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Mechanizm klauzuli nieruchomościowej – wybrane zagadnienia podatkowe

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Streszczenie:

Artykuł podejmuje problematykę klauzuli nieruchomościowej, która stanowi istotny mechanizm w przeciwdziałaniu międzynarodowemu unikaniu opodatkowania. Problematyka ta analizowana jest zarówno z perspektywy krajowego, jak i międzynarodowego prawa podatkowego (ze szczególnym uwzględnieniem umów o unikaniu podwójnego opodatkowania i Konwencji MLI). W artykule autor skupia się na aspektach efektywnego wykorzystania klauzuli nieruchomościowej na gruncie polskich przepisów oraz alternatywnych formach zmierzających do opodatkowania zysków ze sprzedaży nieruchomości w państwie ich położenia.

Słowa kluczowe: klauzula nieruchomościowa, podatek, międzynarodowe prawo podatkowe

The immovable property clause mechanism: Selected tax issues

Abstract:

This article deals with the issue of the immovable property clause, which is an important mechanism in counteracting international tax avoidance. The issue in question is analysed from the perspective of both domestic and international tax law (with particular emphasis on double taxation treaties and the MLI Convention). In this article, the author focuses on aspects of effective use of the immovable property clause under Polish law and alternative methods aimed at taxing profits from sales of immovable property in the country in which it is located.

Keywords: immovable property clause, tax, international tax law

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1. Introduction

A major problem in theory that generates numerous doubts and controversies is the taxation of income from sales of immovable property in the country in which it is located. Such taxation is often avoided by setting up foreign immovable property companies and selling their shares though a non-resident. One obvious consequence of such activities, which actually consist in selling the immovable property, might be that profits are taxed solely in the country in which the seller resides. One of the important mechanisms which can be used to counteract such schemes may be an immovable property clause included in provisions on avoiding double taxation. Its practical application results in certain difficulties both as regards correct determination of the tax obligation in domestic law and its subsequent enforcement. The institution of an immovable property clause has become one of the key solutions used in both domestic and international tax law. Legal regulations related to the immovable property clause and its application raise important issues in the form of a research question whether an immovable property clause may be effectively applied in the Polish tax system. Answering this question is certainly not easy and clear-cut, therefore an alternative research issue appears reasonable: are there any alternative solutions aimed at taxing profits from selling immovable property in the country in which it is located, and if so, how do they look like?

In this article domestic legal regulations relating to the immovable property clause mechanism have been subjected to analysis using the dogmatic and legal method. At the same time, confronting the currently applicable treaties for the avoidance of double taxation entered into by Poland allows to pinpoint current interpretative doubts. This will allow to demonstrate that an immovable property clause may be an effective method of preventing the practice of avoiding the taxation of profits from sale of immovable property in the country in which it is located through sale of shares in an immovable property company by a shareholder who is not a Polish resident.

2. The immovable property clause – how it works

The immovable property clause mechanism operates under treaties for avoidance of double taxation, defining special rules of taxing income from transferring the ownership of shares or stock in companies whose assets consist for the most part of immovable property. Regulations on taxing the alienation of shares or stock in an immovable property company is a deviation from the general principle found in the

OECD Model Convention on Income Tax and on Capital[2] (MC) on which the treaties for avoidance of double taxation entered into by Poland are patterned and which stipulates that income from sale of shares or stock is subject to taxation in the country of residence of the seller. This means that, essentially, the country of origin does not have the right to taxation of income from sale of company shares or stock. In the OECD MC[3] and consequently in bilateral treaties for avoidance of double taxation the recognised rule is that all profits related to immovable property should be taxed in the country in which such immovable property is located.[4] Such state should therefore have the right to tax immovable property as the state of origin. Accordingly, Article 6 of the OECD MC grants the right to tax income derived from immovable property to the state on whose territory the property is situated. The same principle applies to taxation of gains from alienation of immovable property, set out in Article 13, item 1 of the OECD MC.

