***DRAFT - FOR DISCUSSION PURPOSES***

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| **MEMORANDUM** | |
| Subject: | Personal Income Tax and social security consequences of performing remote work in the territory of Poland based on foreign employment contract |
| To: |  |
| From: |  |
| Date: |  |

Further to our arrangements, please find below our comments concerning personal income tax (hereinafter: **PIT**) as well as social security consequences of performing remote work in the territory of Poland based on foreign (\_\_\_\_\_) employment contract.

Our comments are based on our understanding of the information provided to us in the e-mail correspondence with LLP and relevant documents (Offer of employment dated 27th February 2020 and Position description: Director, Corporate Talent Acquisition).

Our analysis is based on:

* The Act of 26 July 1991 on the Personal Income Tax[[1]](#footnote-2) (further: **PIT Act**);
* Polish Social Security System Act of 13 October 1998[[2]](#footnote-3);
* Convention between The Republic of Poland and \_\_\_\_\_ for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income of 14 May 2012 (further: **DTT**);
* The Social Security Agreement of 2 April 2008 between The Republic of Poland and \_\_\_\_\_;

and most recent approach of the Polish tax authorities and administrative courts.

1. **Background**

Based on the information we have been provided with, it is our understanding that:

* Company[[3]](#footnote-4) (further: **the Company**) has recently learned they have an Associate working from the territory of Poland since early last year (further: **the Individual** or **the Employee**). The Individual is employed with \_\_\_\_\_ (\_\_\_\_\_ company, further: **the \_\_\_\_\_ Company**) another arm of group of Companies. As we understand, Individual is not assigned to Poland and the Company has no commercial activity in Poland.
* Associate has moved from \_\_\_\_\_ to Poland with husband and daughter (who attends a \_\_\_\_\_ school in Warsaw) in June 2021. Employee travels to \_\_\_\_\_ every 5 months, and is open to traveling more frequently if required, but as for now, no predetermined end date to move back to \_\_\_\_\_ is set. Employee has had two work periods in \_\_\_\_\_ (September - October 2021 and March-April 2022).
* The Employee’s role is \_\_\_\_\_\_, \_\_\_\_\_\_\_ and \_\_\_\_ remuneration is run via \_\_\_\_\_ payroll (the Individual is remunerated by \_\_\_\_\_ Company).
* The Individual is a dual citizen of Poland (and as a result an EU passport holder) and \_\_\_\_\_. As we understand, the Individual is legally eligible to work in Poland. Additionally, Individual is in possession of immovable property both in Poland and \_\_\_\_\_.
* As we understand, based on local rules the Employee has not broken \_\_\_\_\_ residency and filed a full year 2021 \_\_\_\_\_ return only. As for now, no Polish tax filing was completed for 2021 tax year.

1. **Executive summary**

* Individual may be remunerated based on foreign (non-Polish) employment contract for work performed on the territory of Poland but it causes specific consequences in the field of social security and personal income tax.
* Tax obligations depend mainly on the tax residency status and possibility of applying exemptions based on the DTT. Residency status is determined on a case by case basis and all relevant facts should be considered in determining tax residency.
* Based on our analysis, Individual’s center of vital interests has moved from \_\_\_\_\_ to Poland as of the first day in Poland. Bearing above in mind, based on the local provisions and DTT, we believe that the Employee will most probably be recognized as Polish tax resident from the beginning of her stay in Poland. Adopting of any other solution (such as maintaining \_\_\_\_\_ tax residency for entire 2021) generates significant risk of questioning.
* Polish tax residence means that Individual’s tax obligation in Poland will cover her worldwide income. In the scenario in which \_\_\_\_\_ tax residency is maintained, only Polish sourced income (in this case, employment income generated by working days in Poland) will be taxable in Poland.
* Regardless of residency status, Individual performing a work in Poland, but remunerated by the foreign entity is obliged to calculate and pay monthly tax advances for PIT purposes. This obligation lies directly on the Employee and should be fulfilled until 20th day of the month following the month of income receipt. The \_\_\_\_\_ Company has no obligation in this respect.
* In addition to the above, the Individual is required to submit annual tax return by the 30th April of the following year.
* What is more, in described scenario the Employee will be subject to full Polish social security and healthcare scheme. The \_\_\_\_\_ Company should be considered as a social security remitter - responsible for the calculation and transfer of social security and healthcare contributions on a monthly basis along with necessary social security declarations. To act as a remitter, the \_\_\_\_\_ Company has to obtain Polish tax identification number (NIP) number and register in social security office.
* The current set-up and scope of Employee’s obligation may generate risk of creation of PE in Poland (mainly due to holding a power of attorney and conclusion contracts on behalf of the \_\_\_\_\_ Company on the territory of Poland) assuming the purchases are related to the core business of the \_\_\_\_\_ Company (are not of preparatory or auxiliary nature).

