The actions taken by the Polish authorities in order to fight against the COVID-19 pandemic did not differ significantly from the actions taken by other European Union (EU) member states. However, during the first stage of the pandemic, the Polish authorities appear to have responded faster and more sharply than other EU member states. The radical measures included a practical closure of the country.

They led to a situation whereby cross-border employees, usually Poles working in Germany, had to choose whether to work in Germany or stay with their families in Poland. The restrictions on mobility were onerous, even when crossing the border was not fully prohibited, and they included a requirement to remain in quarantine or to have a negative COVID-19 test following one's return to their state of residence. Consequently, it was more convenient for many employees and employers to switch to remote working systems rather than to maintain traditional methods. There was thus a transition to remote working that was forced by circumstances beyond the control of employers and employees, i.e., the pandemic. This was distinct from remote working transitions typical of so-called digital nomads that were performed with the mutual consent of employees and employers.²

In this article, we aim to analyse an international (Polish-German) solution of overarching tax questions that arise in respect of the cross-border workers forced to work remotely during the pandemic.

The solution was introduced by these member states inter alia via the "Mutual Agreement between the Competent Authorities of Germany and Poland according to paragraph 3 of Article 26 of the Agreement between the Federal Republic of Germany and the Republic of Poland for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital, signed in Berlin on 14 May 2003, with respect to the application of paragraph 1 of Article 15 on cross-border workers and of paragraph 1 of Article 19 on government officials working cross-border"³ (hereinafter the 'Polish-German Mutual Agreement').

1. Types of Problems Faced by the Polish Cross-border Workers in Germany

Poland and Germany are linked very closely by economic and social ties, including the free movement of people. The circumstances are favourable for such

2 See more T. Makimoto, D. Manners, *Digital Nomad*, Wiley, 1997; S.V. Kostić, In Search of the Digital Nomad: Rethinking the Taxation of Employment Income under Tax Treaties, "World Tax Journal" 2019, no. 5, pp. 189–225.

3 This document is available at: <https://www.podatki.gov.pl/media/6433/agreement-ca-niemcy.pdf> (1.06.2021).

movement as there are major cities on both sides of the Polish–German border. A considerable difference between the level of earnings in Poland and the level of earnings in Germany leads many Poles to seek work in Germany. From a cross-border tax perspective, this situation is regulated by the Agreement Between the Federal Republic of Germany and the Republic of Poland for the Avoidance of Double Taxation With Respect to Taxes on Income and on Capital.⁴ This treaty is quite faithfully based on the Organisation for Economic Co-operation and Development (hereinafter the ‘OECD’) Model Tax Convention on Income and on Capital (hereinafter the ‘OECD MTC’).⁵ According to Article 15(1) of the treaty, an employee’s remuneration is taxable only in the individual’s state of residence, unless the employment is performed in the other contracting state. If the work is so performed, the remuneration received for it may be taxed in this second state, the so-called source state. Article 15(2) of the Polish-German Tax Treaty, however, indicates that notwithstanding the above provision, remuneration that a person resident in a contracting state receives from employment carried out in the other contracting state shall be taxable only in the first state if:

- a) the recipient resides in the other state for a period or periods not exceeding 183 days in total during the 12-month period beginning or ending in the relevant tax year,
- b) the remuneration is paid by or on behalf of an employer who is not a resident of the other state and
- c) the remuneration is not borne by an establishment or permanent establishment that the employer has in the other state.

Taxpayers who worked in states other than their state of residence could find themselves in either of two situations that caused tax problems. Such taxpayers were often Polish employees who worked for German or Polish employers in Germany due to the aforementioned difference in earnings between the countries.

The first situation (hereinafter: “Case One”) pertains to a Polish employee who worked in Germany for a Polish employer based on the assumption that Article 15(2) of the Polish–German Tax Treaty would apply to this employee and thus the employee would be taxed only in their country of tax residence, i.e., Poland. In such a situation, it would be the state of tax residence for both the employee and

4 The Agreement between the Federal Republic of Germany and the Republic of Poland for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital signed at Berlin on 14 May 2003, entered into force on 1 January 2015, Journal of Laws [*Dziennik Ustaw*] 2005, item 90, hereinafter the ‘Polish–German Tax Treaty’, <https://www.podatki.gov.pl/media/1836/niemcy-konwencja-tekst-polski-niemiecki.pdf>.

