Member since 2022
JM17111

https://doi.org/10.18778/1509-877X.2023.04.03

Articles

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An Analysis of the Principal Purpose Test Rule and the General Anti-Abuse Rules Contained in the Brazil-Poland Double Taxation Convention Signed in September 2022

Summary. The paper deals with the analysis of the legal aspects of the principal purpose test rule (PPT-Rule) and the general anti-abuse rules contained in the Brazil-Poland Double Tax Convention concluded on 20th September, 2022, in the light of Brazil's international tax treaty policy and practice. The Authors discuss issues related to the interaction between the PPT-Rule and other treaty specific anti-tax avoidance provisions as well as the objective and subjective elements of the PPT-Rule itself and the possible consequences of its application, especially challenges related to the legal certainty principle.

Keywords: Brazil, Poland, double tax convention, anti-abuse rules, principle purpose test rule (PPT-Rule)

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Received: 31.07.2023. Verified: 26.08.2023. Accepted: 23.10.2023.

1. Introduction

After the OECD had released various reports regarding the analysis and the measures to be taken in order to address the phenomenon of the Base Erosion and Profit Shifting (BEPS), many countries signed the G-20/OECD BEPS Plan Action 15 "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting". This multilateral convention implements, among other things, some measures proposed by the G-20/OECD BEPS Plan Action 6[1]. This Action 6 determined, as a minimum standard to address treaty abuse, the following measures:

1) Initially, changes to the title and preamble of double taxation conventions, in order to introduce a clear statement that the parties to the convention intend to avoid creating opportunities for non--taxation or reduced taxation through tax evasion or avoidance, in particular treaty shopping arrangements;
2) Additionally, either the inclusion of the Principal Purpose Test (PPT) rule or a Limitation of Benefit (LOB) clause supplemented by a mechanism that deals with conduit financing arrangements.

Poland is one of the signatory countries to the Multilateral Convention and has agreed to incorporate the PPT rule in their tax treaties. Even though Brazil has not signed the BEPS multilateral agreement as Poland did, it has been adopting in its bilateral treaty negotiations the *minimum standards* set out in the G-20/OECD BEPS Project.

Accordingly, the double taxation convention signed in September 2022 by Poland and Brazil (not yet in force) contains the PPT rule in article 28 (6). The rule follows the OECD Model Convention (2017 Version), stating that[2]

> notwithstanding the other provisions of this Agreement, a benefit under this Convention shall not be granted in respect of an item of income[3] if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that

[1] OECD. *OECD/G20 Base Erosion and Profit Shifting Project*, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report*, OECD Publishing, Paris 2015.

[2] Republic of Brazil & Republic of Poland, *Agreement Between the Federative Republic of Brazil and the Republic of Poland for the Elimination of Double Taxation in Respect to Taxes on Income and the Prevention of Tax Abuse*, New York, 2022, https://concordia.itamaraty.gov.br/detalhamento-acordo/12613?tipoPesquisa=2&TipoAcordo=BL&IdEnvolvido=246

[3] The OECD Model also suggests that the PPT's wording includes items of "capital" (additionally to income), but that has not been included in Brazil and Poland's signed treaty.

> benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Agreement.

In its first part, this paper will indicate some controversial issues regarding the PPT rule, considering the Commentaries to the OECD Model Convention of 2017 (OECD Model)[4].

Afterwards, the paper will comment on the anti-abusive rules and the PPT rule contained in the Convention signed by Brazil and Poland (not yet in force) in the light of the Brazilian international tax policy.

The paper takes into account previous studies carried out by its Authors regarding the PPT rule and Brazilian international fiscal policy[5].

2. The PPT rule

The PPT rule is a General Anti-Avoidance Rule (GAAR) introduced in the OECD Model Tax Convention in 2017. According to the OECD Commentaries to the 2017 Model Tax Convention (art. 29, para. 169), this rule was based on a "guiding principle" that had been suggested by the OECD's Commentaries since 2003[6].

