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In looking at the totalization agreement, it seems pretty clear here that the employer must pay only US social security taxes, and not foreign social security taxes. In light of the fact that the totalization agreement provides that they are liable for United States FICA taxes, I would say FICA taxes should be collected regardless of whether they paid foreign social security taxes. An employer does not have an election whether to pay US or foreign social security tax if it is employment for United States FICA tax purposes under the totalization agreement. (As you may know, section 3121(l) provides an election to pay US FICA taxes in situations where foreign social security taxes would otherwise apply but this is a prospective election and in any event, is not applicable here.) The employer owes United States FICA taxes if it is employment under the totalization agreement. The employer should file for a refund of the foreign social security tax to the extent that is available if it wants to avoid double taxation..

The employer's failure to pay US social security tax and failure to issue Forms W-2 could have an adverse effect on the employee's social security coverage. Also, section 3121(z) has indicated a Congressional concern that the IRS fully enforce the FICA tax liability of employers with respect to employees working overseas. To have an IRS policy of FICA tax forgiveness where the employer pays foreign social security erroneously rather than United States social security would be difficult to defend, and without legal justification as far as I know.