



October 10, 2023

Ministry of Finance
Świętokrzyska 12
00-916 Warsaw
NIP 5260250274
REGON 000002217
citkonsultacje@mf.gov.pl

Re: NFTC Comments Concerning withhold tax regulations in Poland

Thank you for the opportunity to submit comments on Poland's withholding tax draft explanations released on September 28, 2023 (the "Draft").

The National Foreign Trade Council ("NFTC"), organized in 1914, is an association of U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial, and service activities. Our members value the work of the Organization for Economic Cooperation and Development ("OECD") and the Inclusive Framework in establishing and maintaining international tax and transfer pricing norms that provide certainty to enterprises conducting cross-border operations.

In 2019, regulations were established in Poland to withhold taxes at the local statutory tax rates for specific payments exceeding PLN 2 million threshold. These regulations had been suspended and went into effect on January 1, 2022, for dividend, interest, and royalty payments (as defined by Polish law). NFTC members appreciate the recent clarifications to the regulations. However, there are some concerns which should be addressed.

The Draft provides an overly strict requirement to qualify for benefits under bilateral treaties & interest & royalty/parent subsidiary directives ('IS & PS' directive), which seems to impute a beneficial ownership clause into every treaty and directive. It is overly broad to determine that treaties with and without beneficial ownership clauses expressed within their respective treaty provisions essentially have no difference when the language relating to beneficial ownership was specifically not included at the time of negotiation of the tax treaty. The unilateral decision by Poland does not give proper effect to specific treaty text and/or IS & PS directives and seeks to unilaterally amend a tax treaty signed in good faith. Furthermore, treaty parties have not negotiated this change and may disagree with the new interpretation.

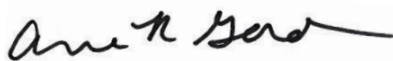
Secondly, the list of premises provided to test beneficial ownership are too wide. Some of these indicators are not directly relevant for determination of beneficial ownership (no withholding tax in the recipient's jurisdiction, treaty network, etc.). It should also be clarified that to test or deny beneficial ownership, the premises indicated should be tested on an overall basis and not in isolation. Further, these premises should exist regularly, and one-off situations should not be considered as a basis for denying the claim of beneficial ownership.

The Draft also provides for applying the Polish domestic definition of beneficial owner, which is stricter than the one adopted for the Model Convention. This position does not correspond with what treaty parties may have agreed, especially in terms of enumerating a list of features that demonstrate that the recipient of a payment is an administrator of income rather than its beneficial owner. NFTC requests that the Draft guidance clarify that the issue of taxation of dividends in the recipient country should not be a factor in whether a dividend recipient is an income administrator or its beneficial owner. It is common for dividends to be at least partially exempted from taxation in the country of receipt, and this should not be a factor in determining beneficial owner status. This factor is also subject to change by local law developments, and those types of law changes should not impact taxpayers' longstanding tax positions within established structures. Whether you have the benefits and burdens of an income stream should not depend on whether the recipient's jurisdiction taxes that income stream.

With respect to the Look-through approach, NFTC appreciates that the Draft confirms the possibility of applying it, but the expression that the Tax Authority is not obliged to apply a look-through approach is concerning. With criteria limiting its application, this could result in taxpayers receiving the Polish statutory withholding tax rate when each owner in the chain is entitled to some type of reduced rate under its applicable treaty with Poland. If each owner in the group is entitled to treaty benefits if considered the beneficial owner, the local statutory rate should not apply just because the immediate shareholder may be regarded as an "income administrator" under the new rules. It should also be noted that such an approach has also been allowed in tax treaty interpretations and anti-avoidance regulations (e.g., Principal Purpose and/or Limitation of benefits test in BEPS). NFTC requests that the Draft is modified such that the Look-through approach should apply if the Tax Authority is provided with necessary data by the withholding agent/taxpayer. Moreover, the criteria limiting application of this approach should be clarified so as not to preclude the application of the applicable tax rate/exemption between the payor and the beneficial owner.

The NFTC appreciates the opportunity to comment on the withholding tax proposal. We are happy to answer any questions or provide additional information.

Sincerely,



Anne Gordon
Vice President for International Tax Policy