1. **Tax and social security consequences of performing work in the territory of Poland based on the foreign employment contract**

Employment contract is the most popular and commonly used remuneration form in Poland. Employment relationship with the company enables the employees to benefit from the Labor Law security such as: paid sickness, holiday and maternity leave, as well as provides for future pension savings in much higher capacity compared to other legal forms of cooperation.

In case the remuneration of employee is paid by the Polish entity under the employment contract as a rule taxes, social security and healthcare contributions would be payable on such a remuneration in Poland. Polish entity acting as a remitter of such contributions is obliged to calculate, remit and pay due contributions for each calendar month.

However, in foreign (non-Polish) employment contract scenario, other specific obligations will be applicable, mainly for the Employee. Please find below our analysis, covering the fields of social security and personal income tax.

* 1. **Tax residency status**

As a rule, the nature of the tax obligation in Poland and therefore, the tax consequences, depends on the place of residence of a given taxpayer.

Polish tax residents are subject to an “unlimited tax liability” in Poland. “Unlimited” means that individual is obliged to declare his / her worldwide income in the Polish tax return, regardless of the source of this income. In practice, Polish tax residents have to declare in Poland also their income earned in foreign countries and in some cases, this part of income can be taxable in Poland.

Alternatively, an individual who is not considered tax resident in Poland (and usually is tax resident of a foreign country) has “limited tax liability” in Poland. In this case, only income received from Polish sources is reportable and taxable in Poland. The most popular example of income from Polish source is income from work performed within the territory of Poland (please note it may be taxable in Poland even if salary is paid out by the non-Polish employer and based on a non-Polish employment contract).

* + 1. **Local provisions**

According to the article 3 clause 1a of a PIT Act, **taxation and income reporting requirements depends on residency status of an individual**. The residency status is determined on a case by case basis and all the relevant facts should be considered to determine it. As a general rule, according to the Polish tax regulations, individual is considered a tax resident in Poland, if he or \_\_\_\_\_:

* spends more than 183 days in a calendar year in Poland or;
* has center of vital interest (economic or personal interest) located in Poland.

Fulfillment of **any of the above conditions is sufficient** to be regarded as a Polish tax resident based on domestic law.

Although the second condition is rather self-explanatory, for determination whether the center of personal or economic interests (second condition: center of vital interests) is located in Poland, the following aspects should be taken into account e.g.: place where the individual derives majority of income; place of stay of an immediate family, place of permanent home, place where the individual participates in e.g. social, cultural, political activities, type of employment contract (Polish/foreign), place where primary bank account is run. According to the current approach of Polish tax authorities, the deciding factor that determines if this condition is met is place of stay of immediate family.

In case of the Employee, its seems clear that \_\_\_\_\_ is currently living in Poland together with immediate family. What is more, \_\_\_\_\_ spent more than 183 days in Poland in 2021 and probably the same considers 2022 as well. Having that in mind, it leaves no doubt that **based on local rules the Individual would be considered as a Polish tax resident** and as a result, worldwide income is subject to reporting in Poland.

Additionally, please be informed that Polish tax authorities accept the “split tax residency approach”. It means that the Employee can be deemed as a Polish tax resident as of her first day in Poland (in June 2021 and afterwards) and not for the entire 2021 tax year.

* + 1. **Double Tax Treaty considerations**

Above rules are applied together with provisions of the relevant double tax treaties concluded by Poland. If more than one country claim that the Employee is deemed tax resident for the purpose of the local tax regulations, the relevant treaties on avoidance of double taxation regulations should be applied.