Pursuant to Article 6(1) of the OECD MC, income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State. At the same time, according to Article 13(1) of the OECD MC, gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State. This means that both the provision of Article 6 of the OECD MC and of Article 13(1) of the OECD MC refer to the same principle, the right to tax immovable property (gains from immovable property or sale thereof) in the state in which the property is situated. As a rule, the state on whose territory immovable property is situated is entitled to derive benefits from taxing widely understood gains from alienating such property. This right is consequent upon the inseparable economic connection between immovable property and the place in which it is situated and is enhanced by the fact that the very determination of what constitutes the notion of immovable property should occur in the first place on the basis of national law of the state on whose territory such property is located. These rules began to be circumvented by using mechanisms whose purpose was to avoid taxing gains from sale of immovable property in the country in which it is situated. Prior to the introduction of the immovable property clause, Article 13 of the OECD MC that regulated taxation of capital gains contained a general principle of taxing gains from alienation of shares or stock in companies in the country of which

[2] *Model Tax Convention on Income and on Capital* (dalej jako: MK OECD), https://www.oecd.org/tax/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm, [dostęp: 1.10.2022].

[3] OECD, *Model Tax Convention on Income and on Capital. Condensed version* - 2017 *and Key Features of Member Countries 2018,* (ed.) A. Cracea, Amsterdam 2018.

[4] Litwińczuk H., *Międzynarodowe prawo podatkowe,* Warszawa 2020, s. 119-167.

the alienating party is a resident (current Article 13, item 5 of the OECD MC).[5] This provision served as a basis for the practice of avoiding tax obligations related to alienation of immovable property, which consisted in establishing companies whose assets included the immovable property to be alienated – this allowed not paying the tax on alienated property. Through alienation of shares or stock of such a company, tax issues were regulated according to the law in force in the state of the alienating party, which deprived the other state of a source of taxation income. The end result was that the taxpayer who derived gains from alienating immovable property in a particular state located them in states serving as tax havens, avoiding the tax obligation incumbent on themselves. In order to counteract these practices, special regulations concerning the immovable property clause were introduced in international treaties.[6]

An immovable property clause has been introduced for the first time to the OECD MC in 2003. According to the original wording of Article 13(4) of the OECD MC,[7] gains from transferring the ownership of shares in a company which derive more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in such other State. This was the first attempt to formulate an autonomous taxation norm whose purpose was to stop practices of avoiding taxation of income from alienation of immovable property by artificially setting up immovable property companies.

3. The MLI Convention and the immovable property clause

Such wording of Article 13(4) of the OECD MC remained in effect until the entry into force of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting[8] (MLI Convention). The convention is a multilateral international treaty designed as a result of activities conducted by the OECD and the G20 as part of the Base Erosion Profit Shifting project (BEPS). Its key assumption is to introduce changes to bilateral treaties for avoidance of double taxation to be covered by the convention, as per the requests of individual states.[9] Poland, by

[5] OECD. *OECD Council approves the 2017 update to the OECD Model Tax Convention* https://www.oecd.org/tax/treaties/oecd-approves-2017-update-model-tax-convention.htm, [dostęp: 1.10.2022].

[6] Tax Convention on Income and on Capital: Condensed Version 2003, https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2003_mtc_cond-2003-en#page34, [dostęp: 1.10.2022].

[7] OECD. Model Tax Convention on Income and on Capital: Condensed Version 2003, OECD Publishing, Paris 2003, https://doi.org/10.1787/mtc_cond-2003en, [dostęp: 1.10.2022],

[8] Sporządzona w Paryżu dnia 24 listopada 2016 r., podpisana w Paryżu dnia 7 czerwca 2017 r.

