STUDIA PRAWNICZE KUL
4 (100) 2024

Conventions for the avoidance of double taxation as acts of international and domestic law: consequences of applying tax agreements with differences between official language versions. Commentary to the verdict of the Polish Supreme Administrative Court of 18 April 2023, II FSK 400/21

Międzynarodowe umowy podatkowe jako akty prawa międzynarodowego oraz akty prawa krajowego – konsekwencje stosowania umów w przypadku rozbieżności pomiędzy różnymi wersjami językowymi. Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 18 kwietnia 2023 r., II FSK 400/21

Международные налоговые договоры как акты международного права и акты внутреннего права – последствия применения договоров в случае расхождений между различными языковыми версиями. Комментарий к решению Высшего Административного Суда от 18 апреля 2023 г., II FSK 400/21

Міжнародні податкові договори як акти міжнародного права та акти національного права – наслідки застосування договорів у разі розбіжностей між різними мовними версіями. Коментар до постанови Вищого адміністративного суду від 18 квітня 2023 року, II FSK 400/21

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Summary: The author discusses the verdict of 18 April 2023 issued by the Polish Supreme Administrative Court in case II FSK 400/21 concerning the obligations of a Polish entity (tax remitter) in the area of uncollected flat-rate corporate income tax – also referred to as withholding tax or WHT – on payments made from Poland to a Swedish entity. The author aims to express approval for the standpoint taken by the Court by underlining the dogmatic correctness and axiological value of the commented verdict, as well as recognising it as a notable example of the voice of reason amongst rather inconsistent rulings in similar cases. The main issue the Court considered was the interpretation of Article 11 section 1 of the Convention of 19 November 2004 between the Government of the Republic of Poland and the Government of the Kingdom of Sweden for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. At the time when the events of the case took place, three language versions of Article 11 section 1 of the Convention existed, and the Polish version – contrary to Swedish and English – did not contain the "beneficial owner" clause. The consequence of the Polish tax remitter assuming that there were no grounds to examine the fulfilment of this condition was, in principle, that no tax was collected on payments made to Sweden, irrespective of whether or not the recipients were the beneficial owners of the receivables. This approach was challenged by Polish tax authorities, according to whom the comparison of different language versions of the disputed provision should effectively lead the tax remitters to notice and apply the beneficial owner condition. In the verdict, the Supreme Administrative Court mostly focuses on the results of discrepancies between the linguistic versions of

ISSN: 1897-7146; eISSN: 2719-4264;
https://doi.org/10.31743/sp.17321

the Convention, nevertheless, the judgment itself is also a valuable voice in the discussion on withholding tax, in particular the position and function of the tax remitter in the tax system, as well as the scope of the obligations that can reasonably be imposed on it within a democratic state under the rule of law.

Key words: international tax law, beneficial owner clause, agreements on the avoidance of double taxation

Streszczenie: Autorka omawia wyrok Naczelnego Sądu Administracyjnego z dnia 18 kwietnia 2023 r., II FSK 400/21, wydany w sprawie określenia odpowiedzialności polskiej spółki (płatnika) za niepobrany zryczałtowany podatek dochodowy od osób prawnych od odsetek wypłaconych podmiotowi w Szwecji. Celem opracowania jest wyrażenie aprobaty dla stanowiska zajętego przez Sąd, w szczególności podkreślenie dogmatycznej poprawności oraz wartości aksjologicznej wyroku – będącego godnym uwagi przykładem głosu rozsądku wśród szeregu niespójnych rozstrzygnięć odnoszących się do tego zagadnienia. Kluczowym elementem wyroku jest kwestia wykładni art. 11 ust. 1 Konwencji między Rządem Rzeczypospolitej Polskiej a Rządem Królestwa Szwecji w sprawie unikania podwójnego opodatkowania i zapobiegania uchylaniu się od opodatkowania w zakresie podatków od dochodu, umowy o unikaniu podwójnego opodatkowania z 2004 r. W badanym okresie wskazany przepis funkcjonował w trzech wersjach językowych, przy czym jego polska wersja – inaczej niż wersja szwedzka i angielska – nie zawierała klauzuli tzw. rzeczywistego właściciela otrzymywanych należności. Konsekwencją przyjęcia przez polskich płatników stanowiska mówiącego, że nie ma konieczności badania spełnienia tego warunku, był zasadniczo brak poboru podatku od płatności dokonywanych do Szwecji, niezależnie od tego, czy odbiorcy byli rzeczywistymi odbiorcami otrzymywanych należności, czy też nie. Podejście to zakwestionowały organy podatkowe, wskazując, że porównanie różnych wersji językowych ww. aktu powinno doprowadzić płatników do wniosku o istnieniu w nim przesłanki rzeczywistego właściciela. Gros rozważań Naczelnego Sądu Administracyjnego koncentruje się właśnie na kwestii rozbieżności między wersjami językowymi Konwencji oraz skutkach tychże, a przywołany wyrok stanowi ponadto cenny głos w dyskusji na temat podatku u źródła, w szczególności pozycji i funkcji płatnika w systemie podatkowym oraz zakresu obowiązków, jakie mogą być na niego racjonalnie nałożone w ramach demokratycznego państwa prawa.

