The MLI comes into effect for South Africa

The multilateral instrument developed in terms of Action 15 of the OECD/G20 BEPS Project comes into force from 1 January 2023 for South Africa. This article explains the application of the MLI to South African tax treaties.

Action 15 of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting ('BEPS') required the development of a multilateral instrument ('MLI'). This instrument allows countries to modify existing bilateral tax treaties synchronously and efficiently to implement tax treaty-related measures developed as part of the BEPS Project without having to renegotiate each treaty. The multilateral convention was developed during 2015/16. It came into effect for South Africa on 1 January 2023.

A brief overview of the MLI

The MLI is signed and ratified by countries to implement various BEPS-related measures into their treaties. These measures include provisions that affect dual-resident entities and the methods to eliminate double taxation. The MLI introduces a principal purpose test and a limitation of benefits clause. It also contains measures that affect treaty relief for dividends and capital gains and address avoidance of permanent establishments.

Countries make reservations and elections to opt out of specific provisions (or parts thereof) and choose optional or alternative provisions.

Entry into force

South Africa was a signatory to the MLI on 7 June 2017 at the initial signing thereof.

The convention, however, only enters into force for a country once ratified, accepted or approved by that country. Countries deposit their instruments of ratification, acceptance or approval with the OECD. South Africa deposited this instrument and the list of reservations and notifications on 30 September 2022. The MLI applies from 1 January 2023 for South Africa.

Effect on South African treaties

The MLI applies to covered tax agreements, a term defined in Article 2 of the convention. A covered tax agreement is a tax treaty between two or more countries for which the MLI has come into force.

The MLI takes effect for:

- Taxes withheld at the source from the first day of the calendar year that begins on or after the MLI enters into force for the last of the contracting states to the treaty, and
- All other taxes levied for taxable periods that begin on or after calendar six months (or a shorter period agreed between states) from the date that the MLI enters into force for the last of the contracting states to the treaty.

The application of the MLI to a treaty requires consideration of, amongst others:

- Whether and when the MLI came in force for the respective contracting state(s), and
- Reservations and elections by each state and how the combination of these affect the application of each article of the treaty.

This adds complexity to the interpretation of treaties, an already complex task. The OECD provides tools to assist with this matching exercise. The National Treasury indicated that SARS would publish non-binding synthesised texts to summarise the effect of the MLI on individual treaties.

+27 83 417 5904 pieter@pvdz.co.za www.pvdz.co.za