G L O S S E S

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A GLOSS FOR THE JUDGEMENT OF THE PROVINCIAL ADMINISTRATIVE COURT IN RZESZÓW DATED AUGUST 7, 2012, FILE REF. NO. I SA/Rz 542/12

I. THE LEGAL AND FACTUAL SITUATION

Being a Polish tax resident, W.B. lodged an application for a written interpretation of tax law regulations in an individual case concerning personal income tax. In the application, he described a future event. The applicant is to do contract work on a ship operated by way of cabotage in Italy. He is to be employed by an entity established in the Isle of Man. The ships upon which the sailor is to perform his contract work are registered in Malta. Ships are owned by different companies, established in the Isle of Man, and the applicant will be employed by such a company. However, the place of effective management and the registered office of those companies (the employer) is located in Turkey, whence remuneration is to come.

In the light of the foregoing the following questions can be asked:

1) Can work carried out by the applicant in the said circumstances qualify as work performed on a ship in the form of cabotage or as work performed on a ship operated in international transport?

2) Is income derived by the applicant under such circumstances liable to tax in Poland?

3) Is the applicant obliged to file a tax return in the said situation?

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The applicant demonstrated that – in accordance with art. 15 para. 3 of the OECD Model Convention With Respect To Taxes on Income and On Capital[2] [hereafter OECD Model Convention] – remuneration paid to the crews of ships or aircraft operated in international transport is subject to a rule which is consistent with the the rule governing remuneration derived from maritime and inland navigation as well as air transport, therefore such remuneration is taxed in the state where the place of effective management is located. As defined by the Model Convention in art. 3 para. 1 letter e, international traffic denotes "any transport by a ship or aircraft operated by an enterprise that has its place of effective in a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State" (cabotage).

The regulation contained in the provision of art. 15 para. 3 of the Agreement between the Government of the Republic of Poland and the Government of the Republic of Turkey for the avoidance of double taxation with respect to taxes on income and capital,[3] which provides that income derived from contract work done aboard a ship, aircraft or a road vehicle used in international traffic shall be taxable only in the contracting state where the registered office of the enterprise is located. Further, in accordance with art. 3 para. 1 letter f of the said agreement, the term "registered office" in the case of Turkey stands for the legal head office registered under the Turkish Code of Commerce.

Acting under the authority of the Finance Minister, the director of the Polish Tax Chamber issued an individual interpretation of tax law, failing to recognise the future service to be delivered by the applicant as contract work performed on a ship used for international traffic. Therefore, in this particular case general contractual provisions regarding contract work apply. It was decided that the applicant's work on a ship operated in the territory of Italy in the case at hand shall be regulated by art. 15 para. 2 of the contract between Poland and Italy.

By letter of March 8, 2012, the applicant filed a request to rectify the breach of the law. In a letter of April 11, 2012, the director of the Tax Chamber found he had no means of amending that interpretation, so he filed a complaint with the Provincial Administrative Court in Rzeszów, demanding that the contested interpretation of provisions of tax law and issued in an individual case be rescinded in whole as breaching procedural and substantive law.

[2] See *Modelowa konwencja w sprawie podatku od dochodu i majątku. Wersja skrócona*, transl. K. Barny (Warsaw: ABC a Wolters Kluwer business, 2011).

[3] Agreement between the Government of the Republic of Poland and the Government of the Republic of Turkey for the avoidance of double taxation with respect to taxes on income and capital, made in Warsaw on November 3, 1993, Journal of Laws of 1997, No. 11, item 58.

II. DECISION AND ARGUMENTATION OF THE PROVINCIAL ADMINISTRATIVE COURT

In the statement of the reasons, the Provincial Administrative Court found that – in accordance with the provision of art. 3 para. 1 letter j of the Polish-Turkish agreement – the notion of "international traffic" means any transport by ship, aircraft, or a road vehicle operated by the enterprise of a contracting state, except when a ship, aircraft or road vehicle is operated only between locations in the other contracting state. The court also demonstrated that the provision of art. 3 para. 8 letter g of the Polish-Italian agreement implies that the notion "international traffic" denotes any traffic carried out by a ship or aircraft managed by an enterprise located in a contracting state, except when a ship or aircraft is operated exclusively between places located in the other contracting state. Also, in the case of the agreement with Italy, the definition of international traffic makes reference to the place of effective management of the enterprise rendering transport services by ship. In contrast, in the agreement with the Isle of Man, art. 3 para. 1 letter g defines "international traffic" similarly as in the agreement with Italy, using the notion of "effective management".