According to the Article 4 of the DTT, regulations in terms of conflict of residency, i.e. when two countries claim tax residency over the individual, so-called “tie-breaker rules” should be taken into account in the following order:

1. permanent home available (where it is located);
2. closer personal and economic ties (center of vital interests) - if an individual has a place of permanent residence in both countries, he/\_\_\_\_\_ shall be deemed to be resident in a country in which the individual has closer personal and economic ties (center of vital interests);
3. habitual residence - in case it is impossible to determine where the place of permanent residence or center of vital interest of an individual is, an individual is considered to be resident in the country where the person usually lives;
4. citizenship;
5. mutual agreement between the competent authorities of both countries.

As we understand, the Employee has home available both in Poland and \_\_\_\_\_, therefore first tie-breaker rule will not apply. However both 2nd and 3rd rule lead to the conclusion that the Polish tax residency should prevail.

* + 1. **Final remarks**

The relocation with the family is an important factor considered in practice of Polish tax authorities. In case closest family (e.g. spouse, children) accompanies the Individual in Poland, there are strong arguments to consider that tax residence would be located in Poland as of the date of arrival.

What is more, having in mind temporary nature of stay in \_\_\_\_\_ (once every 5 months), we see no arguments to support non-residency status in Poland, especially if her stay exceeds 183 days in Poland in each year.

Potential obtaining tax certificate of residence from \_\_\_\_\_ tax authorities for 2021 may somehow support the reasoning for claiming tax residency in \_\_\_\_\_ for 2021, however in our opinion the risk of its questioning by the tax authorities should be considered as high.

It is our position that the Employee should be deemed as Polish tax resident as of her arrival in Poland in June 2021. As a result, income derived by the Individual based on the employment contract for work performed within the territory of Poland will be considered as a Polish-sourced employment income and fully taxed in Poland, according to the rules described below.

* 1. **Personal income tax obligations**
     1. **PIT exemption under DTT**

As a general rule expressed in art. 14.1 of DTT, employment income is taxable in the country where the work is actually performed, therefore income generated in the Poland should be taxable in Poland (based on Polish working days), while income generated during \_\_\_\_\_ working days may be taxable in \_\_\_\_\_.

Exemption to this general rule is provided in Article 14 paragraph 2 of the DTT, which allows the resident of a given country to remain taxable in the country of residence, even tough the work is performed in a different state. In other words, if all the conditions listed below are met the Employee may be fully taxable in Poland regardless of where the work is actually performed.

According to this provision employment income may be taxable only in the country of residency (Poland) if three following conditions are met simultaneously, i.e.

1. the recipient is present in the other state (\_\_\_\_\_) for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned; and
2. the remuneration is paid by, or on behalf of, an employer who is not a resident in the other country; and
3. the remuneration is not borne by a permanent establishment which the employer has in the other country.

Based on the provided background, we understand that above conditions are not met with regards to the Employee. Therefore employment income would be taxable according to the general rules i.e. based on the working days in each country.

* + 1. **Avoidance of double taxation**

Based on general rules, any part of income should not be taxable twice (income that was correctly taxed in one country, should be exempt or credited from taxation in the second country).

Based on Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (so-called “MLI”) the relevant method of avoidance of double taxation used by Poland and \_\_\_\_\_ is tax credit (proportional deduction).

The tax-credit method means that the income earned by individual abroad remain taxable in Poland, but the tax paid correctly abroad may be proportionally deducted from the amount of Polish tax due.

Additionally, individual using tax credit method is entitled to tax abolition relief, however the amount of such deduction may not exceed 1 360 PLN per year.

* + 1. **Taxation of employment income: Employee’s obligation**

The remuneration received by the Employee under the employment contract with \_\_\_\_\_ Company would be subject to personal income tax at the progressive tax rates of 12% and 32% (higher tax rate is applicable to the excess of PLN 120 000).

As described in paragraph 3.2.1, Individual’s income should be allocated and taxed in accordance with the workdays spent on the territory of Poland and other countries than \_\_\_\_\_ to total number of workdays in a given month. In order to calculate the tax advance due for each month, information on all working days which the Individual spent in each country should be gathered.

Under the Polish PIT Act, as long as the tax resident’s remuneration is based on foreign (non-Polish) employment agreement (particularly no pay-out through Polish payroll), during the course of the tax year \_\_\_\_\_/he will be **personally obliged to calculate and pay monthly tax advances** to the Polish tax office on the employment income received for his work performed in Poland. Please be informed, that it is common market practice, that the company takes this obligation over.