The PPT rule was introduced in addition to many Specific Anti-Avoidance Rules (SAARs) that have been proposed by the OECD over the years, such as the LOB clause (which seeks to ensure that there is a sufficient link between the entity claiming treaty benefits and the resident State)[7],

[4] OECD. *Model Taxation Convention on Income and on Capital, Condensed Version 2017*, OECD Publishing, Paris 2017.

[5] See M.A.P. Furman, *Abuso de Tratados Internacionais e a Regra do Principal Purpose Test*, Arraes, Belo Horizonte 2022 and M.S. de Godoi, S.B.M. Cirilo, *A exigência de um padrão mínimo de combate ao abuso dos Tratados tributários (Ação 6 do Projeto BEPS) e a política fiscal internacional brasileira*, "Revista de Direito Internacional Econômico Tributário" 2020, vol. 15, pp. 1–43.

[6] See OECD Commentaries on art. 1, para. 61 (OECD. *Model Taxation Convention on Income and on Capital, Condensed Version 2017*, OECD Publishing, Paris 2017). It is worth pointing out some differences between the PPT rule and the guiding principle, such as: (i) the subjective element and the tax benefit being one of and not the principal purpose of the transaction; (ii) the burden of proof and (iii) the reasonableness test.

[7] Since 1992, the OECD has suggested that this rule integrates anti-abuse clauses that had been suggested over the years, such as: look through approach clause, exclusion approach clause, subject to tax approach, beneficial owner, channel approach, and *bona fide* clauses (safeguards).

holding periods provisions introduced within articles that regard dividends and capital gains (Articles 10 and 13 of the OECD Model Convention) and rules that deal with permanent establishments (PEs).

The PPT rule is, accordingly to the G-20/OECD BEPS Plan Action 6, necessary to address forms of abuse that cannot be properly prevented by the existing SAARs, since SAARs are objective and specific provisions, and, therefore, can reach only certain types of transactions (it is impossible to foresee and prevent all abusive forms of tax planning). The PPT rule, on the other hand, can evaluate and prevent abuse in a general approach, and be applied with a case-to-case analysis[8].

2.1. PPT rule's interaction with SAARs

The PPT rule initiates with the expression "notwithstanding the other provisions of this Agreement (…)", indicating its connection with other rules contained in the tax treaty.

The OECD Commentaries on Art. 29, para 171 and 172, states that this rule supplements other anti-abuse provisions, such as the LOB clause, hence the later rule focuses only on the relationship between the taxpayer and the State of residency but does not guarantee that the treaty was not improperly used.

A practical example of the supplementary nature of the PPT rule is given in para. 173 of the OECD Commentaries. In sum, a public-traded entity can be held as qualified person (resident) if their shares are regularly traded, and it is managed and controlled in the resident State. If, for example, a bank is a public company and attends to those requirements, the bank's ownership could pass the LOB clause. However, the bank could try to attract benefits such as lower source taxation, re-passing the funds to third parties, therefore performing a conduit financing arrangement. Thus, the operation can be structured to improperly gain benefits from lower source taxation in spite of the resident being a qualified person.

Considering this, the PPT is compatible with other SAARs, since each rule addresses a different aspect of the operation – if a person passes the LOB test or another SAARs, it does not necessarily mean that the transaction overall done by this person will pass the PPT rule[9].

[8] See OECD. *OECD/G20 Base Erosion and Profit Shifting Project, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report*, OECD Publishing, Paris 2015, p. 23 (section A–19).

[9] In this sense: A. Pegoraro, *A Cláusula de Principal Propósito (PPT) nos acordos para evitar a dupla tributação da renda*, IBDT, Kindle Edition, São Paulo 2021, position 107;

2.2. The subjective element and reasonableness test

Perhaps the most debated and problematic issue regarding the PPT is the "subjective" test, since the rule states that the benefits can be denied if it is "reasonable to conclude, considering all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction". This is the main element that, as will be shown, is criticised by scholars who understand that the rule is too vague and uncertain.

Regarding the reasonableness test ("reasonable to conclude"), the OECD Commentaries on art. 29, para. 178, states that it is important to make a case-by-case objective analysis of all the facts involved in the transaction. Also, it establishes that it is not necessary to prove the intentions of the persons concerned by the operation, but it must be reasonable to conclude that the transaction aimed, as one of its principal purposes, to obtain benefits, in order to check if the arrangement "can only be reasonably explained" by a tax benefit[10].