5 OECD, Model Tax Convention on Income and on Capital (Full Version), https://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-full-version_9a5b369e-en (1.06.2021).

the employer. However, due to pandemic-related restrictions, the employee became ‘stuck’ in their country of work (i.e., Germany) and exceeded the 183-day period of stay, which would have normally resulted in taxation in the source country (i.e., Germany).⁶

The second situation (hereinafter: “Case Two”) is germane to a Polish employee usually commuted to their place of work in the employer’s source state (Germany) but remained a resident of the other state (i.e., Poland). As the individual worked for an employer in the source state (Germany), the Polish–German Tax Treaty indicated that the employee’s income was to be taxed both in the state of work (i.e., the source state, Germany) and in the individual’s state of residence (i.e., Poland).⁷ A problem arose when, due to the pandemic response’s mobility constraints, the employee could not travel to his or her usual place of work (i.e., Germany) and agreed to work remotely. This meant that taxation in the state where the employee was staying was required because the individual performed their work there, i.e., in Poland, their state of tax residence.

This caused practical problems, particularly in relation to taxation in the source state. The employer, who usually made advance income tax payments to the tax authority, was not a resident of the state where the tax authorities relevant for the taxation of employment income operate, so the employee was required to make the settlements on their own. A problem also arose in which an employee’s remuneration was to be taxed in Poland *and* deducted from the employer’s income in Germany. Yet, Article 15 of the Polish-German Tax Treaty was based on the principle that an employee’s income should be taxed in the state in which the remuneration was deductible from the employer’s income, i.e., in Poland.

2. Case One: the Assistance From the Commentary on Article 15 of the OECD MTC and the OECD COVID-19 Pandemic Guidance

The Polish–German Mutual Agreement does not apply to the Case One, i.e., when a Polish employee worked in Germany for a Polish employer. This is most likely due to the fact that the problem can be solved by applying § 5 of the Commentary to Article 15 of the MTC, as suggested by the OECD COVID-19 Pandemic Guidance (1/2021), i.e., if the days of sickness ‘prevent the individual from leaving and he would

6 See Article 15(2)(a) of the Polish-German Tax Treaty. The OECD defines such employees as ‘stranded workers’. See OECD, *The Updated Guidance on Tax Treaties and Impact of the COVID-19 Pandemic*, 15 (21 January 2020), <https://www.oecd.org/tax/treaties/guidance-tax-treaties-and-the-impact-of-the-covid-19-crisis.htm> (hereinafter the ‘OECD COVID-19 Pandemic Guidance (1/2021)’).

7 See Article 15(1) of the Polish German Tax Treaty.

have otherwise qualified for the exemption, they *exceptionally* do not count towards the days of presence test in Article 15(2)(a).

The OECD argued that this exception may cover many situations driven by the COVID-19 pandemic, such as governments banning travelling, and cases where it is, in practice, impossible to travel due, for example, to cancellation of flights. The OECD concluded that 'where an employee is prevented from travelling because of COVID-19 public health measures of one of the governments involved and remains in a jurisdiction, it would be reasonable for a jurisdiction to disregard the additional days spent in that jurisdiction under such circumstances for the purposes of the 183 day test in Article 15(2)(a) of the OECD Model'.⁸

Thus, a period of 183 days spent in Germany by a Polish employee in order to perform work there does not include the days the employee has to spend in Germany due to a ban on travel to, *inter alia*, Poland, imposed by both or one of the states in response to the COVID-19 pandemic.

Unfortunately, it is difficult to find grounds for such a statement in the content of the Polish–German Tax Treaty and in Article 15 of the OECD MTC. The excerpt from the Commentary on Article 15 in the OECD MTC that is referred to above⁹ is an example of the OECD position going beyond the clear wording of the MTC. This extension appears to violate the general rule for the interpretation of international treaties in Article 31(1) of the Vienna Convention on the Law of Treaties¹⁰ (hereinafter the 'VCLT') under which a dominant role is attributed to linguistic interpretation, in the sense that contextual and purposive interpretation cannot alter a clear understanding of the text resulting from linguistic interpretation.¹¹ Likewise, the principles of specificity and exclusivity for the statutory rank of tax regulations in Article 217 of the Constitution of the Republic of Poland, dated 2 April 1997¹² (hereinafter 'the Constitution') were compromised by such an extensive interpretation.