[9] OECD, *Action 15: A Mandate for the Development of a;* dostęp: 01.10.2022 r. *Multilateral Instrument on Tax Treaty Measures to Tackle BEPS* https://www.oecd.org/tax/beps/beps-action-15-mandate-for-development-of-multi-lateral-instrument.pdf, [dostęp: 1.10.2022].

acceding to the MLI Convention, has declared to widely implement the solutions found therein.[10] One of the solutions proposed to MLI signatories is to make the immovable property clause more uniform and detailed by adopting the wording laid out in Article 9 of the MLI, entitled *Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property.* In case of treaties which already contain an immovable property clause as originally formulated (47 treaties), Poland adopted Article 9)(4) of the MLI Convention in the wording that gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting Jurisdiction if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property (real property) situated in that other Contracting Jurisdiction. It should be stressed, however, that implementing this provision depends on the joint will to avoid double taxation expressed in the MLI Convention by both parties to the amended treaty. A similar wording was inserted in Article 13(4) of the OECD MC. Currently, this right arises not only when an entity meets the criteria for an immovable property company upon alienation of shares, but also when such criteria have been fulfilled in the past (or, more precisely, within 365 days preceding the date of alienating the shares). This was supposed to prevent avoidance of the immovable property clause in its original wording by artificially changing the value of company shares so that their value was not derived in more than 50 per cent from immovable property as of the date of alienation. It should be added that the new wording of Article 13(4) extends the list of entities subject to the immovable property clause by partnerships or trusts, as well as by other entities that do not issue shares or stock but for whom the value of rights to participate in their profits is derived mainly from immovable property.[11]

4. The international legal foundations for applying the immovable property clause

The treaties for avoiding double taxation of which Poland is a party do not adopt a uniform approach to defining the criteria of an immovable property company. The first major difference that occurs in Article 13(4) of Polish treaties for avoidance of

[10] Do MLI zgłosiła 78 umów o unikaniu podwójnego opodatkowania. Ostateczna liczba polskich umów, do których będzie miała zastosowanie konwencja MLI, zależy jednak od liczby sygnatariuszy tej konwencji.

[11] Zob. §28.5 Komentarza do art. 13 ust. 4 MK OECD, s. 298. OECD, Model Tax Convention on Income and on Capital: Condensed Version 2003, OECD Publishing, Paris, s. 298, https://doi.org/10.1787/mtc_cond-2003-en, [dostęp 1.10.2022].

double taxation relates to a precise determination of the share which the value of immovable property has in all assets of the company and which makes applying this clause obligatory. In some of these treaties (for example with Finland, Luxembourg, Malta, Norway or Sweden) it was noted that the value of shares or stock in the alienated company should be derived in more than 50 per cent from immovable property, while in others (for example with Austria, Belgium, Denmark, France, Germany or Sweden) the reference to a 50 per cent share of the immovable property in the value of shares or stock was replaced with the word "mainly." The Supreme Administrative Court addressed this issue while interpreting the Polish-Swedish treaty for avoidance of double taxation,[12] where it construed the expression "mainly" used in Article 13*(1) of the treaty. The interpretative dispute arose because this notion was not defined in Polish tax statutes, while in Swedish domestic law it means at least 75 per cent share of immovable property in the company assets. The interpretation of the word "mainly" adopted by the SAC was based on its dictionary and colloquial understanding, taking into consideration the wording of the corresponding provision of the OECD MC. The Supreme Administrative Court explained that both the colloquial meaning of the word "mainly" and the reference to the OECD Model Convention justify the assertion that in Article 13, item 1 of the Convention the parties agreed that the share of immovable property in company assets must be at least 50%. Having in mind the above position of the Supreme Administrative Court, grounded in practice and also in interpretations of tax authorities, the view that applying the 50 per cent limit directly instead of the expression "mainly" in case of newly entered into or amended treaties for avoidance of double taxation must be recognised as correct. It is worth noting that interpretative disputes of that kind do not arise for treaties in which the immovable property clause was modified due to implementation of MLI Convention provisions (for example Article 13(4) of the treaty with Denmark). According to the new wording of the immovable property clause, the state in which the immovable property is located is entitled to tax gains from alienation of an immovable property company, if:

1) the gains are derived from transferring the ownership of shares, stock or comparable interests, such as interests in a partnership or trust, and
2) at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property (real property) situated in that state.

Undoubtedly, eliminating interpretative difficulties related to the immovable property clause under treaties for avoidance of double taxation will resolve the problems with effective taxation of such gains which might be encountered by states

[12] Wyrok Naczelnego Sądu Administracyjnego z dnia 12 stycznia 2017 r., sygn. II FSK 3155/16.

on whose territory the alienated immovable property is situated. On the other hand, the method of determining the value of immovable property company assets is likewise problematic.