Furthermore, para. 179 of the Commentaries indicates that a person cannot avoid the PPT rule simply by asserting that the arrangement was not undertaken to obtain benefits, and that all evidence should be weighed to verify if the reasonableness test is met. Para. 181 of the Commentaries

D.J. Duff, *Tax Treaty Abuse and The Principal Purpose Test – Part 2*, "Canadian Tax Journal" 2018, vol. 66, no. 4, pp. 961–963; I. Zahra, *The Principal Purpose Test: A Critical Analysis of Its Substantive and Procedural Aspects – Part 1*, "Bulletin for International Taxation" 2019a, vol. 73, no. 11, Online Journals, p. 620; L. De Broe, J. Luts, *BEPS Action 6: Tax treaty abuse*, "Intertax" 2015, vol. 43, no. 2, p. 133; L.E. Schoueri, C.G. Moreira, *Abuso dos Acordos de Bitributação e Teste do Objetivo Principal: Repensando o Teste do Objetivo Principal à Luz da Segurança Jurídica*, [in:] C.C.A. de Azevedo, O.G. da Gama Vital de, M.A.F. Macedo (eds.), *Direitos Fundamentais e Estado Fiscal: estudos em homenagem ao professor Ricardo Lobo Torres*, JusPodivm, Salvador 2019, p. 783; R.J. Danon, *Treaty Abuse in the Post-BEPS World: Analysis of the policy shift and impact of the principal purpose test for MNE Groups*, "Bulletin for International Taxation" 2018, vol. 72, no. 1, p. 35; and V. Chand, *The interaction of the Principal Purpose Test (and the Guiding Principle) with Treaty and Domestic Anti-avoidance rules*, "Intertax" 2018a, vol. 46, no. 2, pp. 116–118. Andrés Báez Moreno (A.B. Moreno, *GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test. What Have We Gained from BEPS Action 6*? "Intertax" 2017, vol. 45, pp. 440–441) disagrees that an operation could be held as abusive if one of its aspects passes a LOB test and understands that applying the PPT rule in this case would be against the rule's objective element. For this author, the PPT could only be applied for rule shopping operations since treaty shopping is to be addressed by LOB rules (residency tests).

[10] See OECD Model Tax Convention 2017, p. 592.

explains that, when an arrangement is "linked to a core commercial activity, and its form has not been driven by considerations of obtaining a benefit, it is unlikely that its principal purpose will be considered to be to obtain that benefit".

Para. 174 of the Commentaries indicates that the PPT intends to ensure that tax treaties apply "in accordance with the purpose for which they were entered into, i.e. to provide benefits in respect of bona fide exchanges of goods and services, and movements of capital and persons as opposed to arrangements whose principal objective is to secure a more favourable tax treatment".

Considering this scenario, it can be concluded that the "subjective" element is not indeed so subjective, since the PPT does not intend to pursue the subjective and personal intentions of the taxpayer, but it seeks, in an objective way, to evaluate if the operation is genuine or if it was structured artificially (the lack of business purposes)[11].

However, the fact that the PPT refers to "one of" the principal purposes and not the principal purpose may be problematic, although the OECD Commentaries and examples of the application of the PPT clearly indicate that having taxpayer a tax benefit as one of the principal purposes of the arrangement is not enough to apply the PPT and deny the treaty application.