Moreover, the statement of the OECD COVID-19 Pandemic Guidance (1/2021) constitutes an over-expansive interpretation of the Commentary on Article 15(1) in the MTC, as it goes beyond the wording of that provision. The fact that such an extensive interpretation is arguably quite reasonable in the context of the COVID-19 pandemic does little to alter its negative assessment from a legal perspective. Furthermore, it should be noted that the OECD position does not constitute a supplement for the Commentary to the OECD MTC. The OECD COVID-19 Pandemic Guidance (1/2021) is a document that has not been adopted in the course

8 See the OECD COVID-19 Pandemic Guidance (1/2021), §§ 54–56.

9 That is, the Commentary to Article 15 of the OECD MTC 2017, §5.

10 Introduced in Vienna, Austria on 23 May 1969. *Journal of Laws*, No. 74, item 439 (1990).

11 R. Gardiner, *Treaty Interpretation*, Oxford University Press 2008, p. 190.

12 *Journal of Laws*, No. 78, item 483.

of amending Commentaries to the MTC. It is merely ‘advice’ from the OECD’s Secretariat concerning how to address problems related to the application of tax treaties during the COVID-19 pandemic based on the MTC.¹³

3. Case Two: The Polish–German Mutual Agreement

As mentioned in the Introduction, German and Poland decided to provide specific solutions for some of problems of cross-border workers related to the COVID-19 by means of the Polish–German Mutual Agreement. This agreement introduced a legal fiction of performing work in the previous country of employment in order to maintain the taxation rules that were in force before the outbreak of the COVID-19 pandemic. The adopted rules were applied for the purpose of Article 15(1) and Article 19(1) in the Polish–German Tax Treaty.

The OECD COVID-19 Pandemic Guidance (1/2021) recommends the use of solutions such as the Polish–German Mutual Agreements to solve tax issues concerning the COVID-19 pandemic.¹⁴ There is no doubt that in this new situation, it is worth working out bilateral solutions to avoid problems, and this is the path the German government has broadly decided to follow. It has entered into negotiations with all its neighbouring countries (Austria, Belgium, France, Luxembourg, the Netherlands, Poland, and Switzerland), apart from the Czech Republic, to create the legal fiction of carrying out work where it would have been carried out had the COVID-19 impediment not arisen¹⁵ on the basis of Mutual Agreements concluded with these countries. This solution corresponds to the logic of rules for the taxation of workers’ income, i.e., a remuneration should be taxed in the state in which it constitutes a deductible tax cost and therefore reduces the tax base of the employer.¹⁶ If a Polish resident were to perform work for a German resident while residing in Poland, the employee’s salary would be taxed in Poland and deducted by the employer in Germany.

The Polish–German Mutual Agreement stipulated that for purposes of Article 15(1) of the Polish–German Tax Treaty, ‘days of work for which wages are received and during which the employment was exercised at home (home-office-day) solely due to the measures taken to combat the COVID-19 pandemic by the German or Polish Government or their local subdivisions, may be deemed as day of work spent in the Contracting State where the cross-border worker would have exercised the employment without the measures taken to combat the COVID-19 pandemic’. The use

13 See the OECD COVID-19 Pandemic Guidance (1/2021) § 4.

14 See the OECD COVID-19 Pandemic Guidance (1/2021), § 62.

15 Ibid. § 63.

16 See L. Oats, A. Miller, E. Mulligan, *Principles of International Taxation*, Bloomsbury 2017, pp. 175–176.

of the words '*may be deemed*' means that this Mutual Agreements introduces a legal fiction, which is explicitly articulated in its wording: '*[t]his fiction does not apply to working days that would have been spent either as home-office-days or in a third State, independent from these measures*'. This legal fiction does not automatically apply to all cross-border workers under the Polish-German Tax treaty, but only if the worker (taxpayer) decides to use it. Once he or she does so, they are then obliged to apply this fiction consistently in Poland and Germany and to prepare and keep '*written confirmation of the employer which part of the home-day-office was solely due to the COVID-19 pandemic related measures*'. Finally, the MAP specifies that this fiction applies only '*to the extent that the respective wages for the days spent working at home are usually taxed by the Contracting State in which cross-border worker would have exercised the employment without the measures taken to combat the COVID-19 pandemic*'.

The scope of the Polish-German Mutual Agreement solves only the Case Two, i.e., when the taxpayer actually stays in a state other than his or her normal place of work and works remotely from their state of residence due to the restrictions caused by the COVID-19 pandemic. Considering the practical impact of that MAP, it will used most often be by a Polish employee working remotely for a German employer. When considering the fiscal interests of both states, the Polish-German Mutual Agreement is advantageous for Germany because Polish workers are usually employed in Germany there rather than vice versa.

Of course, the main benefit that should result from the Polish-German Mutual Agreement is the avoidance of tax related administrative problems by employees and employers. However, the real effects of the agreement are unlikely to be significant. It applies only to employees who can carry out their work remotely, whereas the majority of Polish cross-border workers conduct manual work that require their physical presence in Germany. Moreover, even the intended effect of the Polish-German Mutual Agreement, which is to simplify the tax treatment of cross-border workers between Poland and Germany, may not be easy to achieve in practice.