The tax advances are payable by the 20th of the month following the month in which payment was executed. The mandatory tax advance rate is 12%. The remaining tax liability (up to 32%) is paid in the annual tax return. However, the Individual may decide to pay the tax advances calculated at 32% tax rate on a monthly basis – in such a case the underpayment resulting from the annual tax return (if any) may be lower.

No tax declarations need to be filed during the tax year in respect of monthly tax advances. It is enough to pay advances on a monthly basis.

Additionally, every individual that earns income that is subject to personal income tax in Poland is obliged to prepare and submit annual tax return (tax declaration) in Poland. The return should include at least income from Polish sources (for tax non-residents only) or total worldwide income earned in a given year (for Polish tax residents).

That income shall be declared on PIT-36 form, along with other income subject to progressive taxation derived in the tax year. Final deadline for submitting this tax return and making the final tax payment is 30th April of the year following the year of income receipt (with no extension possible). Within the same deadline the difference between tax resulting from the tax reconciliation and tax advances withheld in the course of the tax year should be paid. In case of delay in payment, penalty interests[[4]](#footnote-5) may be due. Additionally, late filing of the tax declaration may be subject to penalty.

Individuals being a Polish tax residents, receiving income from capital gains are obliged to file a separate annual tax return (PIT-38 form) for the year, in which the income (or loss) was derived from this source. The general deadline is 30th April of the year following the year in which the income (loss) was derived.

Having in mind the above, we believe that the Employee should file a tax return in Poland for 2021 and pay outstanding taxes together with penalty interests and additional document called “active repentance”. Such document may help to mitigate the risks of potential negative consequences (such as fiscal penalties).

In the alternative scenario, in which Individual decides to follow with tax residency in \_\_\_\_\_ for entire 2021 tax year approach (supported by relevant tax residency certificate) the taxation in Poland will still occur as of the first day (exceed of 183 days mentioned in art 14.2 DTT). It will be limited to Polish working days only, however all the obligations (monthly calculations, annual tax return) remain unchanged. Please be however reminded, that in our opinion the risk of questioning such approach is high.

* + 1. **Taxation of employment income: Employer’s obligation**

In case there is no Polish employment contract concluded between the Employer and the Employee, **the \_\_\_\_\_ Company has no payroll, calculation and withholding obligations with reference to Employee’s remuneration**. Moreover, the \_\_\_\_\_ Company is not acting as a Polish tax remitter, neither has any obligations to set up shadow payroll. As described above, all obligation are transferred to the Employee under the law applicable, with no need of separate agreement to be concluded.

* 1. **Social security obligations**
     1. **Possibilty to remain in \_\_\_\_\_ social security scheme**

As per general rule, individual performing work in Poland based on the \_\_\_\_\_ employment contract is **subject to full Polish social security and healthcare scheme** regardless of the fact that the employer is based outside of Poland (in \_\_\_\_\_).

Employees may remain in the other social security system (in our scenario, \_\_\_\_\_), despite the fact that work is performed in another country (Poland) based on the relevant certificate of coverage issued in \_\_\_\_\_ for the period of performing work in Poland. Please be however informed, that this possibility is reserved for employees assigned to another country (art. 7 of Social security treaty). And as we understand, in our scenario the Employee is not assigned.

Alternatively, art. 9 of Social Security treaty gives the possibility to establish applicable social security scheme in the form of exceptional agreement between Poland and \_\_\_\_\_. Respective application to apply an exception/agree on the social security scheme in non-standard situation should be filled in the country, which social security scheme is intended to be maintained (in our case – \_\_\_\_\_).

Please be informed that potential possibility of obtaining of \_\_\_\_\_ certificate of coverage should be consulted with \_\_\_\_\_ advisors. As long as there is relevant certificate issued, the social security obligation in Poland will not arise. And on the contrary, if there is no relevant certificate obtained, such obligation will arise in Poland due to the fact that the work is performed here.

Please find below the summary of obligations related to social security that the \_\_\_\_\_ Company should comply with in Poland, if there is no relevant certificate of coverage in place.

* + 1. **General rules**

Social security and healthcare standard rates in Poland are the following:

| **Type of contribution** | **Employer’s part** | **Employee’s part** |
| --- | --- | --- |
| **Pension** | **9,76 %** | **9,76%** |
| **Disability** | **6,5%** | **1,5%** |
| **Accident  (average)** | **1,67%** | **-** |
| **Labour Fund** | **2,45%** | **-** |
| **Employees’ Guaranteed Benefit Fund\*** | **0,1%** | **-** |
| **Sickness** | **-** | **2,45%** |
| **Healthcare** | **-** | **9%** |

\*Employees’ Guaranteed Benefit Fund is not applicable for foreign employers, so may not be applicable for \_\_\_\_\_ Company.