The immovable property clause under treaties for avoidance of double taxation involves also another difficulty related to its practical application and concerning the value of the company assets. The problematic question relates to whether determining the value of such assets should occur according to their book or market value, and whether it should potentially by reduced by company liabilities.[13] It should be granted that in this case one should take into account book (balance sheet) value, because this kind of evaluation undoubtedly makes it easier to determine whether an immovable property company is involved. Nevertheless, it must be remembered that the book (balance sheet) value of an asset may diverge from its tax value, for example due to depreciation write-offs that are different for tax and balance sheet value. At any rate such an approach, in particular lack of possibility of taking company liabilities into account, is less favourable for company shareholders.

5. Implementation of the immovable property clause in national legal regulations

In treaties for avoidance of double taxation, rights to taxation are divided between the contracting parties of the treaty, however their actual enforcement depends on concrete tax obligations resulting from national tax statutes. In case of the immovable property clause this means that even if a treaty for avoidance of double taxation grants the right to tax income from sale of shares in an immovable property company, actualising this right as granted under treaties for avoidance of double taxation requires the existence of a tax obligation resulting from local regulations.

Polish tax statutes contain a wide-ranging definition of tax obligations of persons who do not have a domicile or seat on the territory of Poland (non-residents). Pursuant to Article 3(2a) of the Personal Income Tax Act[14] (PITA) and Article 32(2) of the Corporate Income Tax Act[15] (CITA) natural persons whose residence is not located in the territory of the Republic of Poland and payers of corporate income tax payers whose seat or management is not located in the territory of the Republic of Poland are

[13] Kukulski Z.. *Klauzula nieruchomościowa w bilateralnych umowach podatkowych zawartych przez Polskę jako mechanizm zapobiegający międzynarodowemu unikaniu opodatkowania,* [w:] *Międzynarodowe unikanie opodatkowania. Wybrane zagadnienia,* red. D.J. Gajewski, Warszawa 2017.

[14] Ustawa z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych (Dz.U. z 1991 r. Nr 80, poz. 350 z późn. zm); dalej jako: updof.

[15] Ustawa z dnia 15 lutego 1992 r. o podatku dochodowym od osób prawnych (Dz.U. z 1992 r. Nr 21, poz. 86 z późn. zm.); dalej jako: updop.

subject to tax obligations only in relation to income (revenue) obtained in the territory of the Republic of Poland (limited tax obligation). Under Polish regulations, an immovable property company may therefore be defined as any entity in which the value of assets of a company/partnership, an entity which is not a legal person, investment fund, collective investment institution or other legal person is derived in at least 50 per cent directly or indirectly from immovable property located in the territory of the Republic of Poland or from interests in such immovable property.

Having in mind such delimitation of the subjective scope of the tax obligation, one must reflect on the method of calculating the value of company assets and the minimum share of immovable property or interests in immovable property in the total assets of the company. Legal theory has already produced a harmonised view that balance sheet values should be used for the purpose of determining the value of company assets and the value of immovable property.[16] This approach should be considered rational (also from the economic point of view), because it would be difficult to require an evaluation of companies and their constituent assets each time they are sold. In particular, when such an entity has subsidiaries, they would have to be evaluated as well, which would undoubtedly entail considerable costs.

It should be assumed that the value of company assets is not reduced by the value of its liabilities by comparing it with the value of immovable property. One cannot agree with the opposite approach that the essence of the regulation was to tax the sale of company the value of whose shares (stock) is derived mainly from immovable property in the state in which the immovable property is located. Accordingly, to calculate this ratio one should use a method that allows to achieve that purpose, i.e. unequivocally assess whether the value of shares (stock) is derived mainly from the value of immovable property. For this reason, I believe that adopting the opposite position (i.e. reducing the value of property by company obligations) does not fulfil this condition. A situation may after all occur in which, even though according to the calculation the share of immovable property in company assets is much higher than 50%, the actual value of shares is not derived mainly from the value of immovable property, because this threshold would not be achieved without reducing the value of company assets by liabilities. This view is also grounded on the commentary to Article

