


## Tax withholding by the remitter based on the example of the lump-sum corporate income tax (WHT) – selected issues


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**Abstract:** This article deals with the role and responsibility of the remitter in corporate income tax with respect to the so-called “withholding tax” (WHT) levied on income earned by non-residents. The authors focused their considerations on establishing the relationship between the statutorily defined standard obligations of the remitter and the implemented activities of this entity in relation to WHT. The subject is important due to international aspects of taxation of cross-border income not only on the basis of Polish corporate income tax regulations, but also with double taxation treaties and exemptions in withholding tax implemented from EU directives in mind. The answer to the research questions posed included tax, fiscal and penal, as well as international and EU aspects. The research thesis is that the obligation to collect tax under the WHT constitutes for the remitter “sui generis” right to perform this collection, and does not have the character of an absolute obligation constituting its subjectivity as a remitter. The analysis of the legislation, case law and literature, through the application of the legal-dogmatic method, has shown that the failure of the tax remitter to collect the tax is not a barrier to the filing a tax refund or overpayment claim by the tax remitter, and in fact constitutes an active legitimacy. The findings of the article

are of practical significance for non-residents from the EU and third countries (from outside the EU) obtaining so-called passive income in Poland.

## 1. Introduction

According to the definition of a remitter stipulated in the Tax Ordinance<sup>1</sup> that the status of this passive entity is determined by the obligations imposed on it by tax law. The construction of these obligations implies that, in addition to the obligation to calculate the tax amount and ultimately to settle it in a timely manner, an element of tax collection is also necessary<sup>2</sup>. This, in turn, translates into the scope of the tax remitter's responsibility<sup>3</sup>, which, as the judiciary rightly points out, is not responsible for the tax remitter's tax liability, but is responsible for his own actions, and specifically for the proper performance of his duties under the Tax Ordinance, i.e. for calculating, collecting tax from the taxpayer and paying it to the tax authority on time<sup>4</sup>. It also seems appropriate to mention that the tax liability of the tax remitter is supplemented by penal fiscal regulations<sup>5</sup>. The failure to collect tax by the tax remitter is considered a punishable act. In addition, attention may also be drawn to the powers of the Minister of Finance, but also of the tax authorities, relating to the possibility to exempt tax remitters from the obligation to collect tax or advance tax payments<sup>6</sup>. Based on the above, it seems that the obligation of the tax remitter to withhold the tax (in abstracto) and the performance of this obligation

<sup>1</sup> Art. 8 of the Act on Tax Ordinance of 29 August 1997 consolidated text: Journal of Laws of 2021, item 1540, hereinafter: TOA.

<sup>2</sup> Marta Joanna Czubkowska and Justyna Siemieniako, "Odpowiedzialność płatnika w prawie podatkowym," in *Stanowienie i stosowanie prawa podatkowego w Polsce*, ed. Beata Kucia-Guściora (Lublin: Wydawnictwo KUL, 2021), 138.

<sup>3</sup> See Art. 30 in connection with Art. 8 of the TOA.

<sup>4</sup> Provincial Administrative Court in Warsaw, Judgment of 8 July 2020, Ref. No. III SA/Wa 2343/19 SIP LEX No. 3099933.

<sup>5</sup> Art. 78 of sec.1 of the Act Penal and Fiscal Code of 10 September 1999, consolidated text Journal of Laws of 2020, item 859 hereinafter PFC.

<sup>6</sup> Art. 22 par. 1, item 2 and par. 2 of the TOA in connection par. 15 sec. 1 item 1 of Ordinance of the Minister of Finance on The Properties Of Tax Authorities of 22 August 2005, consolidated text, Journal of Laws of 2022, item 565, hereinafter: Regulation on Properties.

(in concreto) are immanently linked, since the relevant “consent” of the authorities is necessary for the tax not to be withheld, and if the tax remitter arbitrarily refrains from withholding the tax, they are subject to fiscal or penal-fiscal liability.

The purpose of this article is to examine and evaluate several parallel issues relating to the role and responsibility of the remitter in corporate income tax in terms of the so-called tax “at source”. In order to achieve this objective, it is necessary to answer key questions. First of all - is it really always the role of the tax remitter to withhold tax from the taxpayer, and what is in fact the legal significance of the tax remitter’s obligation to withhold tax in corporate income tax? Secondly, does the order in which the tax remitter chooses to act, i.e. collection and payment of tax, matter? And relative to this; is it possible to reverse the order of execution, i.e. to make a payment and then collect the tax from the taxpayer, or to settle the tax without collecting it from the taxpayer? What are the legal implications of this? Thirdly, is it possible for the tax remitter, despite not having collected the tax, not to be held liable, either for fiscal or penal-fiscal purposes, but to become an entity actively entitled to submit a claim for an acknowledgment of overpayment, or a claim for tax return, in the event that the tax has been paid unduly, or in an amount greater than that due?

The fundamental doubt, therefore, is to understand the statutorily defined obligation towards the remitter relating to tax collection, and to determine whether the failure to fulfil this obligation without negative legal consequences does not violate (or even nullify) the legal construction of the tax remitter institution. Based on the analysed research material, one could formulate a thesis that in fact the obligation of the tax remitter to collect tax specified in Art. 8 of the Tax Ordinance, does not create a mandatory norm (*ius cogens*) towards the tax remitter, but it provides for a kind of tax remitter’s right, constituting a relatively binding norm (*ius dispositivum*). It can be argued that the tax remitter is such a statutorily designated entity, but one of its duties: the duty to collect tax, although it defines it, in fact only designates a certain amount of freedom and power to the remitter, creating a *sui generis* power to collect tax, and the essence of its duty is to pay tax to the tax authority in the correct amount and on time.

It should be noted that this article is an attempt to resolve the above doubts only on the basis of the tax remitter’s obligations to

calculate the collection and payment of the lump-sum corporate income tax - the “withholding” tax (known as WHT), without referring to its status in other tax constructions. From the legal point of view, the research topic is multifaceted and takes into consideration the significant potential that Poland has for foreign investments, or a wide range of the so-called royalties<sup>7</sup>, as well as changes in national legal regulations in the discussed scope. Tax issues seems to be a good topic for analysis both on the national and international level, including the EU one.