[11] In this sense: A.B. Moreno, *op. cit*., p. 435; A. Pegoraro, *op. cit*., p. 136; B. Kuzniacki, *The Principal Purpose Test (PPT) in BEPS Action 6 and the MLI: Exploring Challenges Arising from Its Legal Implementation and Practical Application*, "World Tax Journal" May 2018, p. 261; C.P. Taboada, *OECD Base Erosion and Profit Shifting Action 6: The General Anti-Abuse Rule*, "Bulletin for International Taxation" 2015, vol. 69, no. 10, p. 605; C. Elliffe, *The Meaning of the Principal Purpose Test: One Ring to Bind Them All*? "World Tax Journal" 2019, vol. 11, p. 13; I. Zahra, *The Principal Purpose Test: A Critical Analysis of Its Substantive and Procedural Aspects – Part 1*, "Bulletin for International Taxation" 2019a, vol. 73, no. 11, Online Journals, p. 614; M.L. Gomes, *The principal purpose test in the Multilateral Instrument*, Lumen Juris, Rio de Janeiro 2021, p. 98. Differently, D. Weber, *The Reasonableness Test of the Principal Purpose Test Rule in OECD BEPS Action 6 (Tax Treaty Abuse) versus the EU Principle of Legal Certainty and the EU Abuse of Case Law*. "Erasmus Law Review" 2017, no. 1, Online Journal, p. 49 agrees that the test is objectified but understands that the taxpayer intentions will be considered. In another sense, L. De Broe, J. Luts, *op. cit*., p. 132 and M. Lang, *BEPS Action 6: Introducting na Antiabuse Rule in Tax Treaties*, "Tax Notes International" 2014, vol. 74, no. 7, p. 658 criticize the evaluation of the taxpayer's intentions.

2.3. The objective element

If the subjective element is satisfied, the PPT can still be ruled out if it is "established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention".

Further criticism relates to the burden of proof imposed by the PPT rule, and a question can be raised as to if only the taxpayer must fulfil the objective element or if the tax authorities must also prove that granting the benefit would not be in accordance with the tax convention in order to apply the PPT rule.

In this sense, some authors criticise the PPT rule's burden of proof, since they understand that tax authorities must only show that it would be *reasonable* to conclude that obtaining the benefit is one of the principal purposes (subjective element); meanwhile, the taxpayer would have to *establish* that obtaining such benefit does not confront the double taxation convention[12].

Considering the OECD's Commentaries and examples of the PPT rule, it can be concluded that both elements must be satisfied by tax authorities, and the wording of the PPT rule could be improved by expressly stating that tax authorities must also establish that granting the benefit is not in accordance with the Convention's relevant provisions.

Furthermore, it is not clear what the relevant provisions of the Convention are. In some examples, the OECD Commentaries refer to the treaty as a whole, while in others – to specific articles (such as the dividend rule). Considering Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), a convention must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", and, therefore, it could be understood that the convention must be evaluated as a whole (as well as its protocols) in order to apply the PPT.

2.4. The PPT rule's consequences

The application of the PPT rule, according to the OECD Commentaries on Art. 29, para. 183, could be subjected to some kind of approval process within the administration.

[12] See L. De Broe, J. Luts, *op. cit*., p. 132; M.L. Gomes, *op. cit*., p. 139; M. Lang, *op. cit*., p. 660; R.J. Danon, *op. cit*., p. 18; S. van Weeghel, *A Deconstruction of the Principal Purposes Test*, "World Tax Journal" 2019, vol. 11, no. 1, p. 14; and V. Chand, *op. cit*., p. 21.

Para. 184 of the Commentaries suggests the introduction of a saving/discretionary relief clause in order to allow tax authorities to grant the benefit pursued or another tax benefit if such authority concludes that the benefits would be granted despite of the arrangement that triggered the PPT rule. It is suggested by para. 185 of the Commentaries that the competent authority of the source State consults the resident State before rejecting the benefits that were claimed.

A question may arise as to whether alternative benefits can be granted even if this clause is not introduced in a tax treaty, and if authorities can reclassify the operation in order to grant alternative benefits. The answer is positive: a GAAR requires the reclassification of the operation, and this reclassification could also happen considering domestic provisions[13]. The PPT rule aims to disregard abusive/non-substantial or genuine transactions, so tax authorities can grant benefits that would already be granted if the arrangement was not structured in an abusive manner.

2.5. The PPT rule's compatibility with the legal certainty principle

Concerns have been raised as to whether the PPT rule complies with general tax principles usually adopted by national Constitutions and EU Law, such as the legal certainty principle. Mostly, the subjective element and the burden of proof of the PPT are held as incompatible aspects of the rule, since the opinion of various authors is that the PPT gives discretionary power to tax authorities, without a clear scope of application[14].