Słowa kluczowe: międzynarodowe prawo podatkowe, klauzula rzeczywistego właściciela, umowy o unikaniu podwójnego opodatkowania

Резюме: Автор анализирует решение Высшего Административного Суда от 18 апреля 2023 г., II FSK 400/21, вынесенное по делу об определении ответственности польской компании (плательщика) за невзысканный фиксированный корпоративный подоходный налог с процентов, выплаченных юридическому лицу в Швеции. Цель статьи – выразить одобрение позиции, занятой Судом, в частности, подчеркнуть догматическую правильность и аксиологическую ценность решения, которое является показательным примером голоса разума на фоне ряда противоречивых решений по этому вопросу. Ключевым элементом решения является вопрос толкования статьи 11 (1) Конвенции между Правительством Республики Польша и Правительством Королевства Швеция об избежании двойного налогообложения и предотвращении уклонения от уплаты налогов в отношении налогов на доходы, соглашения об избежании двойного налогообложения от 2004 года. В течение рассматриваемого периода вышеупомянутое положение действовало в трех языковых версиях, причем польская версия – в отличие от шведской и английской – не содержала так называемой оговорки о бенефициарном владельце в отношении полученной дебиторской задолженности. Следствием того, что польские плательщики придерживались позиции об отсутствии необходимости проверять соблюдение этого условия, стало то, что в принципе платежи в Швецию не облагались налогом, независимо от того, являлись ли получатели фактическими бенефициарами полученной дебиторской задолженности или нет. Этот подход был оспорен налоговыми органами, которые указали, что сравнение различных языковых версий вышеупомянутого закона должно привести плательщиков к выводу о существовании в нем условия о бенефициарном владельце. Основная часть рассуждений Высшего Административного Суда посвящена именно вопросу расхождений между языковыми версиями Конвенции и последствиям таких расхождений. Кроме того, цитируемое решение является ценным аргументом в дискуссии о налоге у источника, в частности о статусе и функции плательщика в налоговой системе и объеме обязательств, которые могут быть обоснованно возложены на него в демократическом правовом государстве.

Ключевые слова: международное налоговое право, оговорка о бенефициарном владельце, соглашения об избежании двойного налогообложения

Резюме: Авторка обговорює рішення Вищого адміністративного суду від 18 квітня 2023 року, II FSK 400/21, винесене у справі про визначення відповідальності польської компанії (платника) за несплачення паушального корпоративного податку на прибуток з відсотків, сплачених суб'єкту господарювання у Швеції. Мета статті – висловити схвалення позиції, зайнятої Судом, зокрема, підкреслити догматичну правильність та аксіологічну цінність рішення, яке є яскравим прикладом голосу розуму серед низки суперечливих рішень з цього питання. Ключовим елементом рішення є питання тлумачення статті 11, розділ 1 Конвенції між Урядом Республіки Польща і Урядом Королівства Швеція про уникнення подвійного оподаткування та запобігання податковим ухиленням щодо податків на доходи, угоди про уникнення подвійного оподаткування 2004 року. Протягом звітного періоду вищезгадане положення функціонувало у трьох мовних версіях, причому його польська версія – на відміну від шведської та англійської – не містила так званого положення про "фактичного власника" отриманої дебіторської заборгованості. Наслідком того, що польські платники прийняли позицію про відсутність необхідності перевіряти виконання цієї умови, стало те, що в принципі не стягувався податок з платежів, здійснених до Швеції, незалежно від того, чи були одержувачі фактичними отримувачами отриманої дебіторської заборгованості, чи ні. Такий підхід був оскаржений податковими органами, які вказали, що порівняння різних мовних версій вищезгаданого закону має привести платників до висновку про наявність бенефіціарного власника в згаданому законі. Основна частина дискусії у Вищому адміністративному суді зосереджена саме на питанні розбіжностей між мовними версіями Конвенції та наслідках таких розбіжностей, а цитоване рішення, крім того, є цінним голосом у дискусії про податок що утримується, зокрема, про позицію та функції платника в податковій системі та обсяг зобов'язань, які можуть бути обґрунтовано покладені на нього в демократичній правовій державі.

Ключові слова: міжнародне податкове право, положення про бенефіціарного власника, угоди про уникнення подвійного оподаткування

Introduction

In the commentary,[1] the author discusses the verdict of 18 April 2023 issued by the Polish Supreme Administrative Court (hereinafter also as: the Court) in case II FSK 400/21 concerning the obligations of a Polish tax remitter in the area of flat-rate corporate income tax (also known as withholding tax or WHT) with regard to interest payments made to its Swedish affiliate.[2] Under Polish regulations, tax remitters (i.e. domestic entities disbursing interest payments abroad) are generally obligated to calculate withholding tax at a rate of 20%, collect it, and remit it to the relevant tax office – taking into account the rules governing the application of

1 The scope of the sources cited in this article was determined by the form and aim of the text (commentary), as well as its object (verdict issued by a Polish court), resulting in limited need and possibility to cite studies, especially international ones. Therefore, for comparative purposes, the text is limited to citing only examples of international source materials.

2 The commented verdict was issued in one of four similar cases considered on 18 April 2023, under case II FSK 2524/20, II FSK 2525/20, II FSK 2782/20 and II FSK 400/21.

tax exemptions or different tax rates based on other provisions.[3] One example of such an exemption stems from the Convention of 19 November 2004 between the Government of the Republic of Poland and the Government of the Kingdom of Sweden for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income[4] (hereinafter: the DTT with Sweden). Nevertheless, the wording discrepancies between different language versions of this act, i.e. lack of the beneficial ownership condition in the Polish version, with its simultaneous presence in the English and Swedish versions, resulted in a number of disputes between tax authorities and tax remitters.

The author's aim is to express approval for the standpoint taken by the Court in one of such disputes, by underlining the dogmatic correctness and axiological value of the commented verdict, as well as recognising it as a notable example of clear legal reasoning amongst rather inconsistent rulings in similar cases.[5] As to the merits, the commented verdict focuses on the consequences of a wording discrepancy between different language versions of provisions determining the choice of tax remitter's conduct. However, it also includes important remarks of a systemic and axiological nature with which the author fully agrees and considers worthy of wider advocacy (with the outstanding question of trust in the state and the law it creates). By focusing on the linguistic interpretation of the provisions, the Court manifests a high regard for the guarantee function of tax law, refusing to accept a situation where the burden of errors in legislation issued by the State is shifted to the taxpayer (remitter). This way the Court resists the temptation to adopt a simplistic, short-term approach focused on pursuing solely fiscal objectives but chooses to take into account the historical "state of mind" of the tax remitter, thus ensuring that its position is deeply in line with fundamental values and rules upon which the Polish state and tax system is built. Taking into account the controversies

3 As of 2019, these rules have been significantly modified, including the introduction of the so-called *pay & refund* mechanism, partly replacing the *relief at source* mechanism.