[16] Zob. J. Banach, *Polskie umowy o unikaniu podwójnego opodatkowania,* Warszawa 2000 („punktem wyjścia dla tego rodzaju rozstrzygnięcia powinno być zawsze ustalenie wielkości majątku nieruchomego położonego na terytorium danego państwa, w całym majątku spółki. Ustalenia tego dokonujemy w oparciu o dane bilansowe"); M. Krawczyk, [w:] *Umowa o unikaniu podwójnego opodatkowania z Niemcami,* red. M. Jamroży, A. Cloer, Warszawa 2007 („Podstawą obliczeń tego udziału są dane bilansowe, niezależnie od przyjętej metody wyceny"); W. Missala, [w:] *Umowy o unikaniu podwójnego opodatkowania. Komentarz,* red. M. Zasiewska. A. Oktawiec, J. Chorązka, Warszawa 2011 („Komentarz nie rozstrzyga, czy określając wartość majątku spółki, należy przyjąć wartość rynkową, czy ustalić ją w oparciu o dane wykazane w bilansie spółki. Wydaje się, że w większości przypadków wygodniejszą formą będzie skorzystanie z danych bilansu").

13(4) of the OECD MC,[17] in which it was stated that determining the share of immovable property in company assets should as a rule occur by comparing the value of such property to the value of the entire assets owned by the company without taking into account debts or other liabilities (regardless of whether they are secured by a mortgage established on such immovable property).

The value of assets is determined as of the last day of the month preceding the month of alienating shares (stock) in the company, all rights and duties in a partnership which is not a legal person, or participation units in an investment fund or collective investment institution. Prior to introducing the provisions of Article 3(2b)(6) of the PITA and Article 3(3)(4) of the CITA the Ministry of Finance, referring to the scope of limited tax obligation, argued that a source of income located in Poland occurs whenever such source is permanently connected to the territory of Poland.[18] At the same time, the Ministry recognised as income located in Poland the income of non-residents from alienating "interests in source of income" (such as alienating shares or stock) when the practical result is "the transfer of rights" to immovable property, for example when the assets of a company whose stock is sold consist mainly of immovable property.[19] The conclusion is that the legislator has provided a very wide definition of source of income related indirectly or directly to transferring the ownership of shares in an immovable property company.[20] Taxation in Poland is applied to income obtained by non-residents from alienating all kinds of participation in companies, entities which are not a legal person or other ownership structures, provided that at least 50% of the value of their assets consists of immovable property situated on the territory of Poland or interests in such property. In cases where participation rights in an immovable property company or other entity whose assets consist mainly of immovable property are alienated directly, the respective provisions of tax statutes apply, obligating the non-resident to settle the tax due on account of such income in Poland. One should, however, remember that having Polish tax authorities enforce the obligation of the non-resident to make a settlement on their own in Poland may be difficult.

6. Immovable property clause and its application

[17] Zob. § 28.4 komentarza do art. 13 MK OECD.

[18] Raińczuk M., Leconte M.. *Konwencja Wielostronna - wpływ na umowy o unikaniu podwójnego opodatkowania za warte przez Polskę,* „Przegląd Podatkowy" 2018, nr 1.

[19] Pismo Ministerstwa Finansów z dnia 24 lipca 2001 r. nr PB4/ AK-8214-1045-277/01.

