

What is the "MLI" and why is it important in the context of the South African tax system?

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The Base Erosion and Profit Shifting (BEPS) Project of the OECD was launched with the publication of the OECD BEPS Action Plan in 2013. The BEPS Project comprised various "Actions" aiming to fight tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations.

South Africa is an associate country to the OECD BEPS Project, and the Davis Tax Committee (which was tasked with assessing South Africa's tax policy framework and its role in supporting the objectives of inclusive growth, employment, development and fiscal sustainability) has consequently issued its own reports wherein it recommends that certain of the OECD's recommendations arising from the BEPS Project be implemented in South Africa. Where the implementation of OECD recommendations will require amendments to double taxation agreements (DTAs) to which South Africa is a party, the Davis Tax Committee has stated that the "costs and challenges of re-negotiating ... treaties will be alleviated by signing the multilateral instrument that is recommended under Action 15 which will act as a simultaneous renegotiation of all tax treaties".

The "multilateral instrument" referred to by the Davis Tax Committee is the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI), which is the product of OECD BEPS Project Action 15 and the purpose of which is the swift implementation of the tax treaty-related BEPS measures. As at 20 December 2017, 72 jurisdictions (including South Africa) had signed the convention, with a further six jurisdictions expressing an interest to sign.

The Secretary General of the OECD, Mr Angel Gurría, has stated that "the conclusion of this [MLI] marks a new turning point in tax treaty history. We are moving towards rapid implementation of the far-reaching reforms agreed under the BEPS Project in more than 1 100 tax treaties worldwide. In addition to saving the signatories from the burden of bilaterally re-negotiating these treaties, the [MLI] will result in more certainty and predictability for businesses, and a better functioning international tax system for the benefit of our citizens".

The MLI provides signatory countries with flexibility with respect to ways of meeting BEPS minimum standards on treaty abuse and dispute resolution, as well as the possibility to opt out of

provisions that do not reflect a BEPS minimum standard (with the possibility to opt in later). Where there are multiple ways to address BEPS, the MLI allows signatories to apply optional provisions.

For a DTA to be amended by the MLI, both parties to the DTA (that is, both countries) must have signed the MLI, both countries must have chosen for the DTA in question to be covered by the MLI and, in essence, both countries must have the same stated position on the MLI article in question. Where at least one party has made a reservation in respect of a certain MLI article or the parties did not choose to apply the same optional provision, that reservation or difference in optional provisions will block the modification of the DTA in question, but only in respect of the specific MLI article (that is, amendments driven by other MLI articles in respect of which both countries have the same stated position will still be effected).

As a result, the various possible permutations that may arise can be very complex and will make the interpretation of DTAs even more challenging. Taxpayers and advisors now not only have to consider the protocols that amend original DTAs, but also whether the parties (countries) to the DTA being interpreted are signatories of the MLI, whether the DTA in question is covered by the MLI, as well as each country's stated position on the various articles of the MLI.

National Treasury has published South Africa's position on the various articles of the MLI and has listed 76 DTAs to be covered by the MLI. Lists of covered DTAs by jurisdiction can be found on the OECD's website, together with links to documents recording each signatory's position on the articles of the MLI. The OECD has also created a helpful tool, called the *MLI Matching Database*, which assists taxpayers and advisors in determining if and how the provisions of a DTA is likely to be amended by the MLI, by matching information provided by the MLI signatories on their stated positions in respect of the articles of the MLI.

The timing of entry into effect of the amendments to the covered DTAs is linked to the completion of the ratification procedures in each jurisdiction that is a party to a covered DTA. The MLI will only enter into force in South Africa on the first day of the month following the expiration of a period of three calendar months, beginning on the date of the deposit of its instrument of ratification, acceptance or approval. To date, South Africa has not deposited its instrument of ratification, acceptance or approval with the OECD. It is expected that this will only occur towards the end of 2018 or early in 2019.

While being a positive development for revenue authorities, the MLI is likely to create uncertainty, as businesses that were once confident of the robustness of their international corporate structures may find that the introduction of new anti-avoidance rules into DTAs could remove the tax relief enjoyed until now on cross-border transactions.

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