However, the fact is, as with any other GAAR, that the PPT rule will naturally have a certain degree of uncertainty since it aims to achieve forms of tax planning that cannot always be foreseen and must be defined in a case-by-case scenario[15]. The OECD Commentaries demonstrate a clear effort to show that the rule aims to apply only to artificial, non-genuine or operations that lack of business purposes that were structured in order to obtain tax benefits that would not be granted otherwise. If the PPT is incorporated to the convention and applied in accordance to

[13] See A. Pegoraro, *op. cit*., p. 172; M.L. Gomes, *op. cit*., p. 149; I. Zahra, *The Principal Purpose Test: A Critical Analysis of Its Substantive and Procedural Aspects – Part 2*, "Bulletin for International Taxation" 2019b, vol. 73, no. 11, Online Journals, p. 689; V. Chand, *op. cit*., p. 40; D.J. Duff, *op. cit*., p. 970.

[14] In this sense, see A.B. Moreno, *op. cit*., p. 445; L. De Broe, J. Luts, *op. cit*., p. 146; M. Lang, *op. cit*., p. 663, and R.J. Danon, *op. cit*., p. 26.

[15] Similarly, see C.P. Taboada, *op. cit*., p. 608 and D. Weber, *op. cit*., p. 56.

the OECD's Commentaries and guidelines, the rule could not be held as too vague or subjective, and thus it does comply with principles such as the legal certainty.

3. The Brazil-Poland double taxation convention (signed in September 2022, not yet in force) and its anti-abuse rules in the light of the Brazilian international tax policy

In September 2022, Brazil and Poland concluded negotiations and signed a double taxation convention, which is not yet in force.

As commented in the introduction, Poland has signed the MLI and has agreed to adopt the PPT rule in its treaties. Brazil has also been including anti-abuse rules suggested by the BEPS Plan Action 6 in its other recent negotiated treaties, even though it has not signed the MLI and it is not a member of the OECD.

3.1. Title and preamble

The title of the Brazil-Poland Convention states that the treaty aims to eliminate double taxation of income to prevent tax evasion "and avoidance". This reference in the title of the treaty to the prevention not only of tax evasion but also of tax avoidance is a novelty in Brazilian treaties – a novelty that appears in the treaties with Switzerland, the United Arab Emirates, and Singapore (signed in 2018 and already in force), but does not appear in the treaties signed prior to the BEPS Project. In the case of the treaty with India, for example, signed in 1988 and revised in 2013, the title mentions the prevention of tax evasion, but not tax avoidance.

In the preamble to the Brazil-Poland Convention, as well as in the preamble to the treaties Brazil signed in 2018 with Singapore, the United Arab Emirates, and Switzerland, it is stated that the objective of the agreement is to eliminate double taxation in relation to taxes on income, "without creating opportunities for non- taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third States)". In effect, the text of the OECD Model Convention was used literally in the Brazil-Poland Convention. In treaties signed by Brazil from the 1990s onwards, the preamble only refers to the prevention of tax evasion. In the case of the oldest treaties signed by Brazil, from the 1970s and 1980s, no mention

is even made of the prevention of tax evasion, the parties' objective being only to avoid double taxation, as stated in the Brazil-Luxembourg treaty, signed in 1978.

3.2. Article 1

In Article 1 of the Brazil-Poland Convention, which deals with the subjective scope of the treaty, there is a provision that seeks to avoid an inappropriate use of the treaty through an entity residing in one of the two countries, but which is transparent for tax purposes and whose income is not taxed by the country of residence. This norm, which can be considered a kind of anti-abuse rule, is also included in the 2018 agreements Brazil signed with Switzerland, the United Arab Emirates, and Singapore, but it is not included in the treaties signed before 2018 by Brazil, as is the case with the convention signed with India in 1988 and with Israel in 2002.