Social security is calculated on individual’s gross income. **Employee’s part is deducted from the employee’s salary** and it is included in his gross income. On the other hand, **employer’s part is covered by the Employer** next to the gross salary indicated in the employment contract.

Healthcare contribution is calculated on a different basis (gross income decreased by the amount of social security due in a given month).

The pension and disability insurance contributions are payable on the annual revenues of up to PLN 177 660 (in 2022). Please note that the statutory limit is different for each year and it is announced at the beginning of the year. Other contributions are not limited.

Social security and healthcare contribution are paid on a monthly basis. The payments should be made in PLN currency to the individual bank account created by the Polish social security office (ZUS). **Payments should be done by** **20th of the month** following the month in which the income was received (e.g. for July 2022 the deadline is 20th August 2022). Failure in meeting the deadline results in an obligation to pay additional late payment interest which currently amounts to 16% per year (interest arises on a daily basis since the deadline).

Within the same deadline, submission of **monthly social security declaration** (ZUS DRA/RCA reports) to the Polish social security office is required as well. The declaration may be submitted electronically and EY can take over the whole process of submission.

The \_\_\_\_\_ Company (as a remitter) will be responsible for all reporting and withholding obligations with regards to the employment contract. Remitter’s obligations consist of: calculation and transfer of social security and healthcare contributions on a monthly basis along with necessary declarations to the Polish social security office (ZUS).

It requires obtaining Polish tax identification number (NIP) for the Company from the Polish tax office prior to registration for social security purposes (the procedure requires gathering corporate documents and their translation to Polish). It may generate some difficulties in contacts with the social security office, as all documents and files can be prepared only in Polish language.

Below you can find detailed description of the whole process. **Please be informed that the registration of the Employer shall take 2 steps:**

**STEP 1 – Obtaining Polish tax identification number (NIP)**

* In order to register for social security in Poland, the \_\_\_\_\_ Company must first obtain the tax identification number in Poland (NIP) – unless it already has one;
* Such number for the companies is obtained by filing the so called NIP-2 form;
* The NIP-2 tax identification form needs to be submitted together with the originals or the certified copies of the following documents along with their sworn translations to Polish:

1. certificate of incorporation of the \_\_\_\_\_ Company;
2. extract from the official register for the \_\_\_\_\_ Company.

* The tax identification number should be granted within 14 days from the date of submission of correctly completed documents.

**STEP 2 -** **Filing social security application forms**

* When the NIP is granted, the \_\_\_\_\_ Company should register as a social security contributions remitter. In order to complete this application (with use of relevant ZUS ZPA form), the following information concerning the \_\_\_\_\_ Company will be requested (apart from the information obtained in step I):

1. start date of the insurance obligation,
2. the information whether the accounting records are kept by the accounting office in Poland.

After the whole process is complete, the \_\_\_\_\_ Company may register the Employee as the person covered by social security scheme.

* + 1. **Employee Capital Plan**

As of 2019 there is a new obligation in Poland concerning employers whose employees are subject to Polish social security contributions. Except from a few situations described below, each employer, whose employees are subject to social security system in Poland, is **obliged to implement the Employee Capital Plan** (ECP; in Polish – Pracowniczy Plan Kapitałowy – PPK) by arranging cooperation with a chosen financial institution eligible to run ECP in Poland.

The main goal of ECP is to increase the level of pension received by individuals after their retirement. The most important impact on the employer is an obligation to sign the respective agreements on managing and running ECP, pay obligatory contributions (at least 1,5% of an employee’s salary) and withhold obligatory deduction from employee’s salary (at least 2%). Please mote that the system is not obligatory for employees (he/\_\_\_\_\_ can opt out), but the \_\_\_\_\_ Company still has obligation to find and conclude agreement with relevant institution.

1. **Potential PE risk**

Under the general Polish CIT Act provisions[[5]](#footnote-6), Polish tax residents are subject to taxation in Poland on their worldwide income. If a taxpayer does not have its registered office or management in the territory of the Republic of Poland, only income earned by them in the territory of the Republic of Poland is subject to tax obligation (so-called limited tax liability in Poland).