Considering the above, the Provincial Administrative Court concluded that analysis of the definitions invoked above suggests that it is not enough to exclude cases when transportation services within a contracting state are provided by enterprises of the other contracting state (cabotage) to be able to speak of international traffic. Given the factual state and in the light of the provisions laid down in art. 3 para. 1 letter g of the respective agreement with the Isle of Man and in art. 3 para. 1 letter g of the respective agreement with Italy, the Provincial Administrative Court adjudicated that in the case in question the criterion essential for recognising transport as international traffic is not fulfilled because the effective management of the enterprise operating the ship is not located in any of these states. The court also stated that the respective provision of the agreement with Turkey requires that a ship used for international traffic be operated by enterprise of a contracting state. However, it transpires from the submitted application that the registered of the enterprise (company) operating the ship is located on the Isle of Man, whereas the place of effective management and the legal head office of these companies are in Turkey, hence under the agreement between Poland and Turkey one may not speak of international traffic.

The agreement with Turkey, both in the definition of international traffic and in the above-mentioned provision concerning the place of taxation with respect to remuneration for contract work performed, for example, aboard a ship, makes reference to the registered office of the enterprise rather than the place of effective

management. If the registered office of the enterprise, as it is evident from the description of the factual situation, is located on the Isle of Man, Turkey being only a place of effective management, the agreement with Turkey cannot be said to apply.

Given the above, the court decided that the contested individual interpretation of the provisions of tax law concerning personal income tax does not constitute a breach of procedural and substantive law to an extent which would make it necessary to rescind the said interpretation.

III. EVALUATION OF THE POSITION OF THE PROVINCIAL ADMINISTRATIVE COURT

Full tax liability is a feature of the Polish tax system. Natural persons domiciled in the Republic of Poland are obliged to declare all of their income regardless of the location of its sources.[4] A decision to acknowledge a person as one domiciled in the Republic of Poland is conditional upon this person having a centre of personal or economic interests (centre of vital interests) in Poland[5] or residence in the Republic of Poland for at least 183 days in a respective tax year (art. 3 para. 1 of the Personal Income Tax Act, hereafter PITA). However, for income derived from work performed in a different country, provisions considering agreements on the avoidance of double taxation to which the Republic of Poland is a party apply (art. 4a PITA). This limited obligation applies to Polish seafarers who work on ships operated by foreign sea operators. Undoubtedly, agreements on the avoidance of double taxation, as *lex specialis*, specify where tax liability occurs and which domestic legislation applies in a particular case.[6]

However, it should be noted that an analysis of provisions on the avoidance of double taxation in agreements should start with the text of the OECD Model Tax Convention, which sets an example for this kind of agreements.[7] In accordance

[4] Art. 3 para. 1 of the act of July 26, 1991, on personal income tax, Journal of Laws of 2016, item 2032 as amended [hereafter PITA].

[5] Judgement of the Provincial Administrative Court in Opole of June 10, 2009, file ref. no. I SA/Op 164/09, LEX nr 510684.

[6] Cf. J. Dworas-Kulik, „Regulacje prawne dotyczące pracy polskiego marynarza pracującego u amerykańskiego armatora," *Kwartalnik Prawo – Społeczeństwo – Ekonomia* 2016, no. 3: 6–10; idem, „Status prawny polskiego marynarza," *Kwartalnik Prawo – Społeczeństwo – Ekonomia* 2015, no. 4: 37–40.

[7] See judgement of the Regional Administrative Court in Warsaw, dated April 13, 2007, file ref. no. III SA/WA 3274/07; judgement of the Regional Administrative Court in Warsaw, dated March 6, 2015, file ref. no. III SA/Wa 2163/14.

with art. 15 para. 3, “remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.” Therefore, regardless of the flag of a ship, it is crucial where the place of effective management is situated of the company operating the ship.[8] The content of the Model Convention, just like the wording of the respective commentary, has been developed by consensus by all the OECD members. Accordingly, they pledged to respect the provisions contained therein.[9] Although the said convention and the associated commentary do not constitute a source of commonly binding law in Poland, these texts do mention how provisions of agreements on the avoidance of double taxation should be interpreted. In the light of the above and in accordance with art. 15 para. 3 of the OECD Model Convention, salary obtained in connection with en employment exercised aboard a ship or aircraft operated in international traffic, or on a boat engaged in inland waterways transport, irrespective of the flag of a ship, may be taxed in the contracting state in which the place of effective management of the enterprise is situated.[10] The place of effective management should be construed as the venue of board meetings and the place where key decisions for the company’s growth are made.[11]

It is instructive to look at art. 11 para. 4 of Regulation (EC) 883/2004, whereby contract work or an activity carried out by a self-employed person “normally pursued on board a vessel at sea flying the flag of a Member State shall be deemed to be an activity pursued in the said Member State”, and therefore is subject to its taxation.[12] However, in cases where a person employed aboard a ship “flying the flag of a Member State and remunerated for such activity by an undertaking or a person whose registered office or place of business is in another Member State shall be subject to the legislation of the latter Member State if he resides in that State.[13]

The issues above exclude the possibility of using the agreement on the avoidance of double taxation concluded between Poland and Italy. The ships were registered in

[8] See individual interpretation ITPB2/415-545/12/IB of the director of the Tax Chamber in Bydgoszcz, dated August 17, 2012.