[20] OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action* 15 - *2015 Final Report,* https://read.oecd-ilibrary.org/taxation/developing-a-multilateral-instrument-to-modify-bilateral-tax-treaties-action-15-2015-final-report_9789264241688-en#page1, [dostęp: 1.10.2022],

It appears that in a situation in which the party who alienates shares in an immovable property company is the resident of state with which Poland has signed a treaty for avoidance of double taxation that contains an immovable property clause, enforcement of tax arrears which arose because the non-resident failed to make a settlement on their own might be assisted by provisions concerning exchange of tax information (Article 26 of the OECD MC) and mutual administrative assistance in the collection of taxes (Article 27 of the OECD MC). As regards exchange of tax information, this clause is found in all treaties entered into by Poland, while assistance in the enforcement of tax obligations is not a widely applied solution. Assistance in the enforcement of taxes may also be sought under the Convention on mutual administrative assistance in tax matters made in Strasbourg on 25 January 1988.[21] The parties to the convention include already 137 states and jurisdictions,[22] the majority of which have not entered into a treaty for avoiding double taxation with Poland. Exchange of tax information and assistance in enforcement of tax obligations is also ensured by regulations of European Union member states resulting from the implementation of directives concerning administrative cooperation in the exchange of tax information and assistance with enforcement. In such cases, tax authorities dispose of instruments to enforce tax arrears, although their use, in particular outside the European Union, is often time-consuming and ineffective. A problem arises, however, when the enforced obligation refers to self-taxation of income from alienation of shares in an immovable property company by the resident of a state with which Poland did not enter into a treaty for avoiding double taxation or which is not party to the Strasbourg convention.

In such case, Poland has virtually no possibility of enforcing the tax obligation, because the non-resident who is to pay the tax is entirely outside Polish jurisdiction and there are no legal mechanisms obligating the country of their residence to assist in enforcement.[23] In such case, Poland has virtually no possibility of enforcing the tax obligation, because the non-resident who is to pay the tax is entirely outside Polish jurisdiction and there are no legal mechanisms obligating the country of their residence to assist in enforcement.

[21] Dz.U. z 1998 r. Nr 141, poz. 913, zmienionej protokołem sporządzonym 27 maja 2010 r. (Dz.U. z 2011 r. Nr 180, poz. 107); dalej jako: konwencja strasburska.

[22] Zob. lista sygnatariuszy konwencji: https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf, [dostęp: 1.10.2022].

[23] Dyrektywa Rady 2011/16/UE z dnia 15 lutego 2011 r. w sprawie współpracy administracyjnej w dziedzinie opodatkowania i uchylająca dyrektywę 77/799/EWG; dyrektywa Rady 2010/24/UE z dnia 16 marca 2010r. w sprawie wzajemnej pomocy przy odzyskiwaniu wierzytelności dotyczących podatków, ceł i innych obciążeń.

Another problem is enforcing the right to tax income obtained from alienating shares in an immovable property company by non-residents who fall under the immovable property clause indirectly, namely in case when a change of the ownership structure of an immovable property company occurs abroad and Poland is merely the state in which the immovable property is located. Difficulties with effectively enforcing the right to taxation in such case occur in the majority of states and have for years been brought up internationally in discussions on tax platforms.

Here one should mention the result of works of the Platform for Collaboration on Tax (PCT), a joint initiative of the IMF, OECD, United States and World Bank Group established by recommendation of G20 states. On 4 June 2020,[24] PCT published a report on selected issues of taxing the income of non-residents obtained indirectly from alienation of immovable assets (*The Taxation of Offshore Indirect Transfers - A Toolkit*).[25] The report suggested that capital gains from offshore indirect transfers of rights to domestic immovable property are as a rule included in taxation under local legislation, provided that the prerequisites specified in regulations, especially a sufficiently high share of immovable assets in total assets, are fulfilled. However, all states participating in the study reported difficulties with enforcing tax obligations due on account of indirect alienation of shares in immovable property companies, especially when both the seller and the buyer were foreign entities. In this context, states revealed two differing approaches to enforcing the right to taxing income from indirect alienation of immovable property companies. According to the first, the tax obligation falls on the local immovable property company. This involves adopting a peculiar legal fiction that when the ownership of an immovable property company changes, the company alienates and reacquires the property, which generates taxable capital gains. In the second approach, the taxpayer subject to taxation on account of alienation gains is the actual foreign alienating party, but the source of income is found in the state in which the immovable property is situated. The latter approach is currently reflected in the structure of Polish tax regulations. The report lists example solutions that facilitate collecting information to allow tax authorities to verify changes in the ownership structure of immovable property companies and the enforcement of whether non-residents are fulfilling their tax obligations. Such solutions include introducing the obligation of reporting transactions or share structure changes (often imposed on the purchaser of shares or stock of an immovable property company), withholding tax by

