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Global Tax Alert

Dutch House of Representatives approves MLI

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Executive summary

On 12 February 2019, the Dutch House of Representatives (*Tweede Kamer*) passed the bill for adoption of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the MLI). Before the bill becomes law, it must also be adopted by the Dutch Senate. The bill ratifies the MLI and confirms the preliminary reservations and notifications in respect of the various provisions of the MLI submitted to the Organisation for Economic Co-operation and Development (OECD) in 2017, with the exception of the position with regard to article 12.

Article 12 aims to prevent the artificial avoidance of permanent establishments (PEs) through commissionaire arrangements and similar strategies by lowering the PE threshold. The Dutch Government will make a reservation not to apply article 12 until there is more clarity on the profit allocation to PEs or until an effective dispute resolution mechanism has been established with a sufficient number of other MLI signatories.

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Detailed discussion

MLI and the Netherlands

The MLI aims to swiftly implement the recommendations of the OECD Base Erosion and Profit Shifting (BEPS) action plan in existing tax treaties.[1] The MLI was signed on 7 June 2017. On the same date, the Netherlands submitted a list of 82 tax treaties that the Netherlands would like to designate as Covered Tax Agreements (CTAs), i.e., tax treaties to be amended through the MLI. Together with the list of CTAs, the Netherlands also submitted a provisional list of reservations and notifications (MLI positions) with respect to the various provisions of the MLI. At that time, the Netherlands had chosen to opt in for almost all measures of the MLI, except for the so-called "saving clause" of article 11 of the MLI and certain minor reservations for article 9 (real estate) and article 14 (splitting-up of contracts).[2] This for instance means that the Netherlands will apply article 7 (principal purpose test) and article 13 (lowering the threshold for PEs for auxiliary activities). Furthermore, the Netherlands will apply mandatory binding arbitration, if the treaty partner matches this Dutch position.

With the passing of the bill to ratify the MLI, the Dutch House of Representatives has instructed the Dutch Government to make a reservation to article 12. This article targets the artificial avoidance of PEs through commissionaire arrangements and similar strategies. For example, as a result of article 12 the PE threshold is lowered if a person is acting on behalf of an enterprise and habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise.

The Dutch House of Representatives indicated that the Netherlands should not apply article 12 until the rules regarding allocation of profits to PEs are sufficiently clear or an effective method of dispute resolution in the case of double taxation has been established.

Further parliamentary review

The bill is currently subject to approval by the Dutch Senate. After approval by the Senate and after depositing the instrument of ratification with the OECD, the MLI will enter into effect with respect to the Netherlands. If the instrument of ratification is deposited before July 2019, the MLI will enter into effect as of 1 January 2020.[3] For withholding taxes, ratification should take place before the end of 2019 to be effective as of 1 January 2020.

The Dutch reservation to article 12 is to be revisited by the end of 2020.

Implications

Businesses are encouraged to review whether they may be impacted by the upcoming changes to Dutch tax treaties. In particular, the application of the principal purpose test (treaty abuse) and the lowering of the threshold for PEs, may impact multinational enterprises. Businesses should consider that the Dutch position with regard to article 12 will be reviewed by the end of 2020. Furthermore, in the case of double taxation, businesses should consider the possibility to make use of the mechanism of mandatory binding arbitration, if the specific situation allows for this.

Endnotes

1. See EY Global Tax Alert, *Mandatory Binding Treaty Arbitration under OECD's Multilateral Instrument*, dated 2 December 2016.

2. See EY Global Tax Alert, *The Netherlands signs Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*, dated 10 July 2017.

3. Since the Dutch House of Representatives voted unanimously for this bill, it is expected that the Dutch Senate shall approve the bill as well.

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