Given that the \_\_\_\_\_ Company does not have its registered office nor place of management in Poland (it is a \_\_\_\_\_ tax resident), the profits of the Company could be taxed in Poland only if they are derived from the Polish source, e.g. through a PE situated therein.

According to the CIT Act, a PE means:

* 1. a permanent agency used by an entity whose registered office or management is located in the territory of one state to perform all or part of its activities in the territory of another state, in particular a branch, representation, office, factory, workshop or a natural resource extraction site,
  2. a construction site, construction, assembly or system operated in the territory of one state by an entity that has its registered office or management in the territory of another state,
  3. a person who acts in the territory of one state for and on behalf of an entity that has its management in the territory of another state, if he is authorized to conclude agreements on behalf of that entity and actually exercises that authority.

The above definition can be applied under condition that a relevant agreement on avoiding double taxation to which Poland is a party does not stipulate otherwise. Therefore, the issue should be analyzed by reference to DTTs concluded by Poland. The Polish tax authorities generally rely in practice on the PE definition from the DTTs and OECD approach as regards its interpretation.

Generally, the DTT follows OECD Model Convention. According to article 5 Paragraph 1 and 5 Paragraph 2 of the DTT, PE means a fixed place of business through which the business of an enterprise is wholly or partly carried on. The term “PE” includes especially a place of management, a branch, an office where the trading activity is performed, a factory a workshop and a mine, an oil or gas well, a quarry or any other place of extraction of natural resources as well as construction site or assembly performed for a period exceeding 12 months[[6]](#footnote-7).

Additionally, Article 5 Paragraph 5 of the DTT provides that regardless of the above definition, PE may also exist if a person, other than an agent of an independent status, is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise in respect of any activities which that person undertakes for the enterprise, unless the 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 PE (for exclusions, see the comments below).

There are also exclusions from PE provided directly by the Polish-\_\_\_\_\_ DTT and resulting in no PE with respect to certain types of activities performed in Poland. According to Article 5 Paragraph 4 of the DTT, PE shall be deemed not to include:

* 1. the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
  2. the maintenance of a stock of goods or merchandize belonging to the enterprise solely for the purpose of storage, display or delivery;
  3. the maintenance of a stock of goods or merchandize belonging to the enterprise solely for the purpose of processing by another enterprise;
  4. the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandize or of collecting information, for the enterprise;
  5. the maintenance of a fixed place of business solely for the purpose of preparatory or auxiliary character, for the enterprise;
  6. the maintenance of a fixed place of business solely for a combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

In sum, the analysis of the existence / non-existence of a PE should be performed in the context of the potential:

* 1. fixed place of business existing in Poland (including construction site or assembly in Poland);
  2. dependent agent acting on the foreign enterprise’s behalf in Poland

as well as applicability of the above indicated exclusions from the PE concepts.

**Fixed place of business constituting a PE**

Based on the practice of the tax authorities we are aware of, existence of a place of business should be defined, among others, as having (owning) the premises and resources in the territory of the particular country, having rights to such premises (i.e. renting out the premises in Poland for the purpose of carrying out business activity therein), having the premises at disposal for carrying out business activity (even without ownership or other rights to such premises). It also includes the situation where the premises are owned by another entity (e.g. the client in Poland) but the company’s employees / representatives have the access to them and / or perform their duties there.

As regards home office work of the employee of the foreign entity, we are aware of the tax rulings issued by the Polish tax authorities saying that it should not automatically lead to creation of “a place of business” in Poland. The taxpayer’s argumentation confirmed by the tax authorities was that the foreign entity would not provide the individual with the company’s premises for performing its duties and the company would not have any rights and the access to the place where the individual would work (i.e. home).

Bearing in mind the background provided, we understand that the \_\_\_\_\_ Company will not have any premises on the territory of Poland, i.e. office, branch, factory, etc.

Therefore, in our opinion, the Employee’s activities do not constitute PE in Poland under PE fixed place of business concept as it might be argued that the \_\_\_\_\_ Company have not a place of business in the meaning of the DTT (which is the condition for determining whether other PE conditions are met, i.e. whether a place of business is fixed and whether the \_\_\_\_\_ Company carries out its business activity through it).