[24] Diasamidze T., *Transformation of tax system in Georgia - 25 years of experience and future challenges - National Report,* [w:] *Transformation of Tax Systems in the CEE and BRICS Countries - 25 years of experience and future challenges,* red. W. Nykiel, Z. Kukulski, Łódź 2018, s. 78-82; IBFD - *Tax Research Platform,* https://research.ibfd.org/#/doc?url=/collections/gtha/html/gtha_ge_s_006.html, [dostęp: 1.10.2022].

[25] https://www.oecd.org/tax/taxation-of-offshore-indirect-transfers.htm. [dostęp: 1.10.2022].

the company purchaser, obligation to appoint a tax representative liable for tax obligations due on account of alienation transactions, or even establishing a compulsory mortgage on the immovable property.

7. The immovable property clause and other anti-abusive regulations

The analysed aspects suggest that the MLI Convention was justified in introducing specific means aimed at preventing abuses of the provisions of tax treaties, including the principal purpose test (PPT) and the simplified limitation of benefits (SLOB).[26] The MLI Convention[27] recognises that, regardless of an agreement entered into by states (to which the convention applies), "a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement." At the same time, Poland did not decide to automatically adopt the SLOB clause regulated in Article 7(8) of the MLI Convention, but signalled that it is open to introducing the relevant provisions in tax agreements entered into in the future following bilateral negotiations. Regardless of the general nature of the PPT clause, which will be included in all Polish treaties for avoidance of double taxation covered by the MLI Convention,[28] it should be stressed that the clause applies to non-specific actual circumstances aimed at achieving contractual benefits in case of activities that include transactions or structures established solely for that purpose and are not sufficiently justified economically. In this context, the PPT clause may undoubtedly be of importance for treaties for avoidance of double taxation that do not contain the immovable property clause. In such case, refusing a tax benefit in the form of exemption from tax collected by the state in which the immovable property is situated would entitle that state to tax income from transfer of shares in an immovable property company. It should be remembered, however, that using the PPT clause is much more problematic, because it involves assessing the behaviour and intentions of a non-resident tax payer with a view to the purpose for which the sale of shares in an immovable property company

[26] Franczak A., *Multilateral Convention (MLI) - The Evolution or Revolution?,* „Studia Iuridica Lublinensia" 2018, t. 27, nr 2.

[27] Art. 7 ust. 1 konwencji MLI.

[28] Klauzula PPT została wprowadzona do tej pory do 30 zawartych przez Polskę umów o unikaniu podwójnego opodatkowania. Wynika to z faktu, że nie wszystkie państwa, które podpisały konwencję MLI, zakończyły proces jej ratyfikacji.

was effected.[29] The immovable property clause, its anti-abusive character notwithstanding, is nevertheless a provision dividing the right to taxation of income from alienation of shares in an immobile property company between both states (when applying a method for avoidance of double taxation specified in the treaty). It is therefore much easier to apply than the general PPT clause. One should also consider whether using the general anti-avoidance rule (GAAR) may be an alternative that allows achieving tax results comparable with using the immovable property clause.[30] When using this clause, tax authorities will be entitled to assess the tax consequences of a particular activity or set of activities so as to disregard the resulting tax benefits if the activity or set of activities have been undertaken primarily to achieve a tax benefit which in particular circumstances is contrary to the object and purpose of the tax statute in a situation when the manner of acting was artificial. The GAAR clause can, therefore, similarly to the PPT clause, be used when a treaty for avoiding double taxation does not contain the immovable property clause. According to the regulations of such an agreement, the income of non-residents from alienation of shares in an immovable property company would be subject to taxation solely in the country of their residence and consequently the taxpayer would potentially enjoy the benefit of exemption from tax in Poland.