The Polish-German Mutual Agreement in fact complicates tax settlements for a significant number of Polish employees. This may pertain, for example, to employees who have partially worked remotely from the territory of another country so far, and now have to determine which days spent outside the territory of the country of usual employment (Germany) are taxable under the new rule that introduced the legal fiction. Remembering that this Mutual Agreements entered into force close to the end of the year (27 November), there are significant doubts as to whether it accounted for monthly advance payments on personal income taxes by persons who performed remote work from the territory of another state during the

year and whether, with respect to this work, it accounted for advances on personal income taxes in accordance with the principles of the Polish–German Tax Treaty.¹⁷

It should be noted that, from the perspective of employers, it is necessary to prepare appropriate documentation that enables the application of the new, special taxation rules for cross-border employees in accordance with the Polish–German Mutual Agreement. Furthermore, this Mutual Agreement imposes a requirement on employees to have written confirmations from their employers about the impossibility of performing work in the employer’s state of residence due to the COVID-19 pandemic.¹⁸ Concerns are alleviated somewhat by the fact that it is up to the taxpayer to decide whether or not to make use of the legal fiction provided for in the Polish–German Mutual Agreement. However, it forces employers to be vigilant, as they must consider the decisions of employees when settling with tax authorities. Also, it is worth remembering that the taxpayer should retain a favourable position under the mutual agreement on the basis of the principle of protection of legitimate expectations, which is generally accepted in various legal systems,¹⁹ even though this agreement is legally doubtful (as the Polish-German Mutual Agreement).

4. Legal Basis for the Polish-German Mutual Agreement

In the Polish–German Mutual Agreement, the competent authorities refer to the first sentence of Article 26(3) of the Polish–German Tax Treaty which says that (emphasis added) ‘the competent authorities of the contracting states [Poland and Germany] shall endeavour by mutual agreement to *remove any difficulties or doubts [that] may arise in the interpretation or application of the [Polish-German Tax Treaty]*’. Indeed, in Poland, as a rule, the place at which work is performed will determine the place of employment income taxation. The Commentary to Article 15(1) of the OECD MTC in § 1 clearly indicates that ‘work is exercised in the place where the employee is physically present when performing the activities for which the employment income is paid’. Hence, the Commentary adds that a resident of a contracting state who derives remuneration, in respect to the individual’s employment, from sources in the other state cannot be taxed in that other state in regard to that remuneration merely because the results of this work were exploited in that other state.

17 See J. Chorążka, K. Rzeźnicka, Nowe Polsko-Niemieckie Porozumienie Wpływa na Opodatkowanie Pracy Zdalnej Pracowników Transgranicznych, <https://studio.pwc.pl/aktualnosci/alerty/polsko-niemieckie-porozumienie-wplywa-na-opodatkowanie-pracy-zdalnej-pracownikow-transgranicznych> (4.12.2020).

18 Ibid.

19 See, for example, G. Barrett, Protecting Legitimate Expectations in European Community Law and in Domestic Irish Law, (in:) 20 Yearbook of European Law, 2001, pp. 191–243, S. Schönberg, Legitimate expectation in administrative law, Oxford 2000.

This approach is consistent with the rules applicable under domestic tax law, as they indicate that the performance of work generally involves the physical presence of an employee at their place of work²⁰. That is to say, in the absence of a physical presence in Germany, no work is considered to be conducted there by the Polish employers. A deviation from this principle would require the change in domestic tax law.

Although there have been some hesitations in case law, the prevailing view of courts is also consistent with the principle mentioned above according to which the taxation of employment income may take place only in the country in which the work is actually performed. For example, in a judgment of 22 December 2006 (Case No. BNB 2007/97), the Dutch Supreme Court held that, in relation to stand-by fees, the place of work performance is the place where the employee is present during the period for which the individual is paid – not the place where the employee would potentially perform the work. Interestingly, for the specific case this judgment concerned (i.e., editorial and TV presentation activities), this meant splitting taxation of remunerations between two countries as the taxpayer in question was in the Netherlands for a few days and in their place of residence (Mexico) for a few days.²¹

This position was also taken by the *Naczelny Sąd Administracyjny* (NSA) [Polish Supreme Administrative Court], even against the background of the Polish–German Tax Treaty. In a judgment made by the NSA on 13 May 2011 (II FSK 2165/09), it was stated (emphasis added): “The right to tax income in N. is not determined, as a rule, by the place where the employer is established, nor by the place where the results of the work are used, nor by the place where the remuneration is paid, nor by the place where the entity paying the remuneration is established. *The only criterion is the place where the work is performed.* Thus, the Court of First Instance correctly interpreted Article 15(1) of the Tax Treaty by assuming that the place of taxation of salary, wages[,] and similar remuneration from paid employment depends on the place where the work is performed. Converging views can be found in the Polish tax law literature.²²