4 Journal of Laws [Dziennik Ustaw] 2006 no. 26, item 193.

5 As for the cases where the Courts sided with the tax authority, see e.g. the judgments of the Supreme Administrative Court of 2 February 2012, II FSK 1398/10 and II FSK 1399/10 (tax ruling cases on cash pooling); of 26 July 2017, II FSK 1866/15 (tax ruling case); of 27 April 2018, II FSK 1370/16; of 26 July 2022, II FSK 1230/21; of 30 January 2024, II FSK 560/21 and of 11 June 2024, II FSK 1170/21 and II FSK 1161/21 (the last two with a dissenting opinion by one of the judges). A different position so far was taken by the Provincial Administrative Court in Szczecin in judgements of 27 October 2021, I SA/Sz 645/21, of 19 May 2021, I SA/Sz 820/20 – currently under no. II FSK 1173/21 where a question about legal issue that gives rise to serious doubts was submitted to a panel of seven judges – and of 13 October 2021, I SA/Sz 646/21, as well as the Provincial Administrative Court in Opole in the judgement of 23 February 2024, I SA/Op 340/23, although, as in September 2024, none of these four judgements have become final yet.

arising in cases that involve language discrepancies between different language versions of the provisions, it would be recommended to adopt a general, uniform practice, encouraging judges to resolve such issues in accordance with general tax law principles – and perhaps the first step in this direction has already been taken in case II FSK 1173/21 where a question about legal issue that gives rise to serious doubts was submitted to a panel of seven judges.

1. Overview of the legal issue assessed

The commented verdict concentrates on the interpretation of Article 11 point 1 of the DTT with Sweden, with the main focus on the consequences of the wording discrepancy between the three official language versions of the same act.

At the time when the events of the case took place, the English version of Article 11 point 1 of the DTT with Sweden indicated that "Interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State." Such a wording would seem fairly clear, were it not for the fact that until the end of 2017, the Polish version (originally published along with the English and Swedish texts in the Journal of Laws – Poland's official government journal[6]) lacked the phrase "beneficially owned": according to its wording, the interests were simply to be "paid to a resident of the other Contracting State."[7] As time has demonstrated, this discrepancy, and the notion of beneficial ownership itself, proved to be critical to the adjudication of similar cases including cross-border payments and to WHT matters in general.[8] Although Poland removed this discrep-

6 See footnote no. 3.

7 As indicated by Werner Haslehner in: *Klaus Vogel on Double Taxation Conventions*, eds. E. Reimer, A. Rust, Alphen aan den Rijn 2015, the requirement of beneficial ownership should not be used in a narrow technical sense, but rather understood *(i)* in relation to the purpose for which it was introduced to the OECD Model Convention (i.e. to clarify the meaning of the words "paid to a resident" and to demonstrate that the State of source is not obliged to give up taxing rights over interest income merely because that income was paid directly to a resident of a State with which the State of source had concluded a convention), and *(ii)* in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance. One should, however, keep in mind that the OECD Model Convention is not a treaty under international public law but rather serves as a starting point for tax treaty negotiations, cf. M. Lang, *The Interpretation of Tax Treaties and Authentic Languages*, in: *Essays on Tax Treaties. A Tribute to David A. Ward*, eds. G. Maisto, A. Nikolakakis, J.M. Ulmer, Amsterdam 2013.

8 The notion of "beneficial owner," widely commented on by various international and Polish tax law academics, was officially defined in Polish CIT regulations in 2017, then underwent several

ancy under a dedicated procedure, i.e. through a Notice from the Minister of Foreign Affairs, it was not until 2017 that the adjustment was officially made.[9] Before that, judging by the number of disputes on the subject,[10] there were at least a dozen Polish tax remitters (including State-owned companies[11]) who, while applying this provision, concluded there were no grounds to deduct withholding tax on the interest paid out to Swedish companies, irrespective of whether the recipient could or could not be considered as the beneficial owner of the payables.

changes – all of this while becoming a focal point of many disputes between tax remitters and tax authorities, both in tax ruling and tax assessment cases. A separate discussion revolves around whether beneficial ownership should be examined in cases where the regulations do not provide explicitly for this condition, as is the case with dividend payments, cf., e.g., verdicts of Provincial Administrative courts in Warsaw of 25 April 2022, III SA/Wa 2679/21 and III SA/Wa 2668/21; in Opole of 9 December 2022, I SA/Op 311/22; in Poznań of 9 July 2021, I SA/Po 230/21 (the last one upheld by the Supreme Administrative Court in its verdict of 13 June 2024, II FSK 1209/21, as on 11 September 2024 written justification is not published yet) or in Łódź of 4 October 2022, I SA/Łd 505/22 and of 9 September 2020, I SA/Łd 322/20 (the last one upheld by the Supreme Administrative Court in its verdict of 27 April 2021, II FSK 240/21), as well as the verdicts of the Supreme Administrative Court of 31 January 2023, II FSK 1588/20, or of 6 October 2023, II FSK 1333/22. See also: M. Wilk, *Klauzula rzeczywistego beneficjenta (beneficial ownership) po zmianach w Komentarzu do Konwencji Modelowej OECD w sprawie podatku od dochodu i majątku z 2014 r.*, Przegląd Podatkowy 2015, no. 9, pp. 49–55; idem, *Znaczenie przesłanki rzeczywistego właściciela (beneficial owner) dla zastosowania zwolnienia dywidend z podatku u źródła*, Przegląd Podatkowy 2020, no. 8, pp. 21–29; B. Kuźniacki, *Antyabuzywna wykładnia koncepcji rzeczywistego beneficjenta (beneficial owner) z pominięciem Konwencji wiedeńskiej na gruncie polsko-szwedzkiej umowy o unikaniu podwójnego opodatkowania. Glosa do wyroku NSA z 26.07.2022 r., II FSK 1230/21*, Przegląd Podatkowy 2023, no. 4, pp. 45–46; B. Kuźniacki, *Rzeczywisty beneficjent a podatek u źródła*, Warszawa 2022 and A. van Boeijen-Ostaszewska, J. de Goede, L. Nouel, B. Obuoforibo, J. Wheeler, W. Wijnen, *Response from IBFD Research Staff to: Clarification of the Meaning of 'Beneficial Owner' in the OECD Model Tax Convention*, University of Amsterdam 2011.

9 Notice from the Minister of Foreign Affairs of 20 November 2017 on the correction of errors, Journal of Laws 2017 item 2177.

10 When reviewing the Central Database of Rulings of Administrative Courts, the author identified eight judgements of the Supreme Administrative Court where Article 11 point 1 of the DTT with Sweden was invoked as the basis as to the merits (results as on 11 September 2024), however, there are at least a few more judgments of different Provincial Administrative Courts that are still under consideration of the Supreme Administrative Court and therefore not final yet (e.g., cases I SA/Sz 645/21, I SA/Sz 820/20, I SA/Sz 646/21, I SA/Op 155/22, I SA/Op 156/22, I SA/Op 340/23). Case I SA/Sz 820/20 is already being handled by the Supreme Administrative Court under no. II FSK 1173/21 where a question about legal issue that gives rise to serious doubts was submitted to a panel of seven judges.

11 J. Mazurek, *Euroobligacje – solidny zastrzyk kapitału*, Computerworld, 20.07.2016, https://www.computerworld.pl/news/Euroobligacje-solidny-zastrzyk-kapitalu,405878.html [access: 2.04.2024].

2. Facts of the case

The case involves a Polish entity that in 2012 made cross-border interest payments as a result of a loan agreement concluded in 2007 with a Swedish-affiliated company. When disbursing the payments, the tax remitter applied Article 11 point 1 of the DTT with Sweden in a version that did not include the beneficial owner clause, and thus, did not collect any tax.

Several years later, having verified the correctness of the tax remitter's compliance with its WHT obligations within the dedicated procedure, the relevant tax authority disagreed with this approach and ruled on this entity's liability for the uncollected and unpaid WHT.

Not surprisingly, as the case unfolded, the tax remitter and the tax authority took opposing positions, and while the former claimed they were only compelled to apply the Polish version of the regulations (which effectively meant no obligation to verify the beneficial ownership of the Swedish company), the latter maintained it was the tax remitter's duty to:

(i) compare Polish and Swedish versions of the DTT with Sweden,
(ii) identify the discrepancies in Polish and Swedish wording with respect to the beneficial owner clause,
(iii) look at the English version of the DTT with Sweden to identify the beneficial owner clause, thus resolving the doubts in this regard, and
(iv) apply the beneficial owner clause accordingly.

Having conducted such an analysis itself, the tax authority then claimed that the Swedish entity proved to be nothing more than a conduit company,[12] so the beneficial owner condition was not fulfilled – meaning the tax remitter should have collected the WHT at the 20% domestic rate provided specifically for interest payments.

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12 The concerns about the role of conduit companies in improper use of tax conventions ("treaty shopping") were expressed by the Committee on Fiscal Affairs of the Organisation for Economic Cooperation and Development (hereinafter: OECD) in its Commentary on Article 1 of the 1977 OECD Model Convention. According to the report, the most important situation of this kind regards a company situated in a treaty country and acting as a conduit for channelling income economically accruing to a person in another State who is thereby able to "improperly" take advantage of the benefits provided by a tax treaty – to the detriment of the country of source of income, see: *Double Taxation Conventions and the Use of Conduit Companies*, in: *Model Tax Convention on Income and on Capital 2017*, OECD iLibrary 2019, R(6). Similar positions were also expressed on the grounds of the United Nations Model Convention, see: P. Baker, *Improper Use of Tax Treaties, Tax Avoidance and Tax Evasion*, in: *United Nations Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries*, eds. A. Trepelkov, H. Tonino, D. Halka, New York 2013.

3. Other issues assessed

To resolve the dilemma in question, the Court focused primarily on the differences in the place and effects of the international agreements in the legal system, both as acts of international and domestic law. Although the indicated issue is central to the case, the Court also commented on a number of other legal and axiological problems extensively raised by the parties and reviewed in this and other similar cases. Absorbing as they may be, due to the limited space, these topics do fall outside the scope of this comment, but being an integral and important part of the broader discussion accompanying the WHT and, they do deserve a mention, albeit a brief one.

The other assessed issues were the following:

(i) the question of intertemporal interpretation of legal provisions, here focused on resolving whether the beneficial owner clause, introduced *expressis verbis* to the DTT with Sweden in 2017 by means of a notification procedure (which, as the name suggests, assumes not so much a change in the law but rather a "correction" thereof), can be applied to actions taken since the official publication of all three versions of the DTT with Sweden in 2006 – as the tax authorities would have it – or only *ex nunc,* starting from the publication of the corrected version in 2017, as the tax remitters claim,

(ii) the discussion about tax remitter's position and functions in the area of WHT and in the tax system in general,[13] naturally followed by the question of the scope of this entity's obligations, which materialise at this philosophically important moment of deciding whether "to collect or not to collect," and if yes – which tax rate to apply,[14]

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13 In section 6.3 of the commented judgement the Court underlines that while according to Article 8 of the Tax Ordinance Act tax remitters improve tax collection and prevent the possibility of tax evasion, they also support taxpayers in the fulfilment of their tax obligations, thus relieving them from direct contact with the tax authorities. To this end, tax remitters perform three material-technical operations: they calculate the tax due from the taxpayer, collect it and pay it to the competent tax authority within the time limit prescribed by the tax law. Thus, due to the nature of their obligations (which do not include verification of compliance of national tax regulations with the provisions of Community law or the Constitution of the Republic of Poland), tax remitters cannot be identified with the tax authority.

14 This part of the discussion focuses on whether, at the moment of disbursing the payment, *(i)* the tax remitter is able to and should investigate all possible facts to ensure that the substantive conditions for exemption / reduced tax rate are actually met, or *(ii)* tax remitter's duties are limited to collecting formal documentation (taxpayer's certificate of residence and statement confirming fulfilment of conditions to apply exemption or a lower tax rate), calculating the tax accordingly and paying it to the competent authority within the statutory deadline. Although, contrary to the area of value-added

(iii) the extent of the obligations that a democratic state can reasonably impose on its citizens, as well as that state's duty to provide them with conditions for carrying out these obligations, especially when noncompliance is linked not only to tax liability but also penal fiscal consequences – here discussed in the context of the historically unspoken (and only manifested years later) duty to compare all the language versions of double taxation agreements and to look for possible discrepancies between them, whereby the state itself has not exercised due diligence in drafting the text in such a way as to avoid potential interpretive doubts,

(iv) the fundamental question of trust in the state and the law it creates,[15] which – bearing in mind the argument of abusiveness that is being increasingly raised by the tax authorities in different disputes[16] – may as well spark a general debate about fairness in relations between the state and private law entities, including such issues as a duty to create legal provisions that are as precise, clear and correctly formulated as possible (test of determinacy of law), the general prohibition of abusing the law (by all the entities that apply legal provisions, including state authorities), and finally, the obligation to bear consequences for all actions taken in this regard,[17] especially if the lack of due

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tax (hereinafter: VAT), the requirement for the WHT remitter to maintain "due care" when applying the exemption / lower tax rate was officially introduced to Polish regulations and not developed by the courts, this topic somehow reminds the author of the discussion regarding verification by the taxpayers of their counterparts in terms of potential involvement in VAT frauds. One has to keep in mind, though, that in the area of WHT regulations stipulate mutual relations, be it capital or personal, between tax remitters and taxpayers, which enable the tax remitters to invoke the taxpayer's fault to exclude their liability for failing to collect the tax (Article 30 § 5 of the Tax Ordinance, currently of less importance due to introduction in 2019 of Article 30 § 5a of the Tax Ordinance).

15 In accordance with the principle of a democratic state of law, which stems from Article 2 of the Constitution of the Republic of Poland, the stipulation and application of the law must not become a kind of trap for this law's addressee, as they must be allowed to arrange their affairs in confidence that they do not expose themselves to unforeseeable legal consequences, and in the belief that their actions taken in accordance with the applicable law will also be recognised by the legal order in the future, cf. the verdicts of Polish Constitutional Tribunal of 7 February 2001, K 27/00, published in the official files of the Tribunal, OTK ZU 2001, no. 2, item 29 and of 14 June 2000, P 3/00, OTK ZU 2000, no. 5, item 138.

16 Cf., e.g., the argumentation on Article 22c of the Act of 15 February 1992 on Corporate Income Tax invoked in the verdicts of the Provincial Administrative Court in Opole of 9 December 2022, I SA/Op 311/22 and of 17 February 2023, I SA/Op 5/23 and I SA/Op 379/22.

17 Interestingly, despite the tax remitter's timely fulfilment of its information duties towards tax administration, tax authorities have only "seized the opportunity" to start the tax audit after the publication of the Notice on the correction of errors by the Minister of Foreign Affairs. Since the audit covered fiscal year 2012, the payments must have been made in December 2011 and in November 2012, meaning the tax authorities were aware of tax remitter's not collecting the tax since 2012. Nevertheless, they only started – and finished – the tax audit in November 2017, barely avoiding the expiration of tax liabilities due to a 5-year statute of limitations (suspended shortly thereafter, due to the initiation of fiscal penal proceedings). Such a sequence of events, as the Court underlined in section 6.6 of the

care and mistakes made in the process of drafting and applying the law have created loopholes that were used by tax remitters and/or taxpayers to reduce the scope of their tax burdens.[18]

4. Essence of the judgment and the Court's position

Regarding the essential issue in question, the Court agreed with the tax remitter and took a position that can be summarised as follows: for actions taken before 2017 (that is when the Polish state as a party to the DTT with Sweden corrected the Polish version of the agreement, thus ensuring mutual conformity of all its authentic texts), both the tax remitter and the tax authorities should use the text published in the official language applicable in the Republic of Poland in accordance with Article 27 of the Polish Constitution,[19] i.e. the Polish version officially published in 2006. It was only in 2017 – when the Notice of correction adding the beneficial owner clause to Article 11 point 1 of DTT with Sweden was published – that the tax remitter was able to become acquainted with the correct wording of the act. And since the Notice cannot have a retroactive effect, tax authorities could not have held the tax remitter liable for not collecting the WHT on interest payments made in 2012.

As the Court underlined,[20] a citizen (here: the tax remitter) cannot be compelled to compare different language versions of an international agreement (even if all of them are authentic texts, published in a promulgation journal), to look for

justification, may in turn raise doubts as to whether, before the publication of the Notice, the tax authorities themselves were fully convinced that the Polish authentic version of DTT with Sweden differs that much from other versions. In the commented case, the Court mostly focused on whether there was any obligation on the part of the tax remitter to collect the WHT in the first place and did not discuss the issue of expiration of tax liability, considering it a matter of secondary importance. This issue does, however, provoke reflection about the dynamics of relations between state itself and its citizens, as well as of the condition of trust between them.

18 As underlined by the Court, the Polish state took its time to ensure the correct wording of the authentic Polish text of the DTT with Sweden: the DTT itself was officially promulgated in 2006 and while the Supreme Administrative Court drew attention to the language versions' discrepancy already in 2012 (verdict of 2 February 2012, II FSK 1398/10), the Notice on the correction of errors was only published in November 2017.

19 Cf. verdicts of the Provincial Administrative Court in Warsaw of 7 October 2009, III SA/Wa 101/09 and of the Supreme Administrative Court of 26 November 2001, I SA/Ka 1843/00; of 21 April 2008, I GSK 966/07 and of 27 September 2011, I GSK 482/10.

20 Section 6.6 of the commented verdict.

any discrepancies between these versions, and finally, to resolve the problem caused by these discrepancies in order to determine the scope of obligations arising from applicable provisions – especially if this citizen is not equipped with the legal means to resolve the discrepancy.[21] At the same time, having made a mistake in formulating the authentic Polish text of the agreement, and thus failing to exercise due diligence in this regard, the state cannot demand that the addressee of the regulation performs an obligation that goes further than complying with the provision published in the official language.

To reach this conclusion, the Court had to take into account the signification of the DTT with Sweden (and international tax agreements in general) in the legal system, both as acts of international and domestic law.[22]

5. Conventions for the avoidance of double taxation as acts of international and domestic law

As the Court explained,[23] the conventions for the avoidance of double taxation should be considered at two levels: *(i)* externally, as acts of international law, and *(ii)* internally, as part of domestic law.

On the external level, DTTs express the will of states-parties to agree on a certain division of tax jurisdiction, by allocating the right to tax through dedicated

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21 When it comes to the legitimacy and necessity of comparing different texts of the international agreements in order to determine possible discrepancies, it appears logical to agree with the currently prevailing view that the court may "routinely" limit its interpretation to the version prepared in its national language (provided the interpretation is in "good faith"). Nevertheless, one has to keep in mind that relying on the domestic language version may not always suffice, especially in areas, such as tax law, where the interests of the parties to legal relations are largely divergent and so the interpretation of underlying regulations may have certain financial effects to the country whose court settles the case. To guarantee the effective and reliable application of the DTTs, domestic courts should seek to ensure consistent results of interpretation (the rule of common interpretation). Cf. B. Brzeziński, K. Lasiński-Sulecki, W. Morawski, *Problemy wykładni międzynarodowych umów w sprawie unikania opodatkowania, sporządzonych w dwóch lub większej liczbie języków*, Kwartalnik Prawa Podatkowego 2023, no. 1, pp. 9–18 and the literature cited there.

22 As further explained by F. Majdowski in a commentary to the same verdict: *O zakresie odpowiedzialności płatnika w świetle błędnego tłumaczenia tekstu podatkowej umowy międzynarodowej na przykładzie polsko-szwedzkiej konwencji w sprawie unikania podwójnego opodatkowania. Glosa do wyroku NSA z 18.4.2023 r., II FSK 400/21*, Monitor Podatkowy 2023, no. 4.

23 Section 6.5 of the commented verdict.

distributive (allocation) norms,[24] aimed at ensuring the implementation of the general purpose of DTTs, i.e. elimination of double taxation.[25] DTTs do not therefore create the right to taxation but limit the already existing rights to the extent agreed to by the contracting states. As a result, DTTs can only improve the situation of a taxpayer (including the scenario where states-parties agree on fully giving up their right to tax certain payments[26]), but cannot burden the taxpayer or the tax remitter with an obligation that does not arise from national law.[27]

A crucial aspect of understanding and interpreting DTTs on the external level is of course the examination of the consensual intent of the parties-states at the time of agreement conclusion, including such factors as the reservations on the authenticity of different language versions of the agreement, as well as the choice of the authentic text that is decisive in the interpretation of any discrepancies of the agreement.

The Polish state is obligated to resolve any discrepancies by Article 9 of the Polish Constitution, and has various complementary tools that allow it to fulfil this obligation:

1. The DTTs themselves, including the DTT with Sweden, where Article 30 stipulates anti-collision rules that point to the English version of the agreement as binding in case states-parties to the agreement have any interpretation doubts regarding the allocation of taxation rights between them,[28]
2. Article 33 section 1 and Article 79 section 1 of the Vienna Convention of 23 May 1969 on the Law of Treaties,[29] regulating the issue of authenticity of various lan-

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24 Cf., e.g., B. Kuźniacki, *Antyabuzywna wykładnia koncepcji rzeczywistego beneficjenta*…, pp. 45–56. The author argues that while the allocation function of the beneficial owner clause results from an accurate and comprehensive analysis of this instrument, compliant with the interpretation rules applicable to international agreements (including DTTs), the anti-avoidance function is mostly based on the pro-fiscal, unclear and undefined approach towards beneficial ownership clause, presented by the Organisation for Economic Co-operation and Development (OECD) over the past 50 years.

25 Cf. M. Wilk, *Klauzula rzeczywistego beneficjenta*…, pp. 49–55 and B. Kuźniacki, *Rzeczywisty beneficjent*…, pp. 130–132. In essence, both researchers advocate in opposition to the treatment of "beneficial owner" clause as a type of anti-avoidance rule.

26 Section 6.5 of the commented judgement.

27 F. Majdowski, *O zakresie odpowiedzialności płatnika*…, p. 3.

28 As the court underlined in section 6.5 of the commented verdict, being international law acts, DTTs generally regulate the mutual agreement procedures intended to, among other things, remove difficulties or doubts that may arise in the interpretation or application of a particular DTT (e.g. choice of that DTT's binding text and the correction of errors in it). States may also jointly agree on how to prevent double taxation in cases that are not regulated by the DTT. This, however, only concerns these acts as acts of international law, thus regulating the obligations and rights of the parties to such agreements.

29 Journal of Laws 1990 no. 74, item 439 (hereinafter: Vienna Convention).

guage versions and the way of treating errors that are mutually determined by contracting states,[30]

3. Polish Act of 14 April 2000 on International Agreements,[31] with its Article 18b, regulating the official procedure of correcting any language and translation mistakes that may occur in international agreements – applied by means of a notice made by the competent minister, and effectively used in the case at hand.

Nevertheless, one cannot lose sight of Article 87 section 1 of the Polish Constitution and the fact that international agreements, as one of the sources of universally binding law of the Republic of Poland, also constitute part of domestic law. As a result, unless specified otherwise, international agreements must have an officially promulgated Polish language version to be used as the basis for interpretation.[32] In other words, whatever the authentic languages of the agreement are, its correct applicability may only be ensured if this international agreement was published in the Polish language in the Journal of Laws. This is the only approach that will enable full implementation of all the principles derived from Article 2 of the Polish Constitution: the principle of determinacy of law, requirements of proper legislation and the principle of protection of trust in the state and the law it creates.[33]

Having conducted the above analysis of DTTs' meaning and significance as acts of both international and domestic law, the answer to the question in the commented case has proved to be fairly simple: as the Court concluded, the regulations invoked by the tax authorities in the commented case – regarding the issue of a binding text of an agreement and the procedure aimed at correcting errors in this

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30 Article 33 section 3 of the Vienna Convention establishes a rebuttable presumption that the terms of the treaty have the same meaning in each authentic text. The underlying idea is to spare the interpreter the need to scrutinise and compare all of the authenticated texts in order to apply the treaty. That is why the solution adopted in the DTT with Sweden – with English prevailing in case of discrepancies in interpretation – should generally mean that as long as the wording in the local language version is clear, there is no reason for the interpreter to consider other versions. In this regard, M. Lang presents an example of the treaty between Greece and Turkey where a similar solution has been adopted: "If the wording is completely clear and does not leave any room for doubt, there is no reason for the Greek official to consider the English or the Turkish version of the treaty as well. Likewise, Turkish tax officials interpreting the same treaty provision may limit themselves to examining the Turkish version of the provision. If the wording is clear, they will not be required to take the English or the Greek version into account," M. Lang, *The Interpretation of Tax Treaties*…, pp. 18–19. To learn more on the purpose, content and scope of the rules enshrined in Article 33 of the Vienna Convention, as well as its history, see also P. Arginelli, *The Interpretation of Multilingual Tax Treaties*, Leiden 2013.

31 In the commented verdict, consolidated text: Journal of Laws 2000 no. 39, item 443 as amended.

32 Ref. in Article 87 secition 1 (hierarchy of the universally binding law sources in Poland), Article 27 (Polish as the official language in the Republic of Poland) and Article 2 (principle of a democratic state of law).

33 Cf. verdict of Polish Constitutional Tribunal of 28 October 2009, Kp 3/09, OTK-A 2009, no. 9, item 13.

area – concern the DTTs at the external level only, i.e. as acts of international law. As a result, these factors are not relevant in terms of the tax remitter's situation and the scope of its obligations – especially bearing in mind that it is possible for the states-parties to the DTT to resign from their authority to tax the interest paid to a non-resident who is not the actual beneficiary, as it does not violate the allocation of tax jurisdiction adopted in the agreement.

It is worth noting that not all of the Supreme Administrative Court's judges make the distinction between DTTs as acts of international and domestic law. For example, in the verdict of 26 July 2022, II FSK 1230/21, the same Court – while noting that the language discrepancy of Article 11 section 1 of DTT with Sweden was not removed until 20 November 2017 – underlined that ever since the DTT with Sweden came into force, it included an anti-collision rule of Article 30 indicating the English version of the agreement as binding in case of interpretation doubts. Analysing the same provisions, namely Article 27 and 91 of the Polish Constitution, the Court nevertheless came to a completely different conclusion as to the (lack of) necessity to rely on the Polish version of the DTT. In this regard, the Court effectively advocated for the direct application of the English version of the DTT as a ratified international agreement. A similar position was taken by the Court in its verdict of 30 January 2024, II FSK 560/21. What these judgements did not cover (contrary to the commented verdict) was that this provision is only applicable in the area of international law, and not in that of domestic law.[34]

6. Assessment of the verdict & practical comments

The commented verdict is a commendable example of legal reasoning. It resists the temptation to adopt the simplistic approach that is not necessarily based on regulations but rather pursues the undefined goal of combating tax avoidance. As pointed out in the doctrine, such a standpoint comes not without controversy,[35] since one of the arguments raised by tax authorities in similar cases contained an element of emotionality, emphasising the intentional character of tax burden reduction by means of the DTT with Sweden.[36] In this regard the commented verdict represents

34 As criticised by B. Kuźniacki, *Antyabuzywna wykładnia koncepcji rzeczywistego beneficjenta*…, pp. 45–56.

35 F. Majdowski, *O zakresie odpowiedzialności płatnika*…, p. 5.

36 See also the issue of the parties' intention to create a tax-efficient structure discussed in the verdicts of the Provincial Administrative Court in Opole of verdicts of 9 September 2022, I SA/Op 155/22

the voice of reason, pointing out that it is not mandatory for the taxpayer (tax remitter) to conduct an in-depth analysis of provisions which – at the moment of application – appear clear and uncontroversial. This seems particularly relevant for case at hand as in an attempt to justify a completely reverse approach, the Polish courts have more than once gone as far as to directly invoke Swedish text of the agreement as a reference – which in the days before widely available machine translations was a rather misguided argument, unless, of course, the interpreter of the text actually knew Swedish.[37] Yet, one should remember that laws are derived from abstract and general norms that are not addressed to specific, individual subjects. Unless otherwise specified, the rules and corresponding guarantees are therefore the same for everyone and cannot be understood differently depending on the type of entity (large, small, poor, prosperous etc.) that applies them. And it is exactly by focusing on the linguistic interpretation of the provisions that the Court manifests a high regard for the guarantee function of tax law, refusing to accept a situation where the burden of errors in legislation is shifted to the taxpayer (tax remitter). This way the Court resists the temptation to adopt a simplistic, short-term approach focused on pursuing solely fiscal objectives but chooses to take into account the historical "state of mind" of the tax remitter. As a result, the Court's standpoint is deeply in line with fundamental values and rules upon which the Polish state and tax system is built, such as a democratic state of law and trust, principle of the rule of law or principle of statutory regulation of taxes.[38]

Taking into account the controversies arising in cases that involve language discrepancies between different language versions of the provisions, it would be recommended to adopt a general, uniform practice, encouraging judges to resolve such issues in accordance with fundamental tax law principles – and perhaps the first step in this direction has already been taken in case II FSK 1173/21 where

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and I SA/Op 156/22 (which are not yet final, i.e. waiting to be heard by the Supreme Administrative Court).

37 Position originally expressed by the Supreme Administrative Court in its verdicts of 2 February 2012, II FSK 1398/10 and II FSK 1399/10, and repeated by Provincial Administrative Courts in Szczecin (verdict of 26 February 2012, I SA/Sz 65/15, upheld by the Supreme Administrative Court on 26 July 2017, II FSK 1866/15), Warsaw (verdict of 16 December 2015, III SA/Wa 390/15, upheld by the Supreme Administrative Court on 27 April 2018, II FSK 1370/16), Gorzów Wielkopolski (verdicts of 26 May 2021, I SA/Go 107/21 and I SA/Go 108/21, upheld by the Supreme Administrative Court on 11 June 2024, II FSK 1161/21 and II FSK 1170/21 – as on 11 September 2024, written justification is still to be published) and Opole (verdicts of 9 September 2022, I SA/Op 155/22 and I SA/Op 156/22, still to be heard by the Supreme Administrative Court).

38 Regulated in Article 2 of the Constitution and Article 120 of the Tax Ordinance Act, Article 7 of the Constitution and Article 121 of the Tax Ordinance Act, Article 217 of the Constitution.

a question about legal issue that gives rise to serious doubts was submitted to a panel of seven judges.

Sadly, having determined that the applicable version of the DTT with Sweden did not contain the "beneficial owner" clause, the Court obviously could not comment on the character of this regulation, i.e. whether – in the absence of a separate dedicated provision[39] – it is a *sui generis* anti-avoidance clause or a solely distributive norm aimed only at determining the allocation of income taxation rights. A clear position of the courts in this respect would be highly desirable, especially taking into account that the phenomenon of using regulations not originally intended to combat tax avoidance as a form of anti-avoidance tools is not new – as illustrated by the example of Article 199a of the Tax Ordinance Act, historically used by tax authorities in their attempts to question certain tax avoidance structures; a practice that has been criticised by both the courts and tax academics.[40] Nonetheless, there is often the impression that a conclusive answer to this dilemma in the area of WHT may not come too soon (or at all), especially ever since the Court of Justice of the European Union advocated the existence of a general EU law principle, according to which provisions of EU law cannot be invoked in a way that bears the hallmarks of fraud,[41] thus giving tax authorities an alternative tool to challenge tax settlements in this regard.

All in all, setting aside the detailed argumentation on the application of the DTT with Sweden, it seems that in the commented case, the dilemma effectively

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39 Article 7 section 1 of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (as of March 2024, modifications to this convention have not been introduced into DTT with Sweden yet) or Article 22c of the Act of 15 February 1992 on Corporate Income Tax, consolidated text: Journal of Laws 2014 item 851 as amended (Article 22c generally introduced as of 31 December 2015, and with regard to interest payments – in 2019).

40 Cf., e.g., W. Nykiel, M. Wilk, *Nieprzydatność art. 199a § 2 ordynacji podatkowej w walce z unikaniem opodatkowania a następstwa czynności pozornych*, Przegląd Podatkowy 2017, no. 2, pp. 17–23.

41 The two verdicts of the Court of Justice of the European Union (CJEU) of 26 February 2019 in the so-called "Danish cases," regarding the application of WHT exemption based on the regulations of the *(i)* Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, so-called Parent Subsidiary Directive (combined cases C-116/16 and C-117/16) and the *(ii)* Directive 2003/49 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (combined cases C-115/16, C-118/16, C-119/16 and C-299/16). Within the framework of these cases, CJEU addressed numerous controversies over the meaning of the term "beneficial ownership" – and provoked just as many others. Widely commented by various experts, the "Danish cases" are justifiably referred to as "landmark rulings" on the concept of beneficial ownership, cf. J. Schwarz, *Beneficial Ownership: CJEU Landmark Ruling*, Kluwer International Tax Blog, 27.02.2019 and W. Haslehner, G. Kofler, *Three Observations on the Danish Beneficial Ownership Cases*, Kluwer International Tax Blog, 13.03.2019.

amounted to deciding who is to bear responsibility for the shape of the legal system, including the mistakes made by state authorities at the stage of drafting or applying tax provisions: the state or the citizen. When solving this dilemma, the Court rightly pointed at the former, thus choosing the approach that is both legally correct and axiologically right. Taking into account the steadily deteriorating condition of Polish tax provisions,[42] this issue will probably become relevant more than once in the future – which, nevertheless, is a topic for a separate study.

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