## 2. Obligations of the tax emitter in corporate income tax with regard to the so-called the “withholding tax” (WHT)

The starting point for analysing the status of a tax remitter of corporate income tax is to present that the role of this passive entity is related to the withholding of tax due from taxpayers with limited tax liability<sup>8</sup>, i.e. without a registered office or management in the territory of the Republic of Poland<sup>9</sup>. As for certain types of income obtained in the territory of the Republic of Poland by non-residents, the obligation to deduct tax lies with the Polish entity making the payment of the amount due being the source of such income<sup>10</sup>. The relevance of correctly fulfilling tax remitter’s duties is significant for the development of foreign investments<sup>11</sup> or ensuring the freedoms of capital movements, as they mainly concern cross-border (international) income such as interest, royalties, and dividends<sup>12</sup>. Legally speaking, the im-

<sup>7</sup> Błażej Kuźniacki, *Rzeczywisty beneficjent a podatek u źródła* (Warszawa: Wolters Kluwer S.A., 2022), 36.

<sup>8</sup> Art. 3 sec. 2 of the Act on Corporate Income Tax of 12 February 1992 Journal of Laws of 2021, item 1800, hereinafter: CITA.

<sup>9</sup> Individual interpretation of 9 July 2019, Ref. No. 0111-KDIB2–3.4010.102.2019.2.KK, pub. <http://sip.mf.gov.pl>

<sup>10</sup> Art. 21, sec. 1 and in Art. 22 sec. 1 of the CITA. Individual interpretation of 9 July 2019, Ref. No. 0111-KDIB2–3.4010.102.2019.2.KK, pub. <http://sip.mf.gov.pl>.

<sup>11</sup> Anna Białek-Jaworska and Lyubov Klapkiv, “Does withholding tax on interest limit international profit-shifting by FDI?” *Equilibrium. Quarterly Journal of Economics and Economic Policy*, no. 1(2021): 11–44.

<sup>12</sup> Zee Howell H., “Retarding Short-Term Capital Inflows Through Withholding Tax,” *IMF Working Paper* no. 00/40, (March 2000), Available at SSRN: accessed May 18, 2022, <https://ssrn.com/abstract=879419>; Lejour, van’t Riet, M. A common withholding tax for the EU. (2020), accessed May 18, 2022, <https://www.feps-europe.eu/resources/>

plementation of these obligations in a direct way requires reference not only to national regulations, but also to the implemented provisions of EU directives<sup>13</sup>, as well as the provisions of double taxation conventions<sup>14</sup>.

The obligations of the tax remitter in the aforementioned area are regulated in Art. 26 of the Corporate Income Tax Act. However, it should be noted that, by the Amendment Act<sup>15</sup>, from 1 January 2019 amendments concerning the tasks of the remitter were introduced to the Corporate Income Tax Act.<sup>16</sup> In the light of those provisions, legal persons, organizational units without legal personality and natural persons who are entrepreneurs, and who make payments of amounts due under the titles listed in Art. 21, sec. 1 and Art. 22, sec. 1, up to the amount not exceeding the total amount of PLN 2,000,000 to the same taxpayer, in the tax year relevant at the remitter of such dues, shall be obliged, as tax remitters, to withhold the lump-sum income tax on such payments on the day of making said payment. However, in the event that income is allocated to increase the share capital, or the participation fund in case of collectives, the tax shall be collected by the tax remitters within 14 days of the date, on which

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publications/749-a-common-withholding-tax-for-the-eu.html; Izabela Andrzejewska-Czernek, Gergely Czoboly, Trevor Glavey, Mantas Juozaitis, Katarzyna Knawa and Ivo Vana-saun, "Jak wy to robicie? Podatek u źródeł w różnych państwach Europy, cz. 1. Litwa, Irlandia, Węgry, Estonia," *Przegląd Podatkowy*, no. 1(2022): 41–50; Izabela Andrzejewska-Czernek, Elina Belouli, Cristiana Bulbuc, Daniele Conti, Katarzyna Knawa, Moritz Muelhausen and Iulian Panfiloiu, "Jak wy to robicie? WHT w różnych państwach Europy, cz. 2. Wielka Brytania, Włochy, Niemcy, Grecja, Rumunia," *Przegląd Podatkowy*, no. 2(2022): 33–43; Izabela Andrzejewska-Czernek, Domingo Jesús de L'Hotellerie-Fallois, Pierre-Antoine Klethi and Katarzyna Knawa, "Jak wy to robicie? Podatek u źródeł w różnych państwach Europy (3): Hiszpania, Luksemburg, Polska," *Przegląd Podatkowy*, no. 4(2022): 28–38.

<sup>13</sup> Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (Recast) O.J.E.L. of 2011 No. 345, p. 8 as amended. Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States O.J. E.L of 2003 No. 157, p. 49 as amended. Art. 21 sec. 2 of the CITA.

<sup>15</sup> The Act amending the Personal Income Tax Act, the Corporate Income Tax Act, the Tax Ordinance Act and several other acts of 23 October 2018, *Journal of Laws of 2018*, item 2193.

<sup>16</sup> Art. 26 of the CITA. Cf. Dawid Strzała, "Nowe zasady poboru podatku u źródła – mechanizm walki z optymalizacją podatkową czy patologia podatkowa?" *Doradztwo Podatkowe*, no. 8(2019): 25–32.

the decision of the registry court to register the increase in share capital becomes final, or of the date on which the general meeting resolves to increase the share capital, or in cooperative societies - of the date on which the General Meeting resolves to increase the participation fund<sup>17</sup>. Different rules apply to remitters who are entities that operate aggregate accounts. In the case of payments of interest due on securities recorded on securities accounts or on aggregate accounts, the income<sup>18</sup> derived from securities recorded on securities accounts or on aggregate accounts paid to taxpayers - non-residents, the entities maintaining the securities accounts or aggregate accounts shall collect lump-sum income tax on the day the due amounts are placed at the disposal of the holder of the securities account or the holder of the aggregate account. It has to be reiterated that the payment referred to in the aforementioned regulations means the performance of an obligation in any form whatsoever, including by payment, deduction or capitalisation of interest<sup>19</sup>.