Accordingly, although the assertions of competent authorities imply that the Polish–German Mutual Agreement removes difficulties or doubts in the interpretation or application of the Polish–German Tax Treaty, this does not appear to

20 Art. 3 (2b) (1) Personal Income Tax Act of 26 July 1991, Journal of Laws of 2021, item 1128.

21 See F. Pötgens, Stand-By Fee Taxable in Residence State Under Art. 15 of the OECD Model, “European Taxation” 2008, no. 2, pp. 85–89 and the Decision of the Netherlands Supreme Court BNB 2007/97 (22 December 2006), see: F. Pötgens, Income from International Private Employment, IBFD 2007, pp. 304–322.

22 W. Morawski, Opodatkowanie Dochodów z Pracy Najemnej w Świetle Umów o Unikaniu Podwójnego Opodatkowania (Cz. 1), “Przegląd Podatkowy” 2006, no. 9, pp. 7–8, K. Kaczor, (in:) M. Jamróży, A. Cloer (eds.), Umowa o unikaniu podwójnego opodatkowania z Niemcami, Warsaw 2007, p. 316.

be true. In fact, this Mutual Agreement even fails to confirm a certain understanding of the Treaty by providing a completely different interpretation of the provisions of Article 15 in the Polish–German Tax Treaty than that reasonably following from the Commentary to Article 15 of the OECD MTC and the prevailing case law on the tax issue in question. Most importantly, the view presented by the competent authorities is contrary to the clear wording of the Polish-German Tax Treaty. It is therefore *de facto* a change in its wording.

In the case law of the German courts, the view has been expressed that a mutual agreement may not amend a tax treaty²³. We agree with opinion of A. Rust that ‘a mutual agreement that goes beyond the possible wording of the treaty and which would change the content of the treaty is against the principle of primacy of law over administrative guidance and has to be disregarded’²⁴. Thus, even if mutual agreements are nothing unusual in the treaty practice of the OECD member states,²⁵ the Polish-German Mutual Agreement is definitely not usual insofar as it appears to have a shaky legal basis considering the situations that it purported to regulate and the method of regulation.

5. Revising the Polish–German Tax Treaty Instead of Interpreting It?

The first sentence of its Article 31(1) indicates that in order to enter an amendment of this Treaty into force, ratification is required. According to internal Polish and German legislations,²⁶ the same procedure – ratification – is required to amend each and every international treaty, including, of course, the Polish–German Tax Treaty. This Treaty itself does not introduce any separate regulations that would derogate from the principle of ratification in relation to any of its provisions. In particular, no such provisions are contained in Article 26 of the Polish–German Tax Treaty that served as a legal basis for the Polish–German Mutual Agreement.

Pursuant to Article 91(1) of the Polish Constitution, a ratified international agreement, following its promulgation in the Journal of Laws, constitutes part of the

23 BFG 10 June 2015, I R 79/13, IStR 2015, 785, quoted after: A. Rust, Germany: Taxing Right for a Golden Handshake and the Effect of a Mutual Agreement between the Competent Authorities, (in:) E.C.C.M. Kemmeren et al. (eds.), *Tax Case Law Around the Globe* 2016, pp. 219–226.

24 A. Rust, Germany: Taxing Right..., *op. cit.*, pp. 224–225.

25 See Q. Cai, P. Zhang, A Theoretical Reflection on the OECD’s New Statistics Reporting Framework for the Mutual Agreement Procedure: Isolating, Measuring, and Monitoring, “*Journal of International Economic Law*” 2018, no. 21, pp. 867–884; H. Ault, Improving the Resolution of International Tax Disputes, “*Florida Tax Review*” 2005–2006, no. 7, pp. 137–151.

26 See: Parliament’s Role in International Treaties, Bundestag, <https://www.bundestag.de/resource/blob/509982/1316a1c42f1a8ee8a04cc65640d8af40/WD-2-038-17-pdf-data.pdf>. (12.05.2021), Cf. J.Abr. Frowein, M.J. Hahn, The Participation of Parliament in the Treaty Process in the Federal Republic of Germany–Europe, “*Chicago-Kent Law Review*” 1991, vol. 67, Issue 2, available online: <https://core.ac.uk/download/pdf/217423164.pdf> (12.05.2021).

domestic legal order and is directly applicable, unless its application depends on the enactment of a statute. Furthermore, pursuant to Article 91(2) of the Constitution, an international agreement ratified with prior consent expressed in a statute takes precedence over a statute, if that statute cannot be reconciled with the agreement. International agreements on taxation require ratification with the consent of parliament *per* Article 89(1–5) of the Constitution, according to which ‘ratification of an international agreement and its denunciation [by the Republic of Poland] requires prior consent expressed by law if the agreement concerns ... matters regulated by law or in which the Constitution requires a law’.