3.3. Article 5

In Article 5 of the Convention, which deals with permanent establishments, there is an anti-abuse rule intended to complement the rule that "a building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months". According to this anti-abuse rule (Article 5.4 of the Convention),

> For the sole purpose of determining whether the twelve-month period referred to in paragraph 3 has been exceeded,
>
> a) where and enterprise of a Contracting State carries on activities in the other Contracting State at a place that constitutes a building site or construction or installation project and these activities are carried on during periods of time that do not last more than twelve months, and
>
> b) connected activities are carried on at the same building site or construction or installation project during different periods of time, each exceeding 30 days, by one or more enterprises closely related to the firs-mentioned enterprise, these different periods of time shall be added to the period of time during which the first mentioned enterprise has carried on activities at that building site or construction or installation project.

It is worth noticing that the period of 12 months contained in the rule of the convention with Poland is not common in Brazilian treaties, which generally adopt, regarding this rule, the period of 6 months.

This anti-abuse rule contained in Art. 5.4 of the Convention with Poland is mentioned/suggested in the Official Commentaries to the OECD Model (item 52 of the comments to Art. 5), but it is not found in the other treaties signed by Brazil.

3.4. The PPT Rule – Art. 28

The OECD Model Convention updated in 2017 brings in Art. 28 a series of options for general rules to avoid abuse or inappropriate use of the treaty, and the G-20/OECD BEPS Project considers a minimum standard (Action 6) to provide in bilateral treaties for some form of a combination of these anti-abuse rules, such as the LOB clause (in its complete or simplified versions) and the so-called PPT rule.

In the case of the Brazil-Poland Convention, the rules on "entitlement to benefits" are in Article 28. In this article, there is the following combination of anti-abuse norms.

In Article 28 paragraph 1, a specific anti-abuse rule is defined, aimed at situations in which one of the contracting States already foresees, at the time of signature of the agreement, or foresee in the future, privileged tax regimes for offshore income derived by a resident company from activities such as shipping, banking, insurance, operation as holding company or co-ordination centre to a group of companies which carry on business primarily in the third States. In such cases, the other Contracting State will not be obliged to guarantee the application of the benefits of the Convention on the income derived from these offshore activities or on the dividends paid from such income.

In Article 28 paragraph 2, a typical simplified Limitation on Benefits rule is used to avoid treaty shopping through a relatively simple test regarding the possible control of a company by non-resident entities. According to this rule,

> Notwithstanding the provisions of paragraph 1, a company that is a resident of a Contracting State and derives income from sources within the other Contracting State shall not entitled in that other Contracting State to the benefits of this Agreement if, at that time or on at least half of the days of a twelve-month period that includes that time, persons who are not residents of the first-mentioned State or that are not entitled to benefits of this Agreement own, directly or indirectly, at least 50 per cent of the shares of the company. However, the preceding sentence shall not apply if that company has its principal class of shares regularly traded on one or more recognised stock exchanges, or carries on in the Contracting State of which it

> is a resident a substantive business activity other than the mere holding of securities or any other assets, or the mere performance of auxiliary, preparatory or any other similar activities in respect of other related entities.

In Article 28 paragraph 3, a specific anti-abuse rule is used to deal with situations where an enterprise of a Contracting State derives income from the other Contracting State, but the first Contracting State assigns that income to a permanent establishment of the enterprise situated in a third State, being such income exempt from taxation in the first State. In this situation, if taxation in the third State is less than 75% of the taxation that would be imposed by the first State if the permanent establishment were located there, then the provisions of the treaty will not apply to said income, remaining taxable in accordance with the provisions of the legislation of the other Contracting State.

For all three anti-abuse rules put in Article 28 paragraphs 1 to 3, the Convention provides for a saving clause in Article 28 paragraph 4. The competent authority of the Contracting State in which benefits were to be denied according to paragraphs 1–3 can grant the benefits "taking into account the object and the purpose" of the Convention, but only if "such resident demonstrates to the satisfaction of such competent authorities that neither its establishment, acquisition or maintenance, nor the conduct of its operation, had as one of its principal purposes the obtaining of benefits under this Agreement".

It is worth noticing that, in the case of the Brazil-Switzerland convention, there is no such saving clause rule contained in Article 28 paragraph 4 of the treaty with Poland. The three anti-abuse rules mentioned above are contained in the agreement with Switzerland, but not the saving clause.