**Dependent agent acting in Poland and creating a PE**

As indicated above, according to the DTT, a PE in Poland may also be created if there is an agent (a person or a company) acting on the Company’s behalf based on the respective power of attorney to conclude contracts in the name of the enterprise and actually he/\_\_\_\_\_ performs this power of attorney.

In order to fall under depending agent concept, according to Paragraph 84 of Commentary on Article 5 of OECD Convention [[7]](#footnote-8), the following conditions needs to be met:

* a person acts in a Contracting State on behalf of an enterprise;
* in doing so, such person habitually concludes contracts or habitually plays a principle role leading to the conclusions of contracts that are routinely concluded without material modifications by the enterprise, and
* these contracts are either in the name of the enterprise or for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or for provision of the services by that enterprise.

However, the above will not apply if the activities performed by the person are limited to activities mentioned as an exception not resulting with creation of PE. In other words, a person whose activities are restricted to preparatory and auxiliary activities only, should not create a PE of an enterprise.

Where, for example, a person acts solely as a buying agent for an enterprise and, in doing so, habitually concludes purchase contracts in the name of the enterprise, such activities will not fall under dependent agent concept resulting of PE creation as long as such activities are preparatory or auxiliary[[8]](#footnote-9).

However, the described exception (purchases related to the preparatory or auxiliary activities) will not apply in case the overall activity of the enterprise consists in selling these goods and where purchasing is a core function in the business of the enterprise[[9]](#footnote-10).

As we understand, the Employee is entitled to represent the \_\_\_\_\_ Company, to engage and conclude contracts with 2nd party vendors on behalf of the \_\_\_\_\_ Company. Having in mind that, we can see potential risk of PE being created in Poland as long as the purchases made by the Employee are related to the main business of the \_\_\_\_\_ Company.

The \_\_\_\_\_ Company may take the following steps to mitigate the risk of establishing a PE:

1. ensuring that the Employee will not have a power of attorney to conclude contracts on behalf of the \_\_\_\_\_ Company or at least will not execute such power of attorney in the territory of Poland;
2. ensuring that the Employee will not make key decisions from the perspective of the Company as an enterprise.

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*The above analysis is based solely on the documents and information received from you.*

*Our analysis expresses no opinion other than that stated immediately above, and neither this opinion nor any prior statements are intended to imply or to be an opinion on any other matters. Our comments constitute solely opinions and should not be taken as assurance of the ultimate tax treatment of the contributions covered by the Employer.*

*We have assumed that the facts presented to us (or assumptions made by us) and listed above are complete and accurate and we have not independently audited or otherwise verified any of these facts or assumptions. A misstatement or omission of any fact, or a change or amendment in any of the facts, assumptions or representations we have relied upon may require a modification of all or a part of this opinion.*

*The conclusions set forth herein are based upon the Polish PIT regulations and the DTT existing as of the date of this memorandum. All of these are subject to change. If there is a change, including a change having retroactive effect, in the PIT or other relevant tax regulations or in the prevailing tax authorities’ or judicial interpretation of the foregoing, the opinions expressed herein would necessarily have to be re-evaluated in the light of any such changes. We have no responsibility to update this opinion for any such changes occurring after the date of this letter.*

*The comments presented herein are not binding on the Polish tax authorities and there can be no assurance that they will not take a position contrary to any of the opinions expressed herein.*

*This memorandum is provided solely for your information and use and may not be relied on them upon by anyone else.*

1. The Personal Income Tax Act of July 26, 1991 (JL 2021, item 1128 with amendments); [↑](#footnote-ref-2)
2. Polish Social Security System Act of 13 October 198 (JL 2022, item 1009 with amendments); [↑](#footnote-ref-3)
3. [↑](#footnote-ref-4)
4. Currently at the annual level of 16% [↑](#footnote-ref-5)
5. Article 3 of The Act of 15 February 1992 on Corporate Income Tax (Journal of Laws of 2021, position 1800 with amendments, further: **the CIT Act**), [↑](#footnote-ref-6)
6. As we understand, the construction site / assembly PE is not applicable in the analyzed case. [↑](#footnote-ref-7)
7. Commentary of OECD Model Tax Convention on Income and on Capital (Condensed version – 2017; further: **Commentary of OECD Convention**). [↑](#footnote-ref-8)
8. Ref. to Paragraph 85 of Commentary of OECD Convention [↑](#footnote-ref-9)
9. Ref. to Paragraph 68 of Commentary of OECD Convention [↑](#footnote-ref-10)