Additionally, Article 217 of the Constitution states that ‘the imposition of taxes, other public tributes, the determination of entities, subjects of taxation and tax rates, [and] the principles of granting reliefs and remissions and categories of entities exempted from taxes shall be made by way of a law’. This leads to the conclusion that the entirety of tax regulation – including the provisions of tax treaties on the cross-border taxation of employees – must in fact be found in a law, and thus in an international agreement ratified with a parliamentary approval in the form of a statute and signed by the president of the Republic of Poland. It follows that the principle concerning the statutory levying of taxes leads to the effect that parliament also retains control over international agreements on tax issues, even if such agreements (tax treaties) do not impose taxes but rather limit tax burdens by means of various reliefs (e.g., reduced tax rates, exemptions from taxation).

The Polish constitutional provisions therefore treat an amendment to an international treaty, such as the Polish–German Tax Treaty, as the conclusion of another treaty to the extent of such amendment. To date, there has been no doubt that amendments to an international treaty must be ratified by the President with the consent of Parliament, as is the case with the conclusion of a treaty. Many tax treaties ratified by Poland have already been amended under this procedure. In fact, this procedure is regulated in Polish law in a separate act that was made on 14 April 2000, concerning international agreements.²⁷

Unfortunately, regarding the Polish–German Mutual Agreement, the legal requirements were circumvented, including those of constitutional rank, by taking ‘shortcuts’.²⁸ Bypassing the procedures provided for in the Constitution, the Polish–German Tax Treaty ratified by the President of the Republic of Poland with the consent of Parliament was amended (on the Polish side) by a deputy director of

27 Journal of Laws of 2020, item 127.

28 Although the authors are not experts on German law, it seems that similar doubts may be raised concerning the Polish–German Mutual agreement in light of the German legislative procedures accompanying the introduction and amendment of international agreements in Germany.

a department of the Ministry of Finance,²⁹ who, it should be assumed, acted under the authority of the Government. It seems that the Polish and German competent authorities took the OECD's encouragement that '[e]xceptional circumstances call for an exceptional level of coordination between jurisdictions to mitigate the compliance and administrative costs for employees and employers associated with an involuntary and temporary change of the place where employment is performed'³⁰ too literally. It does not seem correct to understand this idea as an incentive to violate the constitutional standards of any country.

Perhaps the vigilance of the authors of the Polish–German Mutual Agreement was impaired by the fact that the issue concerned only the right, not the obligation, of the taxpayer to make use of the legal fiction of performing work in the place where the individual performed it before the COVID-19 pandemic. This is, however, a weak argument for ignoring the constitutional and international requirements for changing the Polish–German Tax Treaty. The fact that the intention of the Polish–German Mutual Agreement was to introduce solutions favourable to the taxpayer (although it was not entirely successful) is irrelevant. The mechanism of tax treaties is the fact that, as a rule, they only make life easier for taxpayers and are more beneficial to them than no treaties at all. Despite this, to date, no one has considered the idea of disregarding legal principles stemming from the supreme law in Poland (the Constitution) and from international law (the VCLT) under the justification of the alleged good of the taxpayer.

The standard procedure for amending a tax treaty cannot be replaced by the use of the Mutual Agreement, as this procedure is not for amending a treaty. It is merely for resolving difficulties and ambiguities in the understanding and application of tax treaties. The provisions of the tax treaties governing it, including the first sentence of Article 26(3) of the Polish–German Tax Treaty, are subject to the same rules of interpretation, codified primarily in Articles 31–33 of the VCLT, as are any other provisions of the tax treaty in question.

The decision by the Polish and German competent authorities has consequences that can contribute to legal chaos. The Polish–German Tax Treaty was published in the appropriate manner in the official journal of promulgation, which in Poland is the Journals of Laws. To every tax lawyer and taxpayer in Poland, it is clear that what is published in the official promulgating texts, such as the Journal of Laws, is law. Mutual Agreements are not published in Poland in the Journal of Laws [or in any

29 This concerns the Pole, Filip Majdowski, and the German, Silke Bruns, Oberregierungsrätin [Senior Councillor] for the Federal Ministry of Finance in Germany, as seen in the signatures under the Polish–German Mutual Agreement, https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerecht/Staatenbezogene_Informationen/Laender_A_Z/Polen/2020-12-08-Konsultationsvereinbarung-DE-PL-Covid-19-Besteuerung-Grenzpendler.html (20.05.2021).