Complementing these three aforementioned anti-abuse norms, the Brazil-Poland Convention adopts, in the last paragraph of its Article 28, a PPT rule in the exact terms suggested in the 2017 OECD Model Convention (as occurred in the 2018 Brazilian treaties with Switzerland, the United Arab Emirates, and Singapore):

> Art. 28, paragraph 6. Notwithstanding the other provisions of this Agreement, a benefit under this Agreement shall not be granted in respect of an item of income if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Agreement.

Finally, the Protocol of the Brazil-Poland Convention establishes in its item 10 that "the provisions of the Agreement shall not prevent a Contracting State from applying its domestic legislation aimed at countering tax evasion and avoidance, whether or not described as such, including provisions of its law regarding 'thin capitalisation' or to avoid the deferral of payment of the income tax such as the "controlled foreign corporations/CFCs" legislation".

It is worth noticing that in Brazil, federal tax authorities do not use a typical GAAR to disregard transactions that are held as abusive, as those operations are currently questioned by the application of a broad concept of sham. Also, the Brazilian Constitutional Court has not yet properly analysed the limits, nature, and powers of a typical GAAR[16].

4. Final remarks

In order to come into force, the Convention signed by Brazil and Poland in September 2022 must pass the legislative power scrutiny. In the case of Brazil, this legislative power scrutiny has not been started yet (July 2023).

Brazil and Poland decided to use in the Convention signed in September 2022 the entire arsenal of anti-abuse rules provided for in the 2017 OECD Model Convention, perfectly complying with the minimum standard of the Action 6 of the BEPS Project, which demonstrates that Brazil, even though it has not signed the BEPS multilateral agreement as Poland did in 2018, has been adopting in its bilateral treaty negotiations the *minimum standards* set out in the BEPS Project Reports in 2015.

With some minor differences, the Brazil-Poland Convention (not yet in force), regarding anti-abuse rules, follows the same pattern that one can see on Brazilian conventions signed with Switzerland, Singapore, and the United Arab Emirates in 2018, which are in force since 1st January, 2022. This pattern can also be seen in the Protocol that Brazil signed with Argentina in 2017 (already in force) and with Sweden in 2019 (not yet in force) as well as on the DTCs that Brazil signed with Uruguay in 2019 (not in force) and with UK and Norway in 2022 (not yet in force).

[16] As regards Brazilian Supreme Court case law, see M.S. de Godoi, *Exercício de Compreensão Crítica do Acórdão do Supremo Tribunal Federal na Ação Direta de Inconstitucionalidade n. 2.446 (2022) e de suas Consequências Práticas sobre o Planejamento Tributário no Direito Brasileiro*, "Direito Tributário Atual" 2022, vol. 52, pp. 465–485.

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Analiza klauzuli testu celu podstawowego i klauzul ogólnych zawartych w umowie o unikaniu podwójnego opodatkowania między Brazylią i Polską podpisanej we wrześniu 2022 r.

Streszczenie. Artykuły dotyczy analizy normatywnych aspektów klauzuli testu celu podstawowego (PPT-Rule) oraz klauzul ogólnych zapobiegających nadużyciom traktatu zawartych w brazylijsko-polskiej bilateralnej umowie o unikaniu podwójnego opodatkowania zawartej 20 września 2022 r. w świetle brazylijskiej polityki i praktyki bilateralnych umów podatkowych. Autorzy omawiają zagadnienia związane z interakcją klauzuli celu testu podstawowego (PPT-Rule) z innymi traktatowymi klauzulami szczególnymi zapobiegającymi traktatowymi przeciwdziałającymi unikaniu opodatkowania, a także obiektywne i subiektywne elementy samej klauzuli testu celu podstawowego (PPT-Rule) oraz możliwe konsekwencje jej stosowania, w szczególności wyzwania związane z wymogami prawnymi zasada pewności.

Słowa kluczowe: Brazylia, Polska, umowa o unikaniu podwójnego opodatkowania, klauzule przeciwdziałające nadużyciom traktatu, klauzula testu celu podstawowego (PPT-Rule)