[9] Dworas-Kulik, “Regulacje prawne,” 7.

[10] Cf. individual interpretation ITPB2/415-545/12/IB; individual interpretation ITPB2/415-248/09/IB of the director of the Tax Chamber in Bydgoszcz, dated May 20, 2009.

[11] Cf. the judgement of the Supreme Court in Poland of August 26, 2015, file ref. no. I FSK 112/15.

[12] Cf. judgement of the Supreme Court of March 2, 2010, file ref. no. II UK 233/09.

[13] Cf. *Ustalenie właściwego ustawodawstwa na podstawie rozporządzeń 1408/71 I 574/72*, accessed November 27, 2015, www.zus.pl/default.asp?p=1&id=107.

the Maltese registry and the actual registered office of the undertaking is not located in Italy. It should be therefore conclude that in this particular case Italy cannot be a contracting party.

Nowadays in international navigation, in order to protect the capital involved in navigation against potentially severe liability for damages, "one-ship companies" are set up. These companies do not operate ships they own, but they entrust them to a separate legal entity, that is the so-called "managing company". The entity operating a ship in its own name is the shipowner. It is along these lines that the legal definition of ship ownership is formulated. According to art. 7 of the Polish Maritime Code of Septermber 18, 2001,[14] a shipowner is a person who is in his own name is engaged in navigation of a sea-going vessel which is owned personally or by another person. In the case in question, there are more than one place of management, but the main office for management is located in Turkey, and for this reason this company is the effective employer-shipowner with regard to the contract worker. This line of reasoning was upheld by the Finance Minister in his resolution of September 7, 2006, [15] as key decisions are made in the effective place of management, both with respect to the company as a whole and business activity. It should be noted, then, that the employer, not the intermediate company registered on the Isle of Man and employing the seaman for naval service lays down the terms and conditions of work, remuneration, social benefits, sick leave equivalents, or casualty or tropical disease insurance, covers the cost of the seaman's transfer to the place of employment and return to his place of residence when the contract is over.[16]

Importantly, the main indication of ship operation is the payment of taxes on income derived from the sea operation of a particular sea vessel, while the rule is that this income is taxed in the country where the place of effective management of the company is located, Turkey in this case.

Pursuant to art. 4 para. 1 and 3 of the agreement between the government of the Republic of Poland and the government of the Turkish Republic on the avoidance of double taxation with respect to taxes on income and capital, the legal person who is registered in a contracting state means any legal person who in accordance with the law of this state is liable to taxation by that state due to the location of the registered office, where effective management takes place. In the light of the above, art. 15 para 3 of the Polish-Turkish agreement on the avoidance of double taxation

[14] Act of 18 September 2001 (Maritime Code), Journal of Laws of 2016, item 66 as amended.

[15] DDPB6/033-0477-sm6-3012/06/HM/JP.

[16] See the judgement of the Provincial Administrative Court of March 18, 2015, file ref. no. I SA/Gd 1684/14.

applies, whereby remuneration for contract work pursued on board a sea-going vessel, aircraft or a road vehicle used in international traffic can be taxed only in the contracting state where the registered office is established. Simultaneously, it must be made very clear that the term “international traffic” denotes any transport carried out by means of a ship or aircraft, exclusive of situations where a ship or aircraft is operated solely between various locations in a contracting state. In the analysed case, sea transport occurs in the territorial waters of Italy.

SUMMARY

A tax obligation arises automatically as a result of an event which provisions of law regard as one leading to the former, in a non-specific relationship. In contrast, tax liability stems directly from a tax obligation and obligates a specific tax payer to pay to tax authorities within a time limit and place specified by the provisions of tax law. In order for a tax obligation in relation to a particular tax payer to arise, he is to bear the burden of tax duty.

The glossed judgement of the Provincial Administrative Court in respect of its resolution is not fair. The ascertained factual situation implied that the complainant did not bear the tax burden. Therefore the decision which was issued based on an erroneous interpretation of provisions of law grossly violates the provisions of domestic and international law. Consequently, in the light of the above-mentioned criteria it must be concluded that the judgement violates the law in such an extent that it must be excluded from the judicial domain.

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Summary

The Polish tax system includes a principle whereby the income obtained by a resident in Poland must be accounted for. However, agreements on the avoidance of double taxation to which Poland is a party may exclude this obligation because they constitute *lex specialis* in relation to the Polish legislation. The question of taxation of seafarers requires an in-depth analysis not only of national legislation, but also that of other states. When determining tax jurisdiction in respect of seamen it is easy to make a mistake owing to the complicated factual state in addition to the legal status. The presented gloss demonstrates difficulty arising when considering this issue.

Key words: seafarers; Polish seamen; taxes; double taxation; work at sea; shipowner.

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