30 The OECD COVID-19 Pandemic Guidance (1/2021), § 62.

official promulgating journal. To prove it, the Polish–German Mutual Agreement was published only on the website for Poland’s Ministry of Finance.³¹

Moreover, Article 6 of the Polish Language Act of 7 October 1999³² provides that ‘international agreements concluded by the Republic of Poland should have the Polish language version as the basis for their interpretation, unless specific provisions provide otherwise’. Similarly, Article 27 of the Constitution indicates that ‘[i]n the Republic of Poland, the official language is Polish’. However, the Polish–German Mutual Agreement was drafted and published on the website for Poland’s Ministry of Finance in English exclusively (sic!). No version of the Polish–German Tax Treaty was ever drafted in English (it was drafted solely in Polish and German).³³ In comparison, the German government’s website published information on the Polish–German Mutual Agreement, including the content of the agreement, in the official language of Germany, which is German.³⁴ This shows far-reaching negligence by the Polish competent authority.

The contents of the Polish–German Mutual Agreement raise further doubts as to its validity: “(5) This mutual Agreement shall apply to days in the period from 11th March 2020 until 31st December 2020. From 31st December 2020 onwards, the application of this Mutual agreement will automatically be extended, unless it is terminated by either Competent Authority of a Contracting State.

6) This Mutual Agreement shall enter into force on the day following its signature. It can be terminated unilaterally by the Competent Authority of the Contracting States by giving notice to the competent Authority of the other Contracting state at least one week prior to the need of a calendar month. This Mutual Agreement shall remain applicable the following calendar month after being terminated by either Competent Authority of a contracting State.”

How can taxpayers determine whether a contract has been renewed? If the Polish-German Mutual Agreement was the law, an individual would learn about it in the Journal of Laws. However, in relation to the Polish–German Mutual Agreement, the individual must search for it on the website of the Poland’s Ministry of Finance and attempt to interpret and understand rules written in a language that is neither official in Poland nor it is a language of law in that country.

31 <https://www.podatki.gov.pl/media/6433/agreement-ca-niemcy.pdf> (1.06.2021).

32 Journal of Laws 2019, item. 1480.

33 <https://www.podatki.gov.pl/media/1836/niemcy-konwencja-tekst-polski-niemiecki.pdf> (1.06.2021).

34 https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Polen/2020-12-08-Konsultationsvereinbarung-DE-PL-Covid-19-Besteuerung-Grenzpendler.html (1.06.2021).

Conclusions

The solution to the Case One (when a Polish employee works in Germany for a Polish employer) says that a period of 183 days spent in Germany by a Polish employee in order to perform work there does not include the days the employee has to spend in Germany due to the restriction to crossing borders, for example with Poland, under the COVID-19 pandemic. This solution triggers doubts, as it constitutes a very extensive interpretation of Article 15 of the Polish–German Tax Treaty and Article 15 of the OECD MTC, going way beyond their wording.

The Case Two is much more interesting, however. Here, a new solution relies on introducing a legal fiction of carrying out work in the place where it would have been done before the pandemic as a rational solution. This solution has been found under the MAP procedure; a procedure which is essentially interpretative rather than legislative and takes place exclusively between the tax authorities of the two countries, completely beyond the interreference of taxpayers and the purview of the courts or legislative bodies.

The legal solution is not intrinsically bad. The representatives of both countries' Ministries of Finance were certainly guided by good intentions. The Polish–German Mutual Agreement aimed to make life easier for taxpayers in a difficult pandemic period. However, values that are just as (or perhaps even more) important must not be forgotten to make life easier for some groups of taxpayers. These values are the standards of the rule of law that stem from the constitutional principles as well as principles of international public law.³⁵ Even in very difficult situations, such as pandemic,³⁶ the analysed infringement of fundamental principles of law should not be accepted quietly, e.g., cases in which a deputy director in a department of the Ministry of Finance in Poland contributes to amendment of a tax treaty that is ultimately an expression of the will of the President of the Republic of Poland, elected

35 In respect of taxation *See* J. Hattingh, *The Multilateral Instrument from a Legal Perspective: What May Be the Challenges?*, "Bulletin International Taxation" 2017, vol. 71, no. 5. *See* more generally: T. Bingham, *The Rule of Law*, Penguin 2010.

36 Although the competent authorities stated that COVID-19 pandemic 'is a situation of force majeure', this statement was not supported by them with any authority or any other source or explanation, as if it was obvious. Moreover, neither Polish law nor German law nor the Polish–German Tax Treaty defines 'force majeure'. There is therefore no legal basis to claim that COVID-19 pandemic constitutes force majeure for the purposes of interpretation and application of the Polish–German Tax Treaty or any other tax treaty. Although a pandemic is an event that is not, from a human point of view, something ordinary and routine, there is absolutely no consensus in legal circles, both nationally and internationally, as to whether the COVID-19 pandemic can be considered a force majeure in every case and for every subject (i.e. *erga omnes* and *in abstracto*) *See* C.B. Casady, D. Baxter, *Pandemics, public-private partnerships (PPPs), and force majeure | COVID-19 expectations and implications*, "Construction Management and Economics" 2020, no. 38, pp. 1077–1085; Ş.E. Kiraz, E.Y. Üstün, *COVID-19 and force majeure clauses: an examination of arbitral tribunal's awards*, "Uniform Law Review" 2020, no. 437–465.

in Poland in direct elections, when this act requires the consent of Parliament. This leads to the destruction of the legal system and uncertainty for taxpayers as to the extents of their rights and obligations. This is a disproportionate and negligent action. A response to an extraordinary state, such as the COVID-19 pandemic, should not be so extraordinary itself as to violate constitutional and international law.

REFERENCES

- Ault H., Improving the Resolution of International Tax Disputes, "Florida Tax Review" 2005–2005, no. 7.
- Barrett G., Protecting Legitimate Expectations in European Community Law and in Domestic Irish Law, (in:) Yearbook of European Law 2020.
- Bingham T., The Rule of Law, Penguin 2010.
- Cai Q., Zhang P., A Theoretical Reflection on the OECD's New Statistics Reporting Framework for the Mutual Agreement Procedure: Isolating, Measuring, and Monitoring, "Journal of International Economic Law" 2018, no. 21.
- Casady C.B., Baxter D., Pandemics, public-private partnerships (PPPs), and force majeure | COVID-19 expectations and implications, "Construction Management and Economics" 2020, no. 38.
- Chorążka J., Rzeźnicka K., Nowe Polsko-Niemieckie Porozumienie Wpływa na Opodatkowanie Pracy Zdalnej Pracowników Transgranicznych, <https://studio.pwc.pl/aktualnosci/alerty/polsko-niemieckie-porozumienie-wplywa-na-opodatkowanie-pracy-zdalnej-pracownikow-transgranicznych>.
- Frowein J.Abr., Hahn M.J., The Participation of Parliament in the Treaty Process in the Federal Republic of Germany-Europe, "Chicago-Kent Law Review" 1991, vol. 67, Issue 2, <https://core.ac.uk/download/pdf/217423164.pdf>.
- Gardiner R., Treaty Interpretation, Oxford 2008.
- Hattingh J., The Multilateral Instrument from a Legal Perspective: What May Be the Challenges?, "Bulletin International Taxation" 2017, no. 71.
- Kaczor K., (in:) M. Jamróży, A. Cloer (eds.), Umowa o unikaniu podwójnego opodatkowania z Niemcami, Warsaw 2007.
- Kiraz Ş.E., Üstün E.Y., COVID-19 and force majeure clauses: an examination of arbitral tribunal's awards, "Uniform Law Review" 2020, no. 25.
- Kostić S.V., In Search of the Digital Nomad: Rethinking the Taxation of Employment Income under Tax Treaties, "World Tax Journal" 2019, no. 5.
- Morawski W., Opodatkowanie Dochodów z Pracy Najemnej w Świetle Umów o Unikaniu Podwójnego Opodatkowania (Cz. 1), „Przegląd Podatkowy” 2006, no. 9.
- Makimoto T., Manners D., Digital Nomad, Wiley 1997.
- Oats L., Miller A., Mulligan E., Principles of International Taxation, Bloomsbury 2017.
- OECD, Model Tax Convention on Income and on Capital (Full Version), https://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-full-version_9a5b369e-en.

OECD, The Updated Guidance on Tax Treaties and Impact of the COVID-19 Pandemic, 15 (21 January 2020), <https://www.oecd.org/tax/treaties/guidance-tax-treaties-and-the-impact-of-the-covid-19-crisis.htm>.

Parliament's Role in International Treaties, Bundestag, <https://www.bundestag.de/resource/blob/509982/1316a1c42f1a8ee8a04cc65640d8af40/WD-2-038-17-pdf-data.pdf>.

Pötgens F., Income from International Private Employment, IBFD 2007.

Pötgens F., Stand-By Fee Taxable in Residence State Under Art. 15 of the OECD Model, "European Taxation" 2008, no. 2.

Rust A., Germany: Taxing Right for a Golden Handshake and the Effect of a Mutual Agreement between the Competent Authorities, (in:) E.C.C.M. Kemmeren et al. (eds.), Tax Case Law Around the Globe 2016.

Schönberg S., Legitimate expectation in administrative law, Oxford 2000.