8. Conclusions

There are still treaties for avoidance of double taxation that do not contain the immovable property clause. In their case, the provisions of tax statutes do not grant Poland the right to tax the gains related to transferring the ownership of an immovable property company. Accordingly, one of the recommendations in the area of international treaties is to expand the network of treaties for avoidance of double taxation containing the immovable property clause in the wording adapted to up-to-date international solutions provided among others in the OECD MC and to conduct strict and effective exchange of tax information with foreign tax administrations.

[29] MNE Tax, UN releases updated model tax treaty adding new technical services fees article, 2018, https://mnetax.com/un-releases-updated-model-tax-treaty-adding-new-technicalservice-fees-article-27765, [dostęp: 1.10.2022]; Kukulski Z., *Antyabuzywne klauzule Konwencji wielostronnej - nowa rzeczywistość bilateralnych umów podatkowych zawartych przez Polskę,* [w:] *Współczesne problemy prawa podatkowego. Teoria i praktyka,* t. 1 *Księga jubileuszowa dedykowana Profesorowi Bogumiłowi Brzezińskiemu,* red. J. Głuchowski, Warszawa 2019.

[30] Klauzula GAAR - zespół wprowadzonych do ustawy z dnia 29 sierpnia 1997 r. Ordynacji podatkowej (Dz.U. 1997 Nr 137, poz. 926 z późn. zm.) przepisów uniemożliwiających podatnikom podejmowanie działań, które choć są formalnie zgodne z prawem, mają na celu jedynie bądź przede wszystkim minimalizację obciążenia podatkowego; Jamroży M., *Metody unikania podwójnego opodatkowania w świetle wielostronnej konwencji implementującej środki traktatowego prawa podatkowego,* „Studia Prawno-Ekonomiczne" 2018, t.107.

With respect to domestic tax provisions, in turn, it is recommended to expand obligations of reporting changes in the ownership structure of immovable property companies, in particular when the company is indirectly alienated to non-residents, by imposing informational obligations and payer obligations on, for example, the domestic immovable property company or purchaser of assets.

It should also be noted that Poland has currently proposed a new system of taxing immovable property companies. Its essence can be reduced to obligating the immovable property company whose shares (stock), all the rights and obligations, participation units or interests of a similar nature are alienated to pay as a payer a 19 per income cent tax on that account, provided that at least one of the parties to the transaction is a non-resident taxpayer. Moreover, when the immovable property company does not have information about the value of the transaction, the basis of the 19 per cent taxation will be the market value of sold shares (stock), all the rights and obligations, participation units or interests of a similar nature. When the immovable property company is a non-resident, it will be obliged to appoint a tax representative in Poland to exercise taxpayer rights on behalf of the company for which they were appointed. The tax representative will be liable jointly and severally with the immovable property company for the tax obligation settled by the tax representative in the name and on behalf of that entity. At the same time, failure to fulfil taxpayer obligations has been sanctioned with a monetary penalty of up to PLN 1,000,000.

The immovable property clause may be an effective method of opposing practices of avoiding the taxation of gains from sale of immovable property in the state in which the property is situated through sale of shares in an immovable property company by a shareholder who is not a Polish resident. Its efficient use, however, is conditional upon an effective method to collect tax on gains from alienation of shares in an immovable property company by a non-resident. Provisions that obligate the non-resident to self-tax do not fulfil this prerequisite, especially as regards non-residents from states with which Poland has not entered into a treaty for avoidance of double taxation and when there is no legal basis to exchange tax information and provide mutual assistance in enforcing tax obligations with such states.

Changes of domestic regulations concerning the collection of tax on sale of shares in an immovable property company so as to make the companies actually liable for its payment will increase the effectiveness of collection. Because not all Polish treaties for avoidance of double taxation contain an immovable property clause (the Cyprus treaty being an example), the new Polish solutions will in practice not be applicable with respect to alienating parties that are residents of these states. In such case, income from sale of shares in an immovable property company will be taxed solely in the state of which the alienating party is a resident. Therefore, in order to exercise full rights to tax income from alienating immovable property, it is proposed to expand the Polish tax base so as to make treaties for avoidance of double taxation include provisions related not only to the immovable property clause, but also exchange of tax information.

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