

Tax Alert

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Tax residency of Ukrainian refugees

Stay in Poland of people who have fled war in Ukraine into the territory of the Republic of Poland triggers some questions as regards the place of their tax residence (the unlimited tax obligation) and related consequences for Polish entrepreneurs who would employ them.

In accordance with the provisions of the Polish PIT Act, persons who in the territory of the Republic of Poland have their center of personal or economic interests (the center of vital interests) or who stay in the territory of the Republic of Poland longer than 183 days in a calendar year, they become Polish tax residents.

How to determine whether a person from Ukraine is a Polish tax resident?



Criteria for the Polish tax resident status

Center of interests

A person who has come from Ukraine may become a Polish tax resident as long as it can be confirmed that he/she has their center of personal or economic interests in Poland.

Due to the absence of precise statutory criteria, the assessment whether a given person has their center of vital interests in Poland requires a case-by-case analysis of circumstances that accompany such person's stay in the territory of the Republic of Poland. If the person from Ukraine has left there his/her family (e.g., her husband), if she still has there, e.g., an apartment and a bank account, and she thinks of her stay in Poland as temporary – she intends to return to Ukraine or to go to another country – it will be rather impossible to state in such a case that she has the center of vital interests in the territory of the Republic of Poland. If however such a person is going to live in Poland

together with her whole closest family, e.g., in an apartment made available to them, she starts organizing her stay in Poland, and members of her family take a job here or start going to school, some serious arguments will arise in favor of the view that such a center of vital interests does come into being in Poland.

Stay over 183 days

In turn, the prerequisite concerning the number of days of stay in Poland does not cast any doubt. In case of the lapse of 183 days of stay in Poland, a person from Ukraine becomes a Polish tax resident, which means that he/she will be subject to PIT on all of his/her incomes derived, and not only the income derived in Poland.

In practice, disputes occur whether upon the lapse of the 183-day period such a person becomes a Polish tax resident for the future only, for a period of consecutive months or years of stay in Poland or retroactively, from the beginning of his/her stay in Poland, also before the lapse of 183 days. In the latter case, one would also have to pay, in addition, advances and income tax for the period of stay in Poland before the lapse of the said 183 days. We opt for the former view which is clearly supported in some rulings of tax authorities.

Tax residence-related doubts and disputes

Personal, family or property situation of Ukrainian refugees is complicated in the present circumstances. Most often, it will be very hard to determine whether, and since when, a given person has in Poland his/her center of interests and has become a Polish tax resident. It should be emphasized that a given person's tax status will not be decided by the registration of that person to make his/her stay in Poland legal.

In case of persons who before their arrival to Poland were Ukrainian tax residents, the Poland-Ukraine Double Tax Treaty (DTT) resolves the issue of PIT taxation. Please remember that in cases to debate, if you cannot determine in which country a given person has his/her center of vital interests, or in which country he/she usually stays, then his/her place of residence for tax purposes should ultimately be deemed to be the country of which he/she is a citizen. It seems that this rule may apply to many people who in order to flee the war in Ukraine have arrived in the territory of Poland for a temporary stay.

Income from hired labor under a double tax treaty



Possible suspension of the 183-day period of stay in the territory of the Republic of Poland

In accordance with the Poland-Ukraine DTT, incomes from work performed in Poland are tax-exempt in Poland if they are not payable by a Polish employer or for his account, and an employee does not stay in Poland longer than 183 days in a given calendar year. The said period also includes "days of physical presence" in Poland. As from the day of the lapse of that period, exemption from income tax on remunerations for work performed in Poland expires automatically as a rule. If however stay of a given person from Ukraine in Poland is forced by warfare and for this reason he/she does not return to Ukraine, we believe that it should be assumed that the running of the period (183 days) of the tax exemption is subject to suspension for the duration of warfare in Ukraine and will not run again until the end of that warfare.

Such an approach is supported by the contents of the Commentary on the OECD Model Tax Convention on income and capital. Provisions of the Poland-Ukraine DTT should be interpreted in compliance with that Commentary.

It provides that the 183-day period of the tax exemption is calculated by taking into account all days of stay in a given country (in Poland) "excluding events that make that person's departure impossible". Under our rules of language and society it should be assumed that a person fleeing Ukraine into Poland as a result of war is not able to go back there for as long as the war continues. In such a case, we face the event "that makes the person's departure impossible".

In such a situation, the person may not freely decide about his/her place of residence for tax purposes. It seems that such reasoning should also apply to other situations of similar type. Accordingly, incomes of an Ukrainian tax resident from work performed in Poland should not be subject to taxation in Poland for the duration of war in Ukraine even in case of his/her stay in Poland for more than 183 days if such income is payable by a foreign employer, and not the Polish one.

How to document tax residence of a person from Ukraine?



Form of tax residence certificate

In many instances, Polish tax regulations – in order for exemptions provided for therein to apply (in connection with the provisions of the DTT) – require that the foreign tax residence of the taxpayer be evidenced. For instance, pursuant to the Poland-Ukraine DTT, *inter alia*, incomes of contractors (service providers) may be subject to taxation in Ukraine only on condition that Polish tax remitters who pay such persons remuneration are in possession of a certificate to prove Ukrainian tax residency of those persons. Otherwise, the tax remitters – under Polish regulations – are obligated to withhold 20% tax on remunerations paid.

The applicable provisions do not specify the required form of such a certificate and they leave it to the laws of a foreign state, here: Ukraine. Having regarded the situation in Ukraine, one might find it impossible to obtain the certificate of residence from Ukrainian tax authorities. If however the Ukrainian law allowed other forms of confirmation of tax residence than those issued on official forms, e.g., a written statement or a certificate issued by pertinent diplomatic missions of Ukraine in Poland or in other countries, then Polish tax authorities should admit application of certificates of residence also in such a form. A range of legal arguments speak for it, including the circumstance that the Polish law does not stipulate any specific form nor content of such a certificate. It is worth remembering that during the state of epidemic threat and the state of epidemic announced in connection with COVID-19 and in a period of consecutive 2 months after they have been called off, it is possible to document the tax residence by a copy of the certificate (including a scan) if information arising out of the document does not cast any reasonable doubts as to compliance with the facts.



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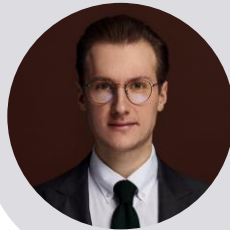


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