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Global Tax Alert

India deposits instrument of ratification of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS

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Executive summary

India deposited its instrument of ratification of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (the MLI) with the Organisation for Economic Co-operation and Development (OECD) on 25 June 2019. At the time of depositing the instrument of ratification, jurisdictions must confirm their MLI positions. Accordingly, India submitted the definite list of 93 tax agreements entered into by India and other jurisdictions that India would like to designate as Covered Tax Agreements (CTAs), i.e., tax treaties to be amended through the MLI and the list of reservations and notifications. The MLI will enter into force for India on the first day of the month following the expiration of a period of three-calendar months beginning on the date of the deposit by India of its instrument of ratification, i.e., 1 October 2019.

Largely, the final list of India's MLI positions deposited with the OECD are on similar lines as the provisional list which was submitted to OECD on 7 June 2017, wherein India's intent to adopt the principal purpose test (PPT) as an interim measure, though an option to modify the same in future, with the limitation of benefits (LOB) clause to combat treaty shopping, has now been provided specifically. Additionally, India has now opted to revise the foreign tax credit provisions to replace the exemption method for elimination of double taxation with the credit method for few of its tax treaties.

Detailed discussion

Background

On 5 October 2015, the OECD released its final report on developing a multilateral instrument to modify bilateral tax treaties under its Base Erosion and Profit Shifting (BEPS) Action Plan (Action 15). This report was released in a package that included final reports on all 15 BEPS Actions. On 24 November 2016, the OECD released the text of the MLI and explanatory notes.

See EY Global Tax Alert, *OECD releases multilateral instrument to implement treaty related BEPS measures on hybrid mismatch arrangements, treaty abuse, permanent establishment status and dispute resolution*, dated 2 December 2016, for a more detailed analysis of the MLI-related BEPS measures on hybrid mismatch agreements, treaty abuse, permanent establishment (PE) status and dispute resolution.

On 7 June 2017, 68 jurisdictions[1] signed the MLI during a signing ceremony hosted by the OECD in Paris.[2] Further, 21 additional jurisdictions signed the MLI after the first ceremony.

Together with the list of CTAs, signatories also submitted a preliminary list of their MLI positions in respect of the various provisions of the MLI.[3] The definitive MLI positions for each jurisdiction is to be provided upon the deposit of its instrument of ratification, acceptance or approval of the MLI.

The MLI entered into force on 1 July 2018 after the first five jurisdictions (i.e., Austria, the Isle of Man, Jersey, Poland and Slovenia) deposited their instrument of ratification, acceptance or approval of the MLI with the OECD.

Following this, as of 28 June 2019, 24 additional jurisdictions have deposited their instrument of ratification, acceptance or approval of the MLI with the OECD. For such countries, the MLI measures will be effective after both parties to the treaty have deposited their instrument of ratification, acceptance or approval of the MLI and a specified time has passed.

Further, once the MLI enters into force for a particular country, one needs to determine the date from when the MLI changes shall be effective for that country's CTAs. The date of entry into force and entry into effect relevant from India's perspective is discussed in detail below.

Structure of the MLI

Recognizing the complexity of designing a general instrument that applies to the CTAs and to the specific provisions included in bilateral tax treaties, the MLI provides flexibility for Contracting Jurisdictions to implement (parts of) the MLI based on their needs.

Many of the provisions of the MLI overlap with provisions found in CTAs. Where the provisions of the MLI may conflict with existing provisions covering the same subject matter, this conflict is addressed through one or more compatibility clauses which may, for example, describe the existing provisions which the MLI is intended to supersede, as well as the effect on CTAs that do not contain a provision of the same type.

Contracting Jurisdictions have the right to reserve certain parts of the MLI (opt-out) and to have these specific articles not apply to their tax treaties.

The different types of provisions

The MLI contains four types of provisions. Depending on the type of provision, the interaction with CTAs varies. A provision can have one of the following formulations: (i) "in place of"; (ii) "applies to"; (iii) "in the absence of"; and (iv) "in place of or in the absence of."

A provision that applies "in place of" an existing provision is intended "to replace an existing provision" if one exists, and is not intended to apply if no existing provision exists. Parties shall include in their MLI positions a section on notifications wherein they will list all CTAs that contain a provision within the scope of the relevant MLI provision, indicating the article and paragraph number of each of such provision. A provision of the MLI that applies "in place of" shall replace a provision of a CTA only where all Contracting Jurisdictions have made a notification with respect to that provision.

A provision that "applies to" provisions of a CTA is intended "to change the application of an existing provision without replacing it," and therefore may only apply if there is an existing provision. Parties shall include in their MLI positions a section on notifications wherein they will list all CTAs that contain a provision within the scope of the relevant MLI provision, indicating the article and paragraph number of each of such provision. A provision of the MLI that "applies to" provisions shall change the application of a provision of a CTA only where all Contracting Jurisdictions have made a notification with respect to that provision.

A provision that applies "in the absence of" provisions of a CTA is intended "to add a provision" if one does not already exist. Parties shall include in their MLI positions a section on notifications wherein they will list all CTAs that do not contain a provision within the scope of the relevant MLI provision. A provision of the MLI that applies "in the absence of" provisions shall apply only in cases where all Contracting Jurisdictions notify the absence of an existing provision of the CTA.

A provision that applies "in place of or in the absence of" provisions of a CTA is intended "to replace an existing provision or to add a provision." This type of provision will apply in all cases in which all the parties to a CTA have not reserved their right for the entirety of an article to apply to its CTAs. If all Contracting Jurisdictions notify the existence of an existing provision, that provision will be replaced by the provision of the MLI to the extent described in the relevant compatibility clause. Where the Contracting Jurisdictions do not notify the existence of a provision, the provision of the MLI will still apply. If there is a relevant existing provision which has not been notified by all Contracting Jurisdictions, the provision of the MLI will prevail over that existing provision, superseding it to the extent that it is incompatible with the relevant provision of the MLI (according to the explanatory statement of the MLI, an existing provision of a CTA is considered "incompatible" with a provision of the MLI if there is a conflict between the two provisions). Lastly, if there is no existing provision, the provision of the MLI will, in effect, be added to the CTA.

India's CTAs

India has submitted a list of 93 tax treaties that it wishes to designate as CTAs, i.e., to be amended through the MLI.

Accordingly, India has chosen to include all the jurisdictions that form part of the India tax treaty network (except the tax treaty with China[4]). Some of the countries on India's CTA list, however, have not yet signed the MLI (for example, Brazil and the United States).

MLI provisions

Hybrid mismatches

Part II of the MLI (Articles 3 to 5) introduces provisions which aim to neutralize certain of the effects of hybrid mismatch arrangements based on the recommendations made in the Final BEPS Action 2 and Action 6 final reports released in October 2015. The provisions cover hybrid mismatches related to transparent entities, dual resident entities and elimination of double taxation. These provisions are all not minimum standard provisions and therefore Contracting Jurisdictions have the right to opt to not apply these provisions to their CTAs.

Article 3 – Transparent entities

This provision addresses the situation of hybrid mismatches as a result of entities that one or both Contracting Jurisdictions treat as wholly or partly transparent for tax purposes.

Under Article 3(1), "for the purposes of a CTA, income derived by or through an entity that is treated as wholly or partly transparent under the tax law of either Contacting Jurisdiction shall only be considered income of a resident to the extent that the income is treated, for purposes of taxation by that Contracting Jurisdiction, as the income of a resident of that Contracting Jurisdiction."

Article 3 of the MLI applies "in place of or in the absence of" an existing provision. Article 3 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.

India has reserved its right for non-applicability of Article 3 in its entirety.

India's tax treaties do not generally contain a provision on treatment of transparent entities.[5] India has continued to maintain status quo and a strict stance on treatment of transparent entities i.e., a transparent entity which is not "liable to tax" in the jurisdiction of its formation may not qualify as a resident to avail treaty benefits. Thus, treaty entitlement for transparent entities will continue to be a challenge in India and other issues like the application of treaty provisions to investors, credit of foreign taxes, double taxation, as well as double non-taxation, remain ambiguous.

Article 4 – Dual resident entities

Article 4 modifies the rules for determining the treaty residency of a person other than an individual that is a resident of more than one Contracting Jurisdiction (dual resident entity – DRE). Under this provision, treaty residency of a dual resident entity shall be determined by a mutual agreement procedure (MAP) between Contracting Jurisdictions. Under the MAP in Article 4, Contracting Jurisdictions are not obligated to successfully reach an agreement and in absence of successful mutual agreement, a dual resident entity is not entitled to any relief or exemption from tax provided by the CTA except as may be agreed upon by the Contracting Jurisdictions.

Article 4 of the MLI applies "in place of or in the absence of" an existing provision. Article 4 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.

India has not provided any reservation in respect of the applicability of Article 4. Accordingly, India chooses to apply this provision and has notified 91 CTAs[6] wherein treaty residence of a DRE will be determined on the basis of MAP. This MLI provision will be made applicable only if the other Contracting Jurisdiction agrees to apply this article. Presently, a majority of India's tax treaties use the place of effective management test as a tie-breaker rule to determine treaty residence of a DRE.

Article 5 – Application of methods for elimination of double taxation

Article 5 includes three options for Contracting Jurisdictions regarding methods of eliminating double taxation. Option A provides that provisions of a CTA that would otherwise exempt income derived or capital owned by a resident of a Contracting Jurisdiction would not apply where the other Contracting Jurisdiction applies the provisions of the CTA to exempt such income or capital from tax or to limit the rate at which such income or capital may be taxed (switch over clause). Instead, a deduction from tax is allowed subject to certain limitations. Under option B, Contracting Jurisdictions would not apply the exemption method with respect to dividends if those dividends are deductible in the other Contracting Jurisdiction. Option C includes that the credit method should be restricted to the net taxable income. Contracting Jurisdictions may choose different options resulting in an asymmetrical application of this provision. Contracting Jurisdictions may also opt not to apply Article 5 to one or more of its CTAs.

Article 5 of the MLI is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this option entirely.

India generally follows the credit method for elimination of double taxation but has a few treaties which operate on exemption method. Accordingly, India has now opted for Option C in the final list and will apply the credit method to provide relief to its residents in place of the exemption method. India's tax treaties which specifically include exemption method as notified in the final list are Bulgaria, Egypt, Greece and the Slovak Republic.

Treaty abuse

Part III of the MLI (Articles 6 to 13) contains six provisions related to the prevention of treaty abuse, which correspond to changes proposed in the BEPS Action 6 final report[7] (*Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*). In particular, the report contains provisions relating to the so-called "minimum standard" aimed at ensuring a minimum level of protection against treaty shopping arrangements (Article 6 and Article 7 of the MLI).

Article 6 – Purpose of a CTA

Article 6 provides for the preamble language of a CTA which is designed to ensure compliance with one of the minimum standards consisting of expressing the common intention to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements.

While India is silent on adoption of Article 6, adoption of the preamble of the MLI is a mandatory requirement and, as a result, India's tax treaties are likely to get modified to include the text of the preamble in addition to the existing preamble. Furthermore, countries were given an option to select the additional statement in the preamble, which provided that the treaty objective can also be to develop economic relationships and enhance cooperation in tax matters. India has not exercised this option.

Article 7 – Prevention of Treaty Abuse

This article contains the provisions to be included in a CTA to prevent treaty abuse. As concluded in the BEPS Action 6 final report, the prevention of treaty abuse should be addressed in one of the following ways: (i) a combined approach consisting of an LOB provision and a PPT; (ii) a PPT alone; or (iii) an LOB provision, supplemented by specific rules targeting conduit financing arrangements. With respect to the LOB provision, the BEPS Action 6 final report provided for the option of including a detailed or a simplified version.

Given that a PPT is the only way that a Contracting Jurisdiction can satisfy the minimum standard on its own, it is presented as the default option in Article 7 of the MLI. Parties are allowed to supplement the PPT by opting for a simplified LOB provision. A simplified LOB provision will apply if both jurisdictions to a CTA agree for its inclusion or when one jurisdiction chooses to apply the simplified LOB and the other jurisdiction agrees to its asymmetrical or symmetrical application.

Specifically, Article 7 of the MLI articulates the PPT which denies treaty benefits where it is reasonable to conclude considering all relevant facts and circumstances, that obtaining such benefit is one of the principal purposes for entering into a specific transaction or arrangement that resulted directly or indirectly in that benefit, unless if granting that benefit is not contrary to the object and purpose of the relevant provisions of the CTA.

India has expressed its intention to adopt the PPT alone as an interim measure[8] with an option to modify the same in the future with an LOB clause to combat treaty shopping. Additionally, India has opted for the simplified LOB for all of its comprehensive tax treaties, for prevention of treaty abuse, which will be applicable if India's tax treaty partners agree for the adoption of the simplified LOB rule.

Article 8 – Dividend transfer transactions

Article 8 of the MLI specifies anti-abuse rules for benefits provided to dividend transfer transactions consisting of exempting or limiting the tax rate on dividends paid by a company resident of a Contracting Jurisdiction to a beneficial owner or recipient that is resident of the other Contracting Jurisdiction, provided certain ownership requirements which need to be met throughout a 365-day period that includes the day of payment of the dividend are met. The 365-day holding period will apply in place or in the absence of a minimum holding period contained in the provisions described above.

India has reserved its right for non-applicability of Article 8 in respect of its tax treaty with Portugal (as it already has a 24-month holding period condition) and has notified 24 tax treaties[9] where a holding period of 365 days is proposed to be applicable to obtain the benefit of a concessional tax rate on dividends.

Article 8 of the MLI may not significantly impact the Indian context as, under the Indian Tax Laws (ITL), a Dividend Distribution Tax (DDT) is levied on the company distributing dividends and, consequently, the dividends are exempt in the hands of the shareholder. It is generally understood that the tax treaty does not control DDT liability.

Article 9 – Capital gains from alienation of shares or interests of entities deriving their value principally from immovable property

Article 9 of the MLI provides for indirect transfer taxation to tax the capital gains arising from the alienation of shares/comparable interest of companies/other entities (such as partnership or trust) that derive more than a certain percentage of their value (value threshold) from immovable properties. The taxation rights are provided to the country where such property is situated (i.e., the source state).

Article 9 provides for two alternatives. Alternative 1 specifies that where the value threshold is met at any time during the 365 days preceding the alienation (look-back period), the capital gains from the sale of shares or comparable interests shall be taxable in the source country. Countries can bilaterally negotiate the value threshold in their tax treaties. Alternative 2 is similar to Alternative 1 and, additionally, fixes a normative value threshold of more than 50% (i.e., share or comparable interest derives more than 50% of its value directly or indirectly from immovable property situated in source State) for the trigger of source taxation in this behalf.

India has opted for Alternative 2 for all its CTAs. India has also notified 71 CTAs which contain a provision described in Alternative 1 viz., the relevant clause of the tax treaties where either the value threshold and/or look-back period of 365 days is not available.

India seems to have made a policy choice of adopting a value threshold of 50% and a look-back period of 365 days as its default option. Alternative 2 will get incorporated in India's CTAs if the other Contracting Jurisdictions opt for the same alternative.

Article 10 – Anti-abuse rule for PEs situated in third jurisdictions

Article 10 contains the anti-abuse rule for PEs situated in third jurisdictions, the so-called "triangular provision." The article provides that treaty benefits will be denied if an item of income derived by a treaty resident and attributable to a PE in a third jurisdiction, is exempt from tax in the residence state and the tax in the PE jurisdiction is less than 60% of the tax that would be imposed in the residence state if the PE were located there. The article makes an exception for cases where the income is derived in connection to or incidental to an active trade or business carried out through the PE and allows discretionary relief to be requested when treaty benefits are denied under this article.

Article 10 of the MLI applies "in place of or in the absence of" an existing provision. Article 10 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.

India has not made any reservation or notified any of its CTAs under Article 10. Thus, in terms of the MLI, Article 10 will apply to all of India's CTAs unless specific reservations have been made by the other Contracting Jurisdiction.

Article 11 – Application of tax agreements to restrict a party's right to tax its own residents

Article 11 contains a so-called "saving clause" rule that preserves a Party's right to tax its own residents.

Article 11 of the MLI applies "in place of or in the absence of" an existing provision. Article 11 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.

India has not made any reservation or notified any of its CTAs under Article 11. Thus, in terms of the MLI, Article 11 will apply to all of India's CTAs unless specific reservations have been made by the other Contracting Jurisdiction.

Avoidance of PE status

Part IV of the MLI (Articles 12 to 15) describes the mechanism by which the PE definition in existing tax treaties may be amended pursuant to the BEPS Action 7 final report to prevent the artificial avoidance of PE status through: (i) commissionaire arrangements and similar strategies (Article 12); (ii) the specific activity exemptions (Article 13); and (iii) the splitting-up of contracts (Article 14). Article 15 of the MLI provides the definition of the term "closely related to an enterprise," which is used in Articles 12 through 14.

Article 12 – Artificial avoidance of PE status through commissionaire arrangements and similar strategies

This article sets out how the changes to the wording of Article 5 of the OECD Model Tax Convention (MTC) to address the artificial avoidance of PE status through commissionaire arrangements and similar strategies can be incorporated in the CTAs specified by the parties. In particular:

- In Article 12(1), the concept of Dependent Agent PE is broadened to include situations where a person is acting in a Contracting Jurisdiction on behalf of an enterprise and, in doing so, habitually concludes contracts, or habitually exercises the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise; and
- In Article 12(2), the concept of Independent Agent is restricted to exclude persons acting exclusively or almost exclusively on behalf of one or more enterprises to which it is "closely related," e.g., certain situations of control, such as an enterprise that possesses directly or indirectly more than 50% of the interest in the agent.

Article 12 is not a minimum standard and the MLI gives an option to countries to reserve the right not to apply this article in its entirety. Modification of a tax treaty is subject to adoption, as well notification of the provision by the other Contracting Jurisdiction.

India has not made any reservation on Article 12 and has notified its 93 tax treaties to adopt the above provisions of broader agency PE rule.

Article 12 seeks to replace the agency PE provisions relating to the agent's activity dealing with the authority to conclude contracts. Other activities listed in tax treaties to trigger agency PE (like maintenance of stock and delivery, manufacturing and processing, securing orders etc.) remain unaffected by the MLI. Independent agent exclusion is made stricter under the MLI when compared to various Indian tax treaties by denying exclusion to the agents who work exclusively for an enterprise and its closely related enterprises.

Article 13 – Artificial avoidance of PE status through the specific activity exemptions

This article addresses the artificial avoidance of PE status through the specific activity exemptions included in Article 5(4) of the OECD MTC. Action 7 recommended that this exemption should only be available if the specific activity listed is of a preparatory or auxiliary character. The MLI provides two options for implementing the changes. Option A is based on the proposed wording in Action 7 (i.e., this exemption should only be available if the specific activity listed is of a preparatory or auxiliary character), while option B allows the Contracting Jurisdiction to preserve the existing exemption for certain specified activities.

This article applies "in place of" an existing provision and therefore this first part of this article is intended to replace an existing provision if one exists and is not intended to apply if an existing provision does not exist.

India has chosen option A and has notified its 93 CTAs to apply the same. However, modification of a tax treaty is subject to adoption, as well notification of the provision by the other Contracting Jurisdiction. Certain countries such as Belgium, France, Ireland, Luxembourg, and Singapore, have opted for option B and, hence, may remain unchanged due to the absence of compatibility.

Article 13(4) contains a second substantial provision: the anti-fragmentation clause, pursuant to which exemptions included in Article 5(4) will not apply in situation where the business activities may constitute complementary functions that are part of a cohesive business operation.

Article 13(4) "applies to" provisions of a CTA. This type of provision is intended to change the application of an existing provision without replacing it, and therefore can only apply if there is an existing provision. For this reason, the notification provision of Article 13 states that the provision of the Convention will apply only in cases where all Contracting Jurisdictions make a notification with respect to the existing provision of the CTA. The anti-fragmentation clause is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this option entirely.

India has not made any reservation for its application.

Article 14 – Splitting-up of contracts

Under the Action 7 final report recommendations on "Preventing the Artificial Avoidance of PE Status" the splitting-up of contracts is a potential strategy for the avoidance of PE status through abuse of the exception in Article 5(3) of the OECD MTC, governing the situations where building sites, construction or installation projects may constitute a PE.

The Action 7 final report further noted, however, that the PPT provision could still address BEPS concerns related to the abusive splitting-up of contracts in these types of cases.

Article 14 of the MLI applies "in place of or in the absence of" an existing provision. Article 14 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely.

India has neither made any reservation nor notified any CTAs in respect of the same. In respect of India's CTAs with Contracting Jurisdictions that have made a reservation, Article 14 would not have any impact (illustratively, France, Japan, Singapore and the United Kingdom). In respect of CTAs where the other Contracting Jurisdictions have not made a reservation, the existing provision of India's CTAs may get superseded by Article 14(1) to the extent they are incompatible.

Article 16 – MAP

Part V of the MLI (Articles 16 and 17) introduces provisions which aim to introduce the minimum standard for improving dispute resolution (the BEPS Action 14 minimum standard) and a number of complementing best practices.

As part of the MLI, India has ensured adoption of the minimum standard as follows:

India has reserved its right for not adopting the modified provisions on the basis that it would meet the minimum standard by allowing MAP access in the resident state and by implementing a bilateral notification process. Furthermore, the MLI requires that MAP access should be allowed in a case where MAP application is presented within three years of the first notification of the action resulting in taxation not in accordance with a tax treaty. This has been implemented by India which has notified CTAs that provide a lower period of two years[10] for presenting a MAP case and CTAs that have a minimum period of three years. The notification ensures that all of India's post-MLI tax treaties will provide a minimum time limit of three years for MAP access.

In terms of the MLI, competent authorities of both the states need to endeavor to resolve a case under MAP if they are not able to arrive at a satisfactory solution unilaterally. India has notified its CTAs that do not have a comparable provision to meet this minimum standard. MAP agreements are to be implemented notwithstanding any time limits under domestic laws. Most existing tax treaties of India have a provision which requires implementation of the MAP resolution irrespective of time limits in the domestic laws. India has provided a list of 10 tax treaties[11] where such a provision does not exist. Post-MLI, the notified tax treaties will also have this minimum standard if the comparable notification is made by the other Contracting Jurisdiction.

The MLI further confers an obligation on the competent authorities to endeavor to resolve any potential difficulties or doubts related to the implementation or application of tax treaties under MAP and provides an option for competent authorities to consult on ways to eliminate double taxation in cases not provided for in the CTA. India has adopted this provision and has notified the CTAs without comparable provisions.

Article 17 – Corresponding adjustments

One of the minimum standards under dispute resolution was that Contracting Jurisdictions were to provide MAP access in transfer pricing (TP) cases. As a complementing best practice, the MLI suggested that countries include the enabling provision of Article 9(2) of the OECD MTC in its CTAs, which provides that where a TP adjustment is made in one of the states, the other state shall provide a corresponding adjustment.

Alternatively, as a minimum standard under dispute resolution, countries are required to provide access to MAP in TP cases. This obligation is not conditional on the existence of the enabling provision of Article 9(2) in CTAs, India has opted to include the enabling Article 9(2) in its CTAs and this makes adoption of bilateral advance pricing agreements a possibility for India's CTAs if a similar position is adopted by the other Contracting Jurisdictions.

Mandatory binding arbitration

Part VI of the MLI (Articles 18 to 26) enables countries to include mandatory binding treaty arbitration (MBTA) in their CTAs in accordance with the special procedures provided by the MLI.

Unlike the other articles of the MLI, Part VI applies only between jurisdictions that expressly choose to apply Part VI with respect to their tax treaties. Of the 89 jurisdictions that signed the MLI, 29 opted in for MBTA.[12]

India at the moment has not opted in for MBTA.

Impact of depositing ratified MLI by India

In general, the MLI will enter into force on the first day of the month after the expiry of three months from the date of deposit of the ratified MLI with the OECD. Accordingly, as India has deposited the MLI on 25 June 2019, the MLI shall enter into force for India on 1 October 2019.

Under the MLI, the general rule is that once the MLI has come into force for both treaty countries, the latter date of coming into force is relevant for determining the date of entry into effect of the MLI (hereafter referred to as the relevant date).

However, under its provisional positions, India had opted for an alternate provision under the MLI, pursuant to which, date of entry into effect for India's tax treaties was required to be determined "30 days from latter of the dates on which OECD receives notification from India and its treaty partner about completion of its respective internal procedures."

Nevertheless, under the final position, India has not opted for such alternate provision and accordingly, the effective date of the MLI for India's tax treaties shall be governed by the general rule. Thus, the date of entry into effect of MLI from India perspective is as under:

Particulars	Date of entry into effect
For withholding taxes	First day of next taxable period that begins on or after the "relevant date"
For other taxes	Taxable period that begins on or after expiry of six calendar months from the "relevant date"

As of 28 June 2018, 29 countries,[13] including India, have deposited the instrument of ratification of the MLI with the OECD which includes some of India's major treaty partners such as Australia, France, Netherlands, Japan, Singapore and the United Kingdom. The MLI will enter into force for India on 1 October 2019. With respect to a specific bilateral tax treaty, the measures will only enter into effect after both parties to the treaty have deposited their instrument of ratification of the MLI and a specified time has passed. The specified time differs for different provisions. For example, for the treaties of India with Australia, France, Netherlands, Japan, Singapore and the United Kingdom, the MLI will have effect in India for taxable periods beginning on or after 1 October 2019 for withholding taxes and for taxable period beginning on or after 1 April 2020 for other taxes.

Implications

The implementation of BEPS-related treaty changes for India are close to reality with the earliest application being for taxable periods beginning on or after 1 October 2019 at least for the Indian treaties with Australia, France, Japan, Netherlands, Singapore and the United Kingdom, which are among the 29 jurisdictions which have deposited the instrument of ratification of the MLI with the OECD.

An important aspect to note here is that India has now excluded China from its list of tax treaties for MLI purposes. This may be due to the bilateral negotiations which have already considered the impact of BEPS provisions in the existing India-China tax treaty.[14] Incidentally, Mauritius, which has kept its tax treaty with India outside the purview of the MLI, has indicated that the MLI-related changes will be implemented pursuant to separate bilateral negotiations. The United States is not a signatory to the MLI and believes that its treaty network is already robust enough to prevent treaty shopping and has a low degree of exposure to BEPS.

With MLI implementation just around the corner, cross-border holding structures and transactions will need to be evaluated in light of the tighter anti-avoidance measures as there are no grandfathering provisions for the existing structures in the MLI.

The MLI does not modify all tax treaties in the same way. Taxpayers must undertake a detailed and complex matching exercise to check if an MLI provision applies on a treaty.

EY has developed an MLI tool[15] which allows users to determine whether the MLI has impacted a treaty. If so, the MLI tool allows users to determine the date of effect (for both withholding and other taxes) and the impact on a specific bilateral tax treaty article.

Endnotes

1. Andorra, Argentina, Armenia, Australia, Austria, Belgium, Bulgaria, Burkina Faso, Canada, Chile, China, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Fiji, Finland, France, Gabon, Georgia, Germany, Greece, Guernsey, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Isle of Man, Israel, Italy, Japan, Jersey, Korea, Kuwait, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Monