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NEW TAX REALITY FOR PERMANENT ESTABLISHMENT OF FOREIGN ENTERPRISES IN POLAND IN A POST-BEPS ERA

Abstract

The main aim of this contribution is to make a review and assess the application of BEPS Action 7 recommendations by the tax administration in Poland when determining whether a non-resident enterprise operating in Poland should be considered to have a permanent establishment (PE). The creation of a PE is crucial for taxable presence in Poland and for identifying the scope of the allocated revenues and expenses (taxable income). Changes to the OECD Model have a genuine practical impact on multinational enterprises and tax administrations and thus they need to be closely examined. The considerations serve to prove the hypothesis that Polish tax authorities apply the

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recommendations of BEPS Action 7 despite the fact that Poland lodged reservations concerning the non-application of Art. 12-14 of the MLI in its entirety. Beyond the legal-dogmatic research the contribution refers directly to the results of an empirical study carried out by the authors in the course of which 88 individual tax rulings issued by the Polish tax authorities were identified and examined.

Keywords: permanent establishment, Polish tax authorities, BEPS Action 7, MLI, double tax treaty, Poland, tax avoidance, tax ruling, commissionaire arrangements, activities of auxiliary or preparatory character, splitting-up of contracts.

JEL Classification: K34, H26

1. Introduction

As a result of the 2015 OECD Base Erosion and Profit Shifting (BEPS) Final Report [OECD 2015] amendments have been made to the definition of permanent establishment (PE) in Article 5 of the OECD Model Tax Convention[1] used as the basis for negotiating tax treaties. The question as to what constitutes a PE was a significant strand of the BEPS Project work as this definition included in tax treaties is crucial in determining whether a non-resident enterprise must pay income tax in another state. The BEPS outcome proposed a series of reinforcing changes to the OECD Model aimed at overhauling the PE concept, which were supposed to increase the chances of a PE's creation to allow the source country taxing rights to be preserved and restored under bilateral tax treaties. Lack of such modernization has led to growing use of tax motivated business models and structures, thereby resulting in avoidance of PE status in several cases. The question is, how to settle this amended approach in law so that it is applied by the courts and tax authorities and reflect it in the guidelines, while giving sufficient certainty to business [Lennard 2016: 740].

The aim of the paper is to make a review and assess the application of BEPS Action 7 recommendations by the tax administration in Poland when determining whether a non-resident enterprise operating in Poland should be considered to have a permanent establishment[2]. Changes to the OECD Model have a genuine practical impact on multinational enterprises and tax administrations and thus they need to be closely examined.

The following considerations serve to prove the hypothesis that Polish tax authorities apply the recommendations of BEPS Action 7 despite the fact that Poland lodged reservations concerning the non-application of Art. 12-14 of the MLI in its entirety. The paper refers directly to the results of an empirical study carried out by the authors in the course of which

[1] From hereinafter: OECD Model.
[2] From hereinafter: PE.

88 individual tax rulings issued by the Polish tax authorities were identified and examined. Most important books and articles on the subject published up to date are mentioned in Section 2.

Section 2 briefly recapitulates the background and general objective of BEPS Action 7. Section 3 presents Polish double tax treaties in the light of BEPS Action 7 and the Multilateral Convention to Implement Tax Treaties Related Measures to Prevent BEPS (MLI). Section 4 presents non-residents' activities in Poland through a foreign PE based on data from the Polish Ministry of Finance and data collected as part of the empirical study. Sections 5 attempts to discuss the artificial avoidance of the PE status through *commissionnaire arrangements*, artificial fragmentation of activities and splitting-up of contracts from the perspective of the practice of the Polish tax authorities and tax courts. Finally, some conclusion on what BEPS Action 7 may mean for foreign PE in the territory of Poland are set out in Section 6.

2. The framework of BEPS Action 7

The BEPS Action 7 is generally advanced to bring taxation closer to where profits are generated, so there is an effort to pinpoint what specific economic activity has generated a certain item of income, but also to exactly locate the place of the income-generating activity and to identify the link between taxation and where economic activity takes place. The problem is that in the BEPS era, global capital and profits are inherently mobile so that sourcing net profits appears to be a difficult exercise that can be called the "source conundrum" [Garbarino 2019: 366]. One facet of the source conundrum within the BEPS phenomenon is that the erosion of the tax base of the country of destination of investment is effected by structuring operations so that they fall below the threshold established by the concept of (PE) as defined by the current tax treaties.

The Final Report on BEPS Action 7, released on 5 October 2015, does not propose changes to the concept of a "physical presence" in the definition of PE in article 5(1) and article 5(2) of the OECD Model ("classical" PE clauses). However, it provides for structural amendments to the text of article 5 of the OECD Model and the Commentary on Article 5 of the OECD Model to address certain common tax avoidance strategies defined as "artificial avoidance of PE" by lowering the threshold for creating a PE and limit the availability of exemptions from creating Pes [Tracana 2017: 215; Critchley 2017: 255]. Importantly, it does not create a new source-residence nexus rule for income allocation, nor provides for new rules of profits attribution; Such rules were proposed few years later [OECD 2018]. It is worth

mentioning that the use of term “artificial avoidance” in the context of PE is though debatable. In pre-BEPS Action 7 implementation stage, for instance, a typical commissionaire structure withstood the examination of the Norwegian Supreme Court, which ruled that there was no PE in such a situation, although the same agreement was regarded as a PE in Spain [Jiménez 2017: 365].

The changes relate to three separate groups of issues regulated by article 5 of the OECD Model: (i) a dependent and independent agent status, (ii) the auxiliary and preparatory activity exemption, and (iii) construction PEs. Accordingly, section A of BEPS Action 7 relating to “Artificial avoidance of PE status through commissionaire arrangements and similar activities” provides for revisions to article 5(5) and article 5(6) of the OECD Model to tackle arrangements through which a non-resident enterprise makes sales in a jurisdiction through a commissionnaire or a dependent agent that does not formally conclude contracts in the jurisdiction, thereby avoiding taxation in the jurisdiction despite having a sufficiet economic nexus in the market jurisdiction. Section B of the BEPS Action 7 concerning the “Artificial avoidance of PE status through the specific activity exemptions” provides for revisions to article 5(4) of the OECD Model, while also introducing a new anti-fragmentation rule in respect of specific activity exemptions, to prevent the exploitation of the specific exceptions to the PE definition. Finally, section C of the BEPS Action 7 regarding “Other strategies for the artificial avoidance of PE status” deals with the practice of splitting-up contracts to ensure not meeting the 12-month-threshold in respect of construction PEs. In other words, BEPS Action 7 limits itself to the restoration of source state taxing rights pursuant to part of the problematic issues in the present definition of a PE [Brauner 2014: 29; Uslu 2018: 5]. These changes were incorporated into article 5 as part of the 2017 Update of the OECD Model.

2.1. Commissionaire arrangements and similar activities

If a person is acting on behalf of an enterprise of one of the Contracting States and has, or habitually exercises, in the other Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in this other Contracting State in respect of any activities which that person undertakes for the enterprise. An exception to this is a situation where activities of such person are limited to those which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment; in principle these are preparatory or auxiliary activities. There is no lack of the criticism of the pre-BEPS Action 7 wording of depended

agent clause [Arnold 2003: 486]. A person acting in the name of the enterprise in the ordinary course of its business (e.g. a broker) shall not be deemed a dependent agent.

In light of the above, a commissionaire arrangement may be defined as an arrangement through which a person sells products in a given State in its own name but on behalf of a foreign enterprise that is the owner of these products [BEPS Action 7, 15]. Such an arrangement allows the foreign enterprise to sell its products in a state without having a permanent establishment to which such sales may be attributed for tax purposes as the person who concludes the sales does not own the products that it sells and cannot be taxed on the profits derived from such sales [Pleijsier 1997: 251; Vann 2010: 551]. The only taxable income in the market country may be the remuneration that it receives for its services (usually a commission). Other strategies that seek to avoid the application of article 5(5) of the OECD Model involve situations where contracts which are substantially negotiated in a particular state are not concluded therein because they are finalised or authorised abroad, for example effected online. Similarly, circumvention of article 5(6) of the OECD Model occurs where the person that habitually exercises an authority to conclude contracts constitutes an "independent agent" to which the exception of article 5(6) applies even though it is closely related to the foreign enterprise on behalf of which it is acting.

BEPS Action 7 extends the definition of dependent agent PE in article 5(5) and narrows the definition of an independent agent PE in article 5(6) of the OECD Model to cover also commissionaire and similar arrangements (sometimes called offshore rubber stamping arrangements), which have been previously applied to reduce the taxable income in source states. Analysed together, these changes broadens the scope of dependent agent clause [Duijn, IJsselmuiden 2016: 83; Pleijsier: 2016, 443]. To tackle the abuse of dependent agent clause, redacted wording of article 5(5) of the OECD Model assumes that an agent, among other conditions, that acts on behalf of the foreign enterprise and habitually concludes contracts or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise constitute a PE of that enterprise. The principal role is explained in the Commentary on Article 5 of the OECD Model as: the principal role leading to the conclusion of the contract will typically be associated with the actions of the person who convinced the third party to enter into a contract with the enterprise. This new reading of article 5(5) of the OECD Model indicates a shift from the scope of authority to conclude contract in a purely legal sense to the nature of the activity of the principal enterprise in business activities in the host state [Pleijsier 2015: 152; Prakash 2020: 672]. Therefore, it is no longer relevant whether the commissionaire is bound to the client or whether the legal bond is created between the client

and the principal enterprise. What is relevant is the degree of intervention of the dependent agent in the contract. This is a reflection of of the OECD's policy where an enterprise should be considered to have a sufficient taxable nexus in the country where the activities of an intermediary are intended to result in the regular conclusion of contracts that will be performed by that foreign enterprise (the principal) [Drobnik 2018: 199].

Moreover, BEPS Action 7 contains a revision to the independent agent exemption from article 5(5) of the OECD Model to prevent the artificial avoidance of a PE, which complements the amendments to article 5(5). Independent agent exception in respect of the agency PE status has become conditional, next to carrying on business as an independent agent and acting for the enterprise in the ordinary course of that business, on whether the agent does not act exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related. The effect of this standard is to prevent "captive" agents of a group benefitting from the independent agent exemption [Watson, Palazzo-Corner, Haemmerle 2017: 182]. The definition of a closely related enterprise is provided (possessing at least 50% of the aggregate vote or exercising actual control over the enterprise), while Commentary on article 5(6) of the OECD Model provides an example on the novel exclusivity criterion by stating that if less than 10% of sales contracts concluded by an agent are for unrelated enterprises that is sufficient to determine that that person acts exclusively or almost exclusively for closely related enterprises [OECD Model, paragraph 112]. Therefore, if 10% or more of a local subsidiary's business volume is with closely related enterprises, it could be concluded that the significance test has been meet, leading to creation of the PE.

2.2. Specific activity exemptions

Activities of multinational groups are often a seamless range of functions in which integrated services are performed. Thus, it is difficult to distinguish between 'core' functions and other functions that are somehow related to the core function. The problem here is to identify when the interaction of those functions may lead to a PE [Garbarino 2019: 368].

Fixed places of business that meet the criteria leading to the creation of a PE shall not be deemed a PE if activities carried out in them are solely of preparatory or auxiliary character. A traditional tenet before the BEPS Project was that Article 5(4) listed several separate exceptions to the basic PE rule of Article 5(1), each of them serving a specific purpose, for example usually storage space, considered separately, fell under this exception of Article

5(4)(a). This was traditionally justified by the fact that Article 5(4)(a) through (f) provided an analytic list of exclusions from the 'status' of a PE.

The preparatory or auxiliary activities can be superseded by a rather different approach based on the functional interdependence of the various situations envisaged by Article 5(4). Whether activities taking place in a facility or a fixed place of business are of such character depends on the entire spectrum of activities of an enterprise. Preparatory or auxiliary activities imply that from the viewpoint of the enterprise in question, these are not core activities but operations that are ancillary to core activities (e.g. advertising of products, provision of information, supervisory activities); they make economic sense only in combination with other activities of the enterprise. Exemptions are also conditioned by the fact that these activities are performed 'for the enterprise'. A wide scope of activities that are considered preparatory or auxiliary opens up a broad space for optimization and can be exploited by multinational enterprises which artificially avoid the PE status through the fragmentation of activities[Hongler, Pistone 2015: 12].

BEPS Action 7 proposes the amendments to article 5(4) of the OECD Model on preparatory and auxiliary activity exemptions by emphasizing the importance of the nature of the business carried on in the source state and preventing the automatic application of the specific activity exemptions. As business models are changing, such activities, once perceived as non-core can nowadays form part of the core business activities and should be taxed in the country where value is created [Spinosa, Chand 2018: 482; Gramm 2020: 106]. To this end, each of the exempted activity from the negative list, stipulated in letter a-f of article 5(4) of the OECD Model, need to be assessed on case-by-case basis, taking into consideration the overall business activities of the enterprises, to evaluate whether it meets the criterion of preparatory or auxiliary character. Thus, no activities are automatically preparatory or auxiliary. Instead, it is necessary that activities are actually preparatory or auxiliary in relation to the business of the enterprise [Permanent Establishment: La lutte continue]. Such a change would allow to counter, in particular, the artificial avoidance of specific activity exemptions by e-commerce companies [Pleijsier 2016: 445; Dutriez 2018: 188], where certain local warehousing activities that were previously considered to be merely preparatory or auxiliary in nature may in fact be core business activities [OECD 2018: 271].

In addition, BEPS Action 7 proposes inclusion of the anti-fragmentation rule for auxiliary and preparatory activities between closely related enterprises. Such a change is intended to prevent the avoidance of article 5(4) of the OECD Model by segregating the activities of an

enterprise with the assistance of closely related enterprises. Currently if an enterprise separates its activities into locally or organizationally isolated business places in one jurisdiction and these activities are of a complementary nature, these separate places could not benefit from the specific activity exemption. The proposal expands its scope to the same structures used by closely related enterprises. If the overall activity conducted by closely related enterprises in the same place or at two places exceed the auxiliary and preparatory limits, it could not benefit from the exemption contained in article 5(4) of the OECD Model. It means that MNEs would need to consider functions of all of the places where the preparatory and auxiliary activities were carried on.

2.3. Splitting-up contracts

Article 5(3) of the OECD Model, applying a concept of the construction PE, stipulates a 12-month period in respect of building sites and construction or installation projects as a threshold to create a taxable presence in the source state. This 12-month threshold could be circumvented by MNEs through division of contracts up into several parts, each covering a period of less than twelve months and attributed to a different company which is, however, owned by the same group, to reduce their taxable presence to below the limits of the permanence threshold.

BEPS Action 7 states that such kind of abusive scenario could either be addressed by the Principal Purpose Test clause introduced in parallel through BEPS Action 6 [OECD 2015] or countries may decide to incorporate an alternative clause to expressly deal with such an abuse. Under the latter option, the overall period of the divided contracts between the related enterprises would be considered in determining the 12 month-threshold on the condition that connected activities are carried on at the same building site or construction or installation project during different periods of time, each exceeding 30 days, by one or more enterprises closely related to the enterprise.

2.4. Implementation of the new PE rules

For the BEPS measures to become effective, a number of changes need to be implemented in the tax treaties of the states involved in the project [Kleist 2016: 824]. The MLI aims to implement the treaty-related BEPS measures in a swift, coordinated and consistent manner by modifying the existing tax treaties rapidly, thus avoiding bilateral negotiations that would be burdensome and time consuming and, in addition, might entail limiting the effectiveness

of multilateral efforts [Gomes 2019: 67]. For the purposes of the MLI, BEPS Action 7 is considered to be common approach and best practices, which means the contracting states are free to opt out of the MLI provisions that address this Action. All of the proposed anti-tax avoidance strategies in BEPS Action 7 have been addressed in the MLI through articles 12-15. The trend of signatories to the MLI has however emerged to opt out of the most PE provisions, which has been confirmed by the OECD in 2018 [OECD 2018: 272]. For the revised dependent agent PE definition it has been estimated that this revamped definition would apply to around 17% of the 1 246 tax agreements currently covered by the MLI (i.e., approximately 206 bilateral tax agreements). For the revised provision defining specific-activity exemptions it is estimated that this revised provision would apply to around 22% (i.e., approximately 277 bilateral tax agreements). As a result, the influence of the most important new PE rules is questionable, as states are unlikely to include these provisions in the bilateral tax treaties that they conclude at least in the short to medium term.

3. Polish Double Tax Treaties in the Light of BEPS Action 7

Polish double tax treaties usually apply the PE definition consistent with the OECD Model which defines a PE as a fixed place of business through which the enterprise operates. In principle, the definition of a PE within national Polish legislation overlaps with the definition contained in Polish bilateral agreements based on article 5 of the OECD Model, with the exception of the delineation of the period of construction (installation) works leading to the creation of a PE. In accordance with the OECD standard, Polish double tax treaties exclude certain types of establishments from the definition of a PE, in particular all establishments that perform specific preparatory or auxiliary operations for an enterprise [Jamroży 2016: 59; Lipniewicz 2016: 223].

Poland ratified the MLI in 2018. It failed however to approve the MLI provisions on preventing artificial avoidance of the PE status in their entirety and lodged the following reservations concerning the non-application of the entirety of MLI provisions with this regard:

1) provisions counteracting artificial avoidance of a PE status through commissionaire arrangements – pursuant to Art. 12 para. 4 of the MLI;

2) provisions on artificial avoidance of a permanent establishment status through the exploitation of the exclusion of certain forms of activities from the definition of a

permanent establishment (anti-fragmentation rule) – pursuant to Art. 13 para. 6 letter a of the MLI;

3) provisions preventing from the splitting-up of contracts – pursuant to Art. 14 para. 3 letter a of the MLI.

It means that with regard to issues regulated by Art. 12–15 of MLI, Polish double tax treaties (covered and not covered by the MLI) will remain unchanged. Although this reservation may technically be withdrawn at any time and give full effect to the changes across all qualifying treaty arrangements, it is improbable to occur. Nevertheless, it cannot be excluded that Poland will use these solutions in bilateral negotiations of double tax treaties [Krysiak, Jamroży 2016].

4. Non-Residents' Activities in Poland Through a Foreign PE

Data from the Polish Ministry of Finance show a decreasing number of permanent establishments registered as branches of foreign enterprises.[3] The population of PEs dropped from 825 in 2015 to 554 in 2018 (see Table 1). Presented data may suggest smaller interest exhibited by foreign investors in establishing their affiliates in Poland or having PEs in other forms. On the other hand, over recent years we may observe a large variation in the values of tax revenues from PEs (e.g. PLN 1 450 million in 2015, PLN 1 922 million in 2019 and 1 210 million in 2020 (see Table 1).

Table 1. Tax payable by branches of foreign enterprises

		2020	2019	2018	2017	2016	2015
No. of taxpayers		LOI	LOI	554	667	727	825
Tax payable	No. of taxpayers reporting tax payable	LOI	LOI	236	243	263	288
	amount in k of PLN	1 210 588	1 922 777	1 486 459	1 528 680	1 212 839	1 450 163

Source: Polish Ministry of Finance (unpublished).

Legal form of foreign investors' branches established in Poland needs closer attention. According to data made available by the Ministry of Finance (Table 2) investors most often opt for legal solutions that exclude the liability of partners (shareholders), i.e., limited liability partnership (almost 52% of all foreign branches registered in Poland) and a joint stock company (27%).

[3] Ministry of Finance does not keep such registers for establishments other than branches.

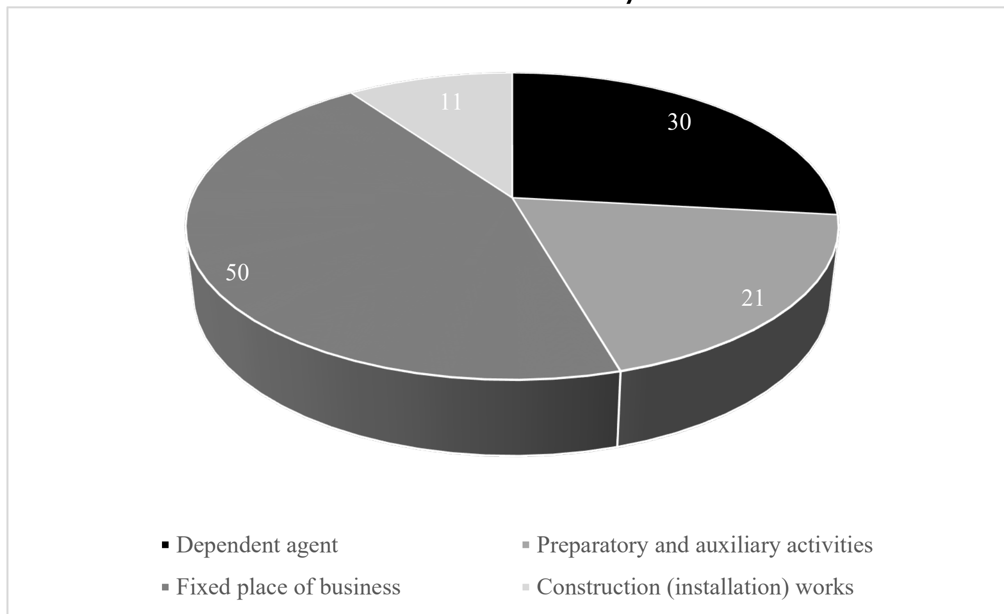
Table 2. Branches of foreign enterprise registered in Poland in 2015-2018 by legal form (identified by enterprise's name)

Legal form	2018	2017	2016	2015
Joint stock company	146	166	182	188
Simplified joint stock company	8	8	8	12
European company	5	4	3	4
Partnership limited by shares	2	1	1	1
Limited liability partnership	288	357	398	442
No data	95	131	135	178

Source: Polish Ministry of Finance (unpublished).

Practical relevance of a PE status in Poland is reflected in the frequency with which tax rulings and administrative court judgements dealing with it are issued. Out of 88 tax rulings issued over the period 2017-2020 that the authors have come across and dealing with PE status, as many as 64 concern the creation of a permanent establishment (almost 73% of all cases).[4] The question of the creation of a PE status has been less often addressed in judgements. Out of 25 examined administrative court decisions concerning the PE status, only 2 dealt with the subject at hand. Graph 1 shows the number of tax rulings by legal form of a PE (in %).

Graph 1. Tax rulings issued in 2017-2020 by legal form of a PE identified during the authors' own study

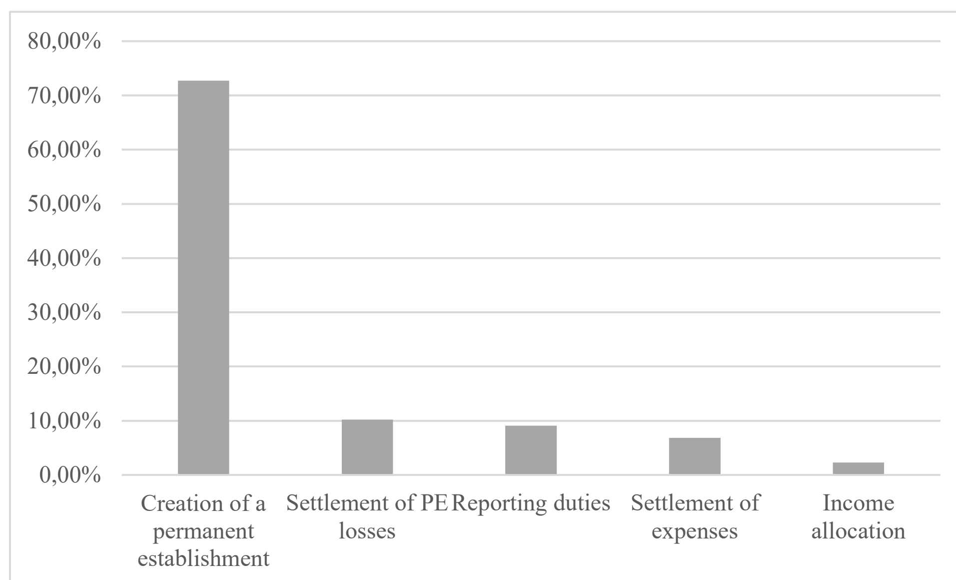


Source: author's own elaboration.

[4] Tax rulings the website of the Ministry of Finance (sip.mf.gov.pl) after the search words 'zakład podatkowy' (permanent establishment) are input.

Frequency with which individual issues feature in the tax rulings in percentage terms are presented in a bar chart (Graph 2).

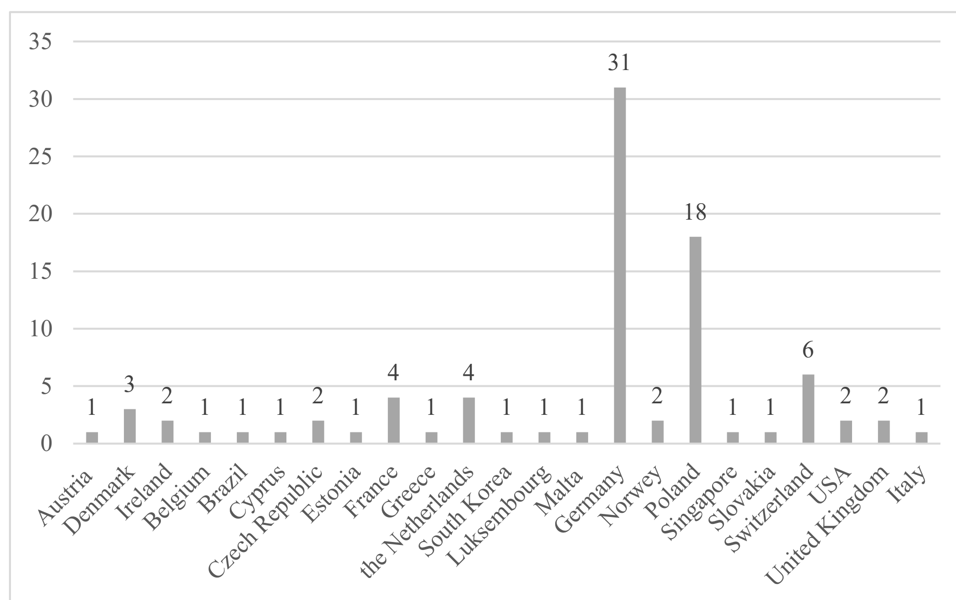
Graph 2. Frequency with which issues relating to PE status feature in tax rulings (in %)



Source: author's own elaboration.

Headquarters' countries of origin featuring in examined tax rulings are also presented in a graphic form (Graph 3).

Graph 3. Headquarters' countries of origin taken from tax rulings identified for the purpose of the study.



Source: author's own elaboration.

5. Approach of the Polish tax administration to BEPS Action 7 recommendations

Poland lodged reservations concerning the non-application of Art. 12-14 of the MLI in its entirety. However, the empirical study through the review of tax rulings issued by the Polish tax administration and court judgements suggests that Polish tax authorities apply the recommendations of BEPS Action 7 and the Art. 12-14 MLI. The following considerations serve to prove this thesis.

5.1. Avoidance of a PE Status Through Commissionnaire Arrangements

In the tax ruling of 24 August 2018 the Head of the National Revenue Administration Information Centre [Dyrektor KIS[5], 0114-KDIP2-1.4010.227.2018.2.AJ] stressed, that the lack of independence of an agent can be judged from minimum economic risk involved in his activities. In facts of the case at hand, a company based in Germany used the services of an agent in Poland where the agent's sole shareholder was another enterprise form the business group. The agent acted as a contact point for local customers, had no authority to negotiate the terms of contracts or to conclude any contracts in the name or on behalf of the company. Tax authorities drew attention to the fact that the company concluded an agreement with an entity from the capital group – the Agent, whose employees actively participate in concluding contracts with the company's customers. What is more, the Agent is bound by the guidelines of the Company which fully supervises his activities. This means the agent is not independent and the economic risk of his activities is minimal, especially when the Company manages the risk and is liable for contracts that it signs with local clients. In the eyes of the tax authorities, activities of the Agent lead to the creation of a PE in Poland. Consequently, the tax authorities adopted the approach taken in BEPS 7 and the redacted wording of article 5(5) of the OECD Model, according to which an agent that acts on behalf of the foreign enterprise and habitually concludes contracts or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise constitute a PE of that enterprise. Polish tax administration attaches also a great deal of attention to whether an agent renders services exclusively to one enterprise. Such stance was presented, among others, in the tax ruling of the Head of the National Revenue Administration Information Centre of 17 August 2018 [Dyrektor KIS, 0114-KDIP2-1.4010.255.2018.1.PW]. In the facts of the case at hand, the activities of the

[5] From hereinafter “Dyrektor Krajowej Informacji Skarbowej” lub “Dyrektor KIS” stands for “Head of the National Revenue Administration Information Centre” or “Head of KIS”.

receipient of the service (a daughter company of the applicant) were limited to warehousing and logistics operations carried out in his own name. In the opinion of tax authorities, his activities led to the creation of a PE because the service provider rendered services exclusively to the applicant suggesting an intention to act in somebody else's interest rather than his own. Thus, in the opinion of tax administration, the service provider was dependent when it comes to its activities (in particular at the economic level) on the applicant. A similar position was presented by the Head of the National Revenue Administration Information Centre in the tax ruling of 22 January 2018 [Dyrektor KIS, 0114-KDIP2-1.4010.351.2017.1.JC]. The above indicates that rendering services to only one enterprise which is a related enterprise is viewed by the Polish tax administration as the absence of economic independence. It corresponds to the approach presented in BEPS 7, according to which the agent cannot be considered as independent if he acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related.

Similar approach can be found in administrative court decisions. For example, the Wojewódzki Sąd Administracyjny (WSA[6]) in Warsaw in the decision of 28 January 2020 [WSA in Warsaw, III SA/Wa 696/19] stated that the fact that an enterprise is not actively involved in the conclusion of contracts may mean that it has already authorized an agent to take care of it. Having real powers to conclude contracts is reflected in seeking orders and securing them, as well as in holding day-to-day communication with clients crucial for winning and keeping them while a foreign enterprise only approves contracts in a routine way. Under such circumstances it is irrelevant who finally signs the contract: a person acting in the name of an enterprise or an enterprise. The decisive criterion lies in legal linkages between an enterprise and the activities of the agent. The same argumentation was presented, i.a. in the decision of Provincional Court in Gliwice of 26 November 2021 [WSA in Gliwice, I SA/Gl 1035/21].

When drawing conclusions from the presented findings, the rather unexpected barrier for foreign investors in Poland is the creation of a permanent establishment, in particular in the form of a dependent agent acting within the framework of ordinary course of his business. The principal role leading to the conclusion of the contract was also derived from being able to 'convince' a third party (client) about the agent's relevance for the conclusion of the contract [OECD Model Convention Commentary, Art. 5 para. 88]. Moreover, in the opinion of tax authority it suffices when an agent provides information about product to clients as

[6] From hereinafter "WSA" stands for "Wojewódzki Sąd Administracyjny" (Provincional Court).

it testifies to his principal role in the conclusion of a contract, irrespectively of the fact that formally he (the agent) is not authorized to conclude contracts or make binding offers. What is more, tax authorities attach a great deal of attention to whether an agent renders services exclusively to one enterprise [Dyrektor KIS, 0114-KDIP2-1.4010.255.2018.1.PW, 114-KDIP2-1.4010.288.2019.1.AJ]. It is viewed by tax authorities as a sign of absence of economic independence and proves that the tax authorities adopt the approach presented in BEPS 7.

5.2. Fixed Place of Business Performing Activities of Auxiliary or Preparatory Charakter

In the tax ruling of 22 February 2019 the Head of KIS [Dyrektor KIS, 0114-KDIP2-1.4010.9.2019.1.AJ] stated that 'the decisive criterion boils down to finding out whether activities of a fixed place of business represent a relevant and significant part of overall activities of an enterprise. (...) Beyond any doubt, a fixed place of business whose goal is identical with the goal of the whole enterprise, does not perform preparatory or auxiliary activities.' Similar view was presented in a the tax ruling of 30 August 2019 [Dyrektor KIS, 0114-KDIP2-1.4010.288.2019.1.AJ] concerning a company engaged in international maritime transport and exploitation of sea shipping vessels. Activities performed for the company in Poland consisted in supporting the loading of sea vessels (cargo loading and control, including dangerous cargo), acting as an internal IT unit (IT Service Centre), and financial and accounting operations. In this case, the National Revenue Administration decided that the activities of the applicant in Poland will not be of preparatory or auxiliary character in the meaning of article 5 paragraph 4 of the double tax treaty because they (especially cargo loading and control, load optimization) represent critical and indispensable part of transport services that the company renders for clients who are tax residents in Poland and strives to achieve the same goals as the entire enterprise.

Moreover, the Head of KIS in the tax ruling of 22 February 2018 [Dyrektor KIS, 0114-KDIP2-1.4010.391.2017.1.PW] highlighted that the fixed place of business performs neither preparatory nor auxiliary activities and there is a significant relationship between the activities of this fixed place of business and revenue obtained by the enterprise. On this occasion, tax authorities described preparatory and auxiliary activities as operations generating outcomes that are little attributable (distant) to profits obtained by an overseas enterprise which means allocating them to these activities becomes next to impossible. Thus, they decided that activities outlined in the facts of the case boiling down to the supervision

over the works carried out by business partners against their compliance with concluded contracts, shall not be deemed as preparatory or auxiliary activities as they may actively impact production by, e.g., eliminating the shortcomings. In additon, in the tax ruling of 24 August 2018 [Dyrektor KIS, 0114-KDIP2-1.4010.227.2018.2.AJ] the Head of KIS came to the conclusion that activities carried out by a fixed place of business may not be of preparatory or auxiliary character because they included marketing activities representing a relevant part of the applicant's activities as a manufacturer and seller of specialist products and a distributor of standard products. Consequently, the tax authorities took into consideration the overall business activity of the enterprise, to evaluated whether it meets the criterion of preparatory or auxiliary character. It proves the tax authorities adopt the approach presented in BEPS 7.

When deciding whether given activities are solely of preparatory or auxiliary character, administrative courts also pay special attention to finding out if these activities represent a relevant part of overall activities of an enterprise and what they include. For instance, in the decision of 8 November 2019 Naczelny Sąd Administracyjny [NSA[7], II FSK 3718/17] ruled that the creation of a PE in Poland is triggered by an active involvement of a company in production. Core activities carried on by the applicant in Poland suggested that they consist in production (current) rather than storage services. It was stressed that the supervision over production, quality control, as well as being authorised to perform machine changeover and reject the final product if it does not comply with quality standards, suggest an active interference with the production process. In the court opinion, company's activities in Poland were not of auxiliary or preparatory character as they covered a relevant part of applicant's operations.

A change in the position of tax administration is also seen in the approach to preparatory and auxiliary activities. According to tax authorities, marketing activities are not of such character because they represent operations that are crucial for investor's business [Dyrektor KIS, 0114-KDIP2-1.4010.227.2018.2.AJ, 0114-KDIP2-1.4010.9.2019.1.AJ]. Similar approach applies to support services, such as IT, accounting, and loading performed for entities operating in the area of international maritime transport [Dyrektor KIS, 114-KDIP2-1.4010.288.2019.1.AJ]. Activities carried out by an agent exhibiting signs of being significantly related with the income received by the enterprise are not considered auxiliary or preparatory by nature [Dyrektor KIS, 0114-KDIP2-1.4010.391.2017.1.PW]. Tax

[7] From hereinafter "NSA" stands for "Naczelny Sąd Administracyjny" (Supreme Court).

authorities describe preparatory and auxiliary activities as operations generating outcomes that are little attributable (distant) to profits obtained by an overseas enterprise which means allocating them to these activities becomes next to impossible.

5.3. Splitting-up of Construction Contracts

For some activities connected with the implementation of long-term projects (mainly construction, assembly or installation projects), Polish double tax treaties, modelled after the OECD Model, contain a rather standard provision that makes having a PE status dependent on the project timeline. In Polish double tax treaties the provision of usually Art. 5 par. 3 refers to construction sites when they last for more than 12 months.

For example, in the tax ruling issued by the Head of the Tax Office in Warsaw of 21 June 2016 [Naczelnik US[8] in Warsaw, IPPB5/4510-459/16-4/RS] it is explained that the economic and organizational relationship between performed works is of primary importance. To consider a construction site, assembly or installation works a homogenous fixed place of business (one PE), there must be economic and geographic cohesion between them. To assess whether a construction site (construction works) or assembly works constitute a PE, we need to consider the timeline of the construction or assembly works. To calculate the time of construction works, we may not take these works separately as they are carried out in the same place although subject to two different contracts. Moreover, Polish tax administration excludes the possibility to artificially avoid a PE status through the splitting-up of contracts motivated by geographic location of the construction sites or assembly works. Accordingly it does not matter whether workers that carry out the contract stay for twelve months in a given place. What matters is whether activities taking place in different locations make up an integral part of a single project and such a project must be considered a PE if it lasts for longer than 12 months. Such approach was adopted, for example, in the tax ruling of the Head of the National Revenue Administration Information Centre of 11 December 2017 [Dyrektor KIS, 0115-KDIT2-3.4010.261.2017.2.MJ].

According to the approach presented in BEPS 7, the complementary activities which were performed by a company or a group of related companies shall be considered as one unit of activities in the case the activities are connected to each other. Hence, the new approach has been applied by Polish tax authority. Polish tax administration excludes the possibility to

[8] From hereinafter “Naczelnik Urzędu Skatbowego” lub “Naczelnik US” stands for “Head of the Tax Office” or “Head of US”.

artificially avoid a PE status through the splitting-up of contracts between construction sites or assembly works taking place in different locations. Increasingly more often the overall assessment is made from the viewpoint of activities undertaken by all related enterprises rather than from the perspective of a single entity artificially separated from the organizational structure.

6. Conclusion

Globalization has led enterprises to do cross-border business through foreign permanent establishments. Tax framework is trying to catch up this reality. BEPS Action 7 and ensuing MLI have had to major effects: (i) lowering the PE threshold, and (ii) its (broad) non-acceptance by countries. The PE provisions in bilateral tax treaties have received an extensive attention from scholars and practitioners over the years and have been subject to numerous tax rulings and court decisions in Poland.

Although Poland did not formally approve the package of solutions proposed in the MLI to prevent the avoidance of a PE status, Polish tax administration issues tax rulings that are in line with the direction delineated by the MLI. The empirical findings serve as a proof that Polish tax authorities apply, as a rule, an extended understanding of a PE proposed by the BEPS Action 7, even though Poland has not formally adopted Article 12-15 MLI. Hence, the hypothesis was confirmed.

A material change in the position of Polish tax administration can be seen in the approach to preparatory and auxiliary activities to all three areas of issues: (i) a dependent and independent agent status, (ii) the auxiliary and preparatory activity exemption, and (iii) construction PEs. This can be also viewed as a rather unexpected barrier for foreign investors in Poland [Jamroży, Janiszewska 2021].

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