With regard to the withholding of tax by tax remitters, there is also a provision to waive the obligation to withhold tax or for the possibility to withhold tax at a lower rate by applying the tax rate resulting from the relevant double taxation treaty<sup>20</sup>. This requires, among other things, the taxpayer's residence for tax purposes to be documented by a certificate of residence obtained from the taxpayer<sup>21</sup>. Furthermore, no tax is withheld in a situation where income from dividends and other income from shares in the profits of legal persons is earmarked for statutory purposes or for other purposes specified in relation to tax exemptions<sup>22</sup>, upon submission to the remitter, no later than on the day of payment, of an appropriate statement that the income has been earmarked for the aforementioned

<sup>17</sup> See Art. 26, sec. 2 of the CITA.

<sup>18</sup> Art. 7b sec. 1 item 1 (a), (b), (e) and (g) of the CITA.

<sup>19</sup> Art 26 sec.7 of the CITA.

<sup>20</sup> Kunka Petkova, "Withholding tax rates on dividends: symmetries versus asymmetries or single versus multilateral double tax treaties," *International Tax and Public Finance* no. 28(2021): 890–940, <https://doi.org/10.1007/s10797-020-09637-y>.

<sup>21</sup> See a.o. Mikołaj Jabłoński and Marek Wołyński, "Podatek u źródła," in *Uszczelnienie w systemie podatkowym w CIT- najważniejsze regulacje*, ed. Joanna Henzel, Mikołaj Jabłoński and Marek Wołyński (Warszawa: C.H. Beck, 2021), 195.

<sup>22</sup> See Art. 17 sec. 1 of the CITA.

purposes. The exemption from tax collection also applies to income from interest or discount on mortgage bonds and bonds with a maturity of no less than one year, as well as those admitted to trading on a regulated market or introduced into an alternative trading system<sup>23</sup> in the territory of the Republic of Poland or in the territory of a state which is a party to a double taxation treaty concluded with the Republic of Poland, whose regulations specify the principles of taxation of income from dividends, interest and royalties. Non-collection of tax in the latter case is subject to the condition that the issuer makes a declaration to the tax authority that the issuer has exercised due diligence<sup>24</sup> in informing its related parties<sup>25</sup>, of the terms of the exemption<sup>26</sup>, which applies when the taxpayer holds, directly or indirectly, together with other related parties within the meaning of these provisions, less than 10% of the nominal value of these bonds<sup>27</sup>.

Another controversial derogation from the tax obligation of withholding of remitters is the failure to withhold due to the receipt of a written statement that the conditions for benefiting from the exemptions introduced to income tax on the basis of EU directives are fulfilled with regard to the payments made<sup>28</sup>. For certain types of passive income<sup>29</sup>, a written statement is required to indicate that either the company or the foreign permanent establishment is the beneficial owner of the amounts paid<sup>30</sup>.

<sup>23</sup> As defined in the provisions of the Act on trading in financial instruments of 29 July 2005, Journal of Laws 2022, item 861.

<sup>24</sup> Jabłoński and Wołyński, "Podatek u źródła," 177.

<sup>25</sup> Within the meaning of Art. 11a, sec. 1 item 4, or Art. 23m, sec. 1 item 4 of the Act on Personal Income Tax of 26 July 1991, Journal of Laws of 2021, item 1128 as amended, hereinafter: PITA.

<sup>26</sup> Art. 17, sec. 1, item 50c of the CITA.

<sup>27</sup> Art. 26, sec. 1aa and 1ab of the CITA.

<sup>28</sup> See Art. 21, sec. 3a and 3c or Art. 22, sec. 4 item 4 of the CITA. See: Maciej Wiśniewski, "Czasowy częściowy brak efektywnego opodatkowania przychodów z tytułu udziału w zyskach osób prawnych i należności uzyskiwanych przez nierezydentów podatku dochodowego od osób prawnych," *Przegląd Podatkowy*, no. 9(2019): 34–40.

<sup>29</sup> See Art. 21, sec. 1 item 1 of the CITA.

<sup>30</sup> Cf. Art. 26, sec. 1f of the CITA. Cf. Joanna Kiszka, "Instytucja rzeczywistego właściciela należności - jej źródła i znaczenie praktyczne," *Doradztwo Podatkowe*, no. 2(2020): 43–46; Mateusz Raińczuk, "Warunki zwolnienia z podatku zryczałtowanego od niektórych przychodów osiąganych przez nierezydentów. Glosa do wyroku WSA z dnia 11 marca 2020 r., I SA/Wr 977/19," *Przegląd Orzecznictwa Podatkowego*, no. 6(2020): 437–446.

The option for tax remitters paying claims to taxpayers, who are mutual investment vehicles, not to withhold tax provides for a similar solution relating to the need to submit a declaration of beneficial ownership status and a tax residence certificate<sup>31</sup>.

The withholding tax obligation for part of the dues was based on the *pay and refund tax* construction<sup>32</sup>. If the total amount of dues paid for the reasons listed in Art. 21, sec. 1 and Art. 22, sec. 1 exceeds the amount of PLN 2,000,000.00, legal persons, organisational units without legal personality and natural persons who are entrepreneurs are obliged, as remitters, to withhold, on the day of making the disbursements, according to the basic tax rate for a given payment specified in Polish regulations, from the excess over the amount of PLN 2,000,000.00. In the case of dividends, it is possible to apply the deductions set out in the Act<sup>33</sup>. On the other hand, excluded in this mechanism is the possibility not to withhold tax on the basis of the relevant double tax treaty and without taking into account exemptions or rates resulting from special provisions or double taxation treaties, which is important for non-residents.

However, this substantial limitation relating to amounts paid, exceeding PLN 2,000,000.00 is subject to exception. The possibility to waive the withholding tax applies to remitters who are exclusively legal persons and entities without legal personality, provided that the right to the exemption is confirmed by an opinion on the application by the remitter of the exemption from the lump-sum withholding tax, from the dues paid to the taxpayer referred to in Art. 21 sec. 1 point 1 or Art. 22 par. 1, or the application of the tax rate resulting from the relevant agreement on the avoidance of double taxation, or the non-application of the tax in

<sup>31</sup> Art. 26, sec. 1g of the CITA.

<sup>32</sup> Jacek Wojtach, "Changes to Poland's pay and refund withholding tax regime from 2022" *International Tax Review* November 25, 2021, accessed May 18, 2022, <https://www.proquest.com/scholarly-journals/changes-poland-s-pay-refund-withholding-tax/docview/2614042261/se-2?accountid=11796>; Thabo Legwaila, "When Caesar Must Pay, Caesar Must Pay-The Withholding of Tax Refunds by The South African Revenue Service Rappa Resources (Pty) Ltd v CSARS (20/18875) 2020 ZAGPPHC (5 November 2020)", *Journal of South African Law* no. 1(2022), 191. Gale Academic OneFile. <https://link.gale.com/apps/doc/A694952864/AONE?u=anon~b01bb198&sid=googleScholar&xid=a9d4d8cd>.

<sup>33</sup> Art. 22, sec. 1a - 1e of the CITA.

accordance with such agreement. This opinion shall be issued by the tax authority upon request of the taxpayer, the remitter or the entity disbursing the amounts due through entities maintaining securities accounts or aggregate accounts in accordance with the requirements set out in Art. 26b of the CITA<sup>34</sup>.

In addition, it should be pointed out that it is legally possible not to withhold tax if the remitter fulfils the conditions laid down in Art. 26, sec. 7a of the CITA. Pursuant hereto, the obligation to withhold the tax in the case of making payments exceeding the amount of PLN 2,000,000.00 does not apply, if the remitter submits an appropriate statement that it possesses documents required by the tax law regulations, in order to apply the tax rate or exemption or not to withhold the tax resulting from special regulations or double taxation avoidance agreements, and does not possess any knowledge justifying the assumption that there are circumstances excluding the possibility of applying the tax rate or exemption or not withholding the tax resulting from special regulations or double taxation avoidance agreements<sup>35</sup>. The declaration shall be made by the head of the body<sup>36</sup>, or, where the body is headed by a group of persons, by a designated person being a member of that body, but shall not be made by proxy. The remitter is obliged to submit said statement to the tax authority not<sup>37</sup> later than on the day of the tax payment for the month in which the amount of PLN 2,000,000.00 was exceeded, however, performing this obligation after the payment is made does not release the remitter from the obligation to exercise due diligence before making it.

It is worth noting that the wording of the provisions under review makes a clear literal distinction between the moment of tax collection and the moment of payment of the lump-sum tax deducted “at source”. Tax remitters transfer the tax amounts by the 7th day of the month following the month, in which the tax was collected to the account of the appropriate tax office<sup>38</sup>, which, according to the executory order, is the Lublin Tax Of-

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<sup>34</sup> Art. 26, sec. 2g in fine of the CTIA.

<sup>35</sup> Art. 26, sec. 7a of the CITA.

<sup>36</sup> See Art. 3, sec. 1 item 6 of the Act on accounting of 29 September 1994, Journal of Laws of 2021, item 217.

<sup>37</sup> Art. 28b, sec. 15 of the CITA.

<sup>38</sup> Art. 26, sec. 3 of the CITA.

fice in Lublin<sup>39</sup>. Based on the presented statutory regulations it stands to reason that the obligation to collect the tax arises, generally speaking, on the date of making the payment, i.e. fulfilment of the obligation, including by way of payment, deduction or capitalisation of interest, as well as on the date of transferring the due amount to the disposal of the holder of the securities account or the holder of an aggregate account, or in the case of an increase in the share capital, within 14 days from the date on which the decision of the registry court on making an entry on the increase of the share capital becomes final, or in the case of no requirement to register the increase of the share capital - from the date of adoption by the general meeting of a resolution on the increase of the share capital.

From the standpoint of tax remitter status, the exemptions from the withholding tax obligation, which are subject to a number of conditions, can also be considered relevant. The analysis of the content of the provisions of the Corporate Income Tax Act may lead to the conclusion that these conditions should be understood as a specific instrument aimed at excluding *de jure* the obligation to pay the tax. The same applies to the exemption under *the pay and refund tax* regulations in connection with obtaining a preference opinion or submitting a declaration by the <sup>40</sup>remitter. These *de facto* solutions amount to the exclusion of the obligation not only to collect the tax, but in fact to pay it to the tax authority.

It seems appropriate to emphasize here that the above-mentioned provisions of substantive tax law provide, on the one hand, for the collection of tax by entities recognized as remitters. On the other hand, the exceptions to that rule, which are in fact intended to exclude the obligation to pay the tax, show that it is not the collection but only the payment of the tax that constitutes the expected fulfilment of the remitter's task as an intermediary in collecting the tax for its active subject. On the other hand, the statutory moment of tax collection determines the remitter's right (competence) to collect the amount due. It does not, however, bear the significance of a mandatory obligation under the legislation.

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<sup>39</sup> See Art. 121, sec. 4 of the Regulation on the Properties.

<sup>40</sup> Art. 26, sec. 7a of the CITA.

It can be concluded that from the institution (*pay and refund tax*) enabling to obtain a refund of the tax<sup>41</sup> subject to prior mandatory payment by the remitter, and the admissibility of not withholding the tax by the remitter on the basis of the so-called preference opinion, the provisions of substantive law legitimize obtaining of benefits in connection with the so-called gross-up of the tax remitter<sup>42</sup>. This is a situation where, *de facto* not withholding tax by the remitter occurs, but at the same time there is payment of this tax to the tax authority, with the remitter providing proof, of bearing the economic burden of the tax deducted “at source”. Provincial Administrative Court in Warsaw stated unequivocally that the right to file a request for an opinion is, as a rule, vested in the taxpayer who has generated/is generating taxable income in accordance with the provisions of the above-mentioned Act., and as for the remitter - in the event that the remitter makes the payment from its own funds and bears the economic burden of the tax<sup>43</sup>. It should also be mentioned that another amendment to the Corporate Income Tax Act, introduced as part of the so-called “Polish Order”, effective 1 January 2022, excluded the requirement regarding the remitter’s obligation to prove its withholding, i.e. the remitter’s bearing the economic burden of the tax deducted “at source”<sup>44</sup>. Although the amendment does not constitute a clarification of the previously adopted solution regarding the remitter’s standing to sue, but rather a new legislative solution, it does not affect the fact that the remitter will still have

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<sup>41</sup> Art. 28b o the CITA.

<sup>42</sup> See the foreign literature on this very topic: Viki Anjarwati and Veny Veny, “Perbandingan Pajak Penghasilan Pasal 21 Metode Gross Up, Gross, Dan Net Basis Terhadap Pajak Penghasilan Badan,” *Journal of Public Auditing and Financial Management* vol. 1 no. 2, (2021): 101–108; Anisa Fitria, Islamy and Ervina Deasy, “Analisis Penerapan Metode Gross Up PPh Pasal 21 sesuai PSAK 46 untuk meminimalkan Pajak Penghasilan Badan (Studi Kasus pada PT. XYZ),” *Journal of Finance and Accounting Studies* vol. 3, no. 1(2021): 13–25.

<sup>43</sup> Provincial Administrative Court in Warsaw, Judgment of 25 November 2020, Ref. No. III SA/Wa 1062/20, LEX No. 3114035.

<sup>44</sup> Art. 26b, sec. 1 amended by the Art. 2 item 56 a of the Act amending the Personal Income Tax Act, the Corporate Income Tax Act and several other acts of 29 October 2021, *Journal of Laws*, of 2021, item 2105. See Aleksandra Szczesny, “Zmiany w poborze zryczałtowanego podatku dochodowego (tzw. podatku u źródła),” *Doradztwo Podatkowe*, no. 12(2021): 105–107.

the possibility under, i.e., the gross-up clause to bear the economic burden of the tax paid<sup>45</sup>.

It is worth mentioning that the possibility of obtaining a tax refund by both the taxpayer and the tax remitter resulting from Art. 28b, sec. 2 of the CITA is closely related to the tax paid under Art. 26, sec. 2e of the CITA. At the same time, a tax remitter may apply for a tax refund, provided it paid the tax with its own funds and bore the economic burden of the tax. This confirms that although the burden of lump-sum corporate income tax withholding from non-residents is generally borne by the taxpayer, it is often the case that it is the Polish resident withholding agent, who “takes on” the burden. In practice, such an option is provided for in the agreements concluded between the tax remitter and the taxpayer resulting from the existing capital, personal or functional relations (links) between them, or the terms of conclusion of the agreements, or the permitted methods of payment do not allow the deduction of the tax “at source” (e.g. concluding a contract electronically, card payment, etc.)<sup>46</sup>.

In view of the above, one could argue that the tax remitter’s duty to collect tax suffers a break that is already provided for in the substantive tax law provisions themselves. The tax law therefore allows the remitter to settle the amount due plus the due “withholding” tax under, i.e., a contractual gross-up clause. The obligation to withhold tax is therefore seen in this context as a right of the remitter rather than a sanctioned, absolute statutory obligation.

### 3. Tax and penal fiscal aspects of the remitter’s liability

The situation of the remitter from the fiscal penal provisions perspective requires separate consideration. It follows from the Penal and Fiscal Code that a tax remitter who fails to withhold tax or does so in an amount lower

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<sup>45</sup> Such a conclusion may be drawn based on the fact that no reference has been made to Article 28b 2 of the CITA and the introduction of the company’s own catalogue of entities entitled to apply for an opinion on the application of the exemption.

<sup>46</sup> Natalia Stępień and Katarzyna Trzópek, “Z czyjej kieszeni powinien być zapłacony podatek u źródła,” *Dziennik. Gazeta Prawna*, December 7, 2019, accessed May 18, 2022, <https://podatki.gazetaprawna.pl/artykuly/1442573,podatek-u-zrodla-podatnik-danina-obowiazek-poniesienia-kosztow-wht.html>

than due is liable to a penalty<sup>47</sup>. It is argued in the literature that the typification of conduct set out in Art. 78 of the Fiscal and Penal Code refers to one of the three obligations incumbent on the remitter set out in the Tax Ordinance, i.e. to withhold the tax from the taxpayer<sup>48</sup>. It is worth noting that the verb “does not withhold the tax” is defined in the Fiscal Penal Code<sup>49</sup>. Accordingly, the doctrine assumes that a failure to collect tax occurs when the person obliged to do so - the remitter - fails to collect the quantified monetary amount in whole or in part, and a financial loss actually occurs. The prohibited act typified by Art. 78 of the Penal and Fiscal Code is therefore, as assumed in the literature, of an effectual nature, as it is connected with causing financial loss<sup>50</sup>. It is also worth noting that the adopted penal law solution raises some doubts in the literature. It should be recalled that, from the perspective of tax construction of the tax withholding obligation, it is not at all necessary for the failure to comply with that obligation to result in a financial loss. This is because it is already unfulfilled at the time of the expiry of the time limit set for the collection of tax, and not only at the time of payment of the tax collected<sup>51</sup>. At the same time, it is necessary to distinguish the scope of penalisation set out in the provisions of Art. 77 and Art. 78 of the Penal and Fiscal Code. Pursuant hereto, it may be assumed that the latter provides for the penalisation of the remitter’s failure related to tax collection, regardless of their cause, while the provision of Art. 77 of the Penal and Fiscal Code provides for criminal liability of the remitter for failing to fulfil the obligation to make payment for the (actually) collected tax. This dual division corresponds to the regulation of the tax liability of the tax remitter provided for in Art. 30 of the Tax Ordinance Act, according to which it is liable for tax not collected or tax collected but not transferred<sup>52</sup>.

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<sup>47</sup> Art. 78 of the PFC.

<sup>48</sup> Grzegorz Łabuda “Commentary to Art. 78,” in *Kodeks karny skarbowy. Commentary*, ed. III, ed. Piotr Kardas, Tomasz Razowski and Grzegorz Łabuda (Warszawa: Wolters Kluwer, 2017), 873–876.

<sup>49</sup> Art. 53, par. 29 in conjunction with 27 of the Penal and Fiscal Code.

<sup>50</sup> Łabuda, “Commentary to Art. 78,” 875

<sup>51</sup> Łabuda, “Commentary to Art. 78,” 874

<sup>52</sup> Jarosław Zagrodnik, “Pojęcie „pobranie podatku” w kontekście odpowiedzialności karnoskarbowej płatnika,” *Palestra*, no. 12(2017): 45–52.

When considering the issue in question in terms of the remitter's liability for uncollected and unpaid tax<sup>53</sup>, i.e. the principles of liability formulated in the Tax Ordinance, it may be noted that the tax remitter's liability is twofold: for failure to collect tax and for collection and non-payment of tax. The judiciary emphasizes that, in contrast to third-party liability decisions, the object of adjudication on the liability of the tax remitter is monetary dues and not merely the existence of certain prerequisites for liability<sup>54</sup>. When issuing a decision on the liability of the remitter, the tax authority shall determine the amount of the liability for uncollected or collected but not paid tax. In fact, however, the non-collection of tax must be accompanied by non-payment of tax in order to discuss the due amount assigned by the decision to the taxpayer.

The above analysis may also indicate that in the case of lump-sum withholding tax, the liability of the remitter may only relate to the tax that is not actually paid to the tax authority. Failure to withhold the tax is in fact, as shown above, a *sui generis* option of the remitter, its right vis-à-vis the taxpayer to recover an amount of tax, corresponding to the amount of tax calculated and payable by the taxpayer, from the taxpayer, and at the date resulting from the statutory time dedicated for withholding the tax.

It is argued in the doctrine that, as a rule, no element of sanction is associated with the liability of the remitter based on the norms of the tax ordinance<sup>55</sup>. Such liability shall be limited to restitution, that is to say, to enabling the authority to recover dues, which the tax remitter has failed to pay, despite being under an obligation to do so, by the due date<sup>56</sup>. However, an additional tax liability may apply to the withholding tax remitter<sup>57</sup>. This is only possible if a decision on the liability of the remitter is made<sup>58</sup>, which will not be possible without establishing the loss of tax due by the remitter. In addition, it is an essential prerequisite for the application of the additional tax liability that the declaration referred to in Art. 26, sec. 7a or 7g

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<sup>53</sup> Art. 30 of the TOA.

<sup>54</sup> Provincial Administrative Court in Warsaw, of 15 June 2020 Ref. No. III SA/Wa 1529/19, LEX No. 3085009.

<sup>55</sup> Art. 30 of the TOA.

<sup>56</sup> Czubkowska and Siemieniako, "Odpowiedzialność płatnika w prawie podatkowym", 137.

<sup>57</sup> Art. 58a, par. 1, item 5 of the TOA.

<sup>58</sup> Art. 30 of the TOA.

of the CITA, was not factual, the remitter did not perform the required verification or the verification undertaken by the remitter was inadequate in terms of nature and scale of the remitter's business. This issue is related to the widely commented issue of abuse of law, the discussion of which goes well beyond the scope of this paper<sup>59</sup>.

#### 4. Issues of overpayment and refund of withholding tax

The issue in question also needs to be considered from the point of view of the provisions of the Tax Code relating to overpayment of tax. This is because the remitter has the possibility to apply for a acknowledgment of WHT overpayment and recover the amount paid in part or in full - in situations where the withholding tax paid was not due at all, or was paid in an amount higher than due. Therefore, the rules stipulated in the Fiscal Code for obtaining an overpayment by the remitter at its request, support the thesis that the right not to collect tax by the remitter was introduced into the legal and tax order. It should be noted that since bearing the economic burden of the tax by the remitter is a statutory requirement for the application of the institution of establishing the overpayment, then the failure to collect the tax by the remitter fully justifies the remitter's request for acknowledgment of the overpayment.

When considering the issue of overpayment, it is necessary to also bear in mind that, as of 1 January 2019, the legislation provides for two, non-competitive to each other, modes of "recovery" of WHT. The first one is the procedure for obtaining a refund under the provisions of Art. 28b

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<sup>59</sup> CJEU Judgment of 26 February 2019 r., N Luxembourg 1 (C115/16), X Denmark A/S (C118/16), C Danmark I (C119/16), Z Denmark ApS (C299/16), ECLI:EU:C:2019:134. Joachim Englisch, "The Danish tax avoidance cases: New milestones in the Court's anti-abuse doctrine," *Common Market Law Review* vol. 57, issue 2, (2020): 503–538, Filip Majdowski, "Planowanie podatkowe z wykorzystaniem zagranicznych podmiotów holdingowych - koniec pewnej epoki? Kilka uwag na tle ostatnich wyroków Trybunału Sprawiedliwości w sprawie dyrektyw podatkowych dotyczących tzw. pasywnych płatności," *Przegląd Podatkowy*, no. 10(2019): 29–40; Monika Lewandowska and Adrian Stępień, "Trybunał Sprawiedliwości o nadużyciu zwolnienia z podatku u źródła: zaskakujące rozczarowanie czy przewidywalny kierunek interpretacji? Polskie regulacje niezgodne z prawem UE?," *Przegląd Podatkowy*, no. 8(2019): 12–20; Monika Boniecka, "'Look through approach' w kontekście nowego mechanizmu poboru podatku u źródła," *Przegląd Ustawodawstwa Gospodarczego*, no. 3(2020): 21–27.

of the CITA (*pay and refund tax*). The second one is the procedure for applying for an acknowledgment of overpayment under the Fiscal Code<sup>60</sup>. With the first mode according to the Regulation of the Minister of Finance, Development Funds and Regional Policy<sup>61</sup> in practice can be used by WHT remitters and taxpayers only from 1 January 2022, and is applicable only if the threshold of PLN 2,000,000.00 of payments made by the remitter to the non-resident taxpayer is exceeded, while the remitter, who has borne the economic burden of the tax paid, may apply for this refund<sup>62</sup>. On the other hand, the second procedure regulated in the Fiscal Code may be applied by the remitter, when requesting the declaration of WHT overpayment, provided that the provisions regulating the tax refund under Art. 28b of the CITA. However, much like a refund under Article 28b of the CITA, the taxpayer may do so only if it pays the tax amount from its own funds, i.e. it bears the economic burden. It is hard to oppose the view expressed in the literature that the two modes are consistent with each other and point out that if the tax has been unduly paid, it should be returned to the entity that bore the economic burden<sup>63</sup>.

The issue of the possibility of obtaining a WHT refund, despite the remitter's failure to include a gross-up clause, in a situation where the remitter bears the economic burden of the tax, has been clarified by the Ministry of Finance in the draft clarification<sup>64</sup>. The draft clarification confirms that taxpayers will also have the right to request a refund of the WHT, provided the gross-up is not based on contractual provisions<sup>65</sup>. As the draft clarification is still not final, it may be noted that the remitter's obligation to collect the tax remains of interest to the tax authorities in terms of the obligation to

<sup>60</sup> Art. 75, par. 2 of the TOA.

<sup>61</sup> Regulation of the Minister of Finance, Development Funds and Regional Policy of 25 June 2021 amending the regulation concerning exclusion or limitation of the application of Art. 26, sec. 2e of the the Corporate Income Tax Act Journal of Laws of 2021, item 1159.

<sup>62</sup> Art. 28b, sec. 2 item 2 of the CITA.

<sup>63</sup> Stępień and Trzópek, "Z czyjej kieszeni powinien," accessed May 11, 2022 <https://podatki.gazetaprawna.pl/artykuly/1442573,podatek-u-zrodla-podatnik-danina-obowiazek-poniesienia-kosztow-wh.html>.

<sup>64</sup> Draft tax explanations of 19 June 2019. "Zasady poboru podatku u źródła,"<sup>6</sup> accessed May 11, 2022, <https://www.gov.pl/web/finanse/konsultacje-podatkowe-w-sprawie-objasnienia-doprzepisow-w-zakresie-zasad-poboru-podatku-u-zrodla> hereinafter: Draft explanation.

<sup>65</sup> Paragraph 4.2 of the Draft explanation.

settle it. The above indicates that, in fact, the legislator does not put emphasis on the collection of the tax, in terms of transferring a part of the property, expressed in monetary units, from the taxpayer to the tax remitter, but on its collection and settlement - payment, in the due amount, of the tax amount to the account of the tax authority.

When analyzing the remitter's right to an overpayment, it is necessary to point out the general rule, according to which the overpaid or unduly paid tax constitutes an overpayment<sup>66</sup> which arises, as a rule, on the day on which the remitter pays tax in an amount greater than the tax collected<sup>67</sup>. The remitter has the right to make a claim for overpayment if the tax paid has not been collected from the taxpayer<sup>68</sup>. It is therefore possible to assume the idea that the taxpayer's right to apply for a declaration of overpayment arises only where, as a result of its own errors, the taxpayer has paid tax in an amount greater than that due or in excess of the tax withheld, thereby depleting its assets.<sup>69</sup>

It has to be pointed out that currently the remitter has the right to submit a request for acknowledgement of overpayment, only if the tax paid has not been collected from the taxpayer, i.e. it concerns a situation when the remitter has financed the paid tax with own funds<sup>70</sup>. The right to make a claim for an overpayment will also arise if the remitter was not obliged to make a tax payment but made an undue payment, or if the remitter was obliged to make a payment but did not withhold tax and made a payment higher than due. The taxpayer's right to claim an overpayment would also be relevant when the tax was due on the date of payment, but became undue thereafter. This is the case, for example, when the remitter does not have, on the date of payment of a benefit to a taxpayer, the appropriate

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<sup>66</sup> Art. 72 of the TOA.

<sup>67</sup> Art. 73, par. 1, item 4 of the TOA.

<sup>68</sup> Art. 75, par.2 of the TOA.

<sup>69</sup> See Jan Rudowski, "Commentary to art. 75," in *Ordynacja podatkowa. Commentary, ed. XI*, ed. Stefan Babiarczyk, Bogusław Dauter, Roman Hauser, Andrzej Kabat, Małgorzata Niezgódka-Medek and Jan Rudowski (Warszawa: Wolters Kluwer 2019), 522–531.

<sup>70</sup> Supreme Administrative Court, Judgment of 16 March 2018 Ref. No II FSK 688/16m LEX nr 2471490, Cf. Jan Rudowski *Commentary to Art. 75*, and the administrative court decisions referred to therein.

documents, i.a. the taxpayer's certificate of residence<sup>71</sup>, enabling it not to withhold the tax, and therefore pays the tax calculated from its own funds and subsequently obtains the required document, fulfilling the statutory requirements for not withholding the tax. In these circumstances, before the limitation period for filing an overpayment claim expires, it decides to file an overpayment claim in relation to the payment made with a charge against the remitter's own assets. According to the literature, depletion of the remitter's assets tends to occur when the remitter has collected tax from the taxpayer but has shown and paid more (the difference constitutes depletion of the remitter's assets), and when the remitter has collected nothing from the taxpayer and paid the whole amount himself (the whole amount constitutes depletion of the remitter's assets)<sup>72</sup>.

It is quite clear that the essential boundary of the issue under consideration is determining whether the entity making the payment for the tax is, in fact, the tax remitter. The judiciary has expressed the view that an entity which does not possess the statutory features of a remitter, by paying the tax carries out an undue benefit<sup>73</sup>. In this context, it must be pointed out that it is in fact the substantive law that determines whether an entity can become a party to overpayment proceedings. Thus, what matters here is the relationship of a given entity to a particular tax obligation or a particular tax liability. On the other hand, any rights or obligations of entities which do not have legal basis in tax law do not create a legal standing in tax proceedings.<sup>74</sup>

However, it is important to also consider the opinion expressed in case-law stating that since the taxpayer has the right to request refund of the overpayment only if it suffers a loss as a result of having paid more than the amount collected, it may submit such a request only after the value of the improperly collected tax has been returned to the taxpayer, because

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<sup>71</sup> Wojciech Kawa, "Posiadanie przez płatnika certyfikatu rezydencji warunkiem skorzystania z opcji niepobrania podatku u źródła," *Monitor Podatkowy*, no. 12(2017): 7.

<sup>72</sup> Rudowski, "Commentary to Art. 75," 528.

<sup>73</sup> Supreme Administrative Court, Judgment of 17 December 2020, Ref. No. II FSK 2125/18, LEX No. 3113451.

<sup>74</sup> Provincial Administrative Court in Lublin, Judgment of 9 July 2020 Ref. No. I SA/Lu 270/20, LEX No. 3038893

only then will it suffer the said loss<sup>75</sup>. The above makes it possible to look at the issue of tax collection also from the perspective of making a settlement between the remitter and the taxpayer and obtaining *post factum*, subsequent to the state of bearing the economic burden of tax. Based on the judgment of the Supreme Administrative Court of 21 September 2020, when it comes to the issue of defining a given entity as a remitter, it is important that the entity making the benefit (payment) acts in its own name and on its own account.<sup>76</sup> If an entity operates in this manner, then the fact that the economic value of the benefits (payments) made by this entity is compensated by another entity under a separate legal relationship is irrelevant to the issue of defining it as a remitter.

When combining the two modes of obtaining a tax refund, it can be pointed out that the procedure for claiming an overpayment and the WHT refund procedure (Art. 28b of the Corporate Income Tax Act) have something in common, namely the fact that in both types of proceedings the scope of proceedings is limited by the content of the application of the entitled entity, and in the course of the proceedings the tax authority analyses only the factual state specified by the entitled applicant. Therefore, in both types of proceedings, it is incumbent on the person claiming the overpayment (refund) to prove its case and to support it with relevant evidence. However, the prerequisite for triggering either of the two modes indicated is that the remitter must prove that it has borne the economic burden of the tax paid. The above, on the other hand, determines the statement that the legislator allows for a legal possibility of not collecting the tax by an entity, which by virtue of the act is a remitter, although pursuant to Art. 8 of the Tax Ordinance Act is, after all, also obliged to collect the tax.

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<sup>75</sup> Supreme Administrative Court, Judgments of 10 July 2018, Ref. No. II FSK 1864/16, LEX No. 2537272; of 14 June 2018, Ref. No I FSK 1270/16, LEX No. 2510463; of 16 March 2018, Ref. No II FSK 688/16, LEX No. 2471490 Supreme Administrative Court, Judgment of 10 August 2006, II FSK 913/05, LEX No. 261969; Provincial Administrative Court in Gdańsk, Judgment of 15 July 2010, I SA/Gd 452/10, LEX No. 673160; Provincial Administrative Court in Warsaw, Judgment of 4 March 2010, Ref. No III SA/Wa 1713/09, LEX No. 606816.

<sup>76</sup> Supreme Administrative Court, Judgment of 21 September 2020 Ref. No. II FSK 1195/18, LEX nr 3062309.

## 5. Conclusion

The Act defines the remitter status, in the sense that it is the entity that fulfils the indicated conditions *ex lege*. If another entity (which does not have these characteristics), fulfils the obligations of a remitter, its payments, even if it includes “tax” or “advance tax” as their title, do not constitute such benefits and are undue. Similarly, the provisions of tax law do not provide for a decision granting or denying an entity of its status as a remitter.<sup>77</sup> Thus, any tax proceedings initiated by entities whose rights or obligations do not have legal basis in the provisions of tax law, do not give those entities standing in tax proceedings, which *ab initio* renders the proceedings initiated by such entities to claim an overpayment groundless.

It is hard to disagree with the fact that according to the tax law the remitter is an entity whose functioning is dictated primarily by the need for efficient and effective implementation of tax obligations.<sup>78</sup> There can be no doubt, therefore, that the tax laws are aimed at effective tax collection. On the other hand, the mere fact of collecting tax by the remitter, although it constitutes an activity aimed at collecting due taxes, does not have to lead ultimately to a gain for the State Treasury. This view is particularly important in the context of tax due by non-residents, for whom the role of remitter becomes a kind of guarantee of efficiency of collection<sup>79</sup>. The obligations imposed on the remitter, as an intermediary entity, to pay the tax collected from the taxpayer, provide the remitter with legal instruments to fulfil its obligations. The above analysis shows, however, that although it is standard practice for the remitter to calculate, collect and pay the tax, from the point of view of fiscal interest it is in fact the final payment of the tax that is crucial. Thus, it can be concluded that the legal institutions regulating the legal situation of the remitter are oriented towards this phase of the remitter’s activity. The tax remitter is the entity that, in a certain sense,

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<sup>77</sup> Supreme Administrative Court, Judgment of 17 December 2020, Ref. No II FSK 2125/18, LEX No. 3113451.

<sup>78</sup> Czubkowska and Siemieniako, “Odpowiedzialność płatnika w prawie podatkowym,” 137.

<sup>79</sup> Joseph Van Wagstaff, “Income Tax Consciousness under Withholding” *Southern Economic Journal*, Part 1, vol. 32, no. 1(1965): 73–80.

secures the interest of the tax creditor for the most efficient procedure of collecting taxes due.<sup>80</sup>

Thus, if the legislator allows for the possibility of transferring the economic burden of the tax to the remitter, also under the gross-up formula, it clearly indicates that the even if the remitter fails to collect the tax, it is not a legal barrier to the remitter's right to apply a tax refund or overpayment claim, but is in fact legal standing. This confirms that the somewhat isolated obligation to withhold tax, in fact in the context of WHT corporate income tax, is a right of the remitter, and does not have the character of an absolute obligation, constituting its subjectivity as a remitter as it may be concluded, in the literal sense, based on the wording of Art. 8 of the Tax Ordinance Act.

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<sup>80</sup> Leonard Etel and Piotr Pietrasz, "Zapłata podatku (zaliczki) przez podatnika a wydanie decyzji w przedmiocie odpowiedzialności podatkowej płatnika," *Zeszyty Naukowe Sądownictwa Administracyjnego*, no. 4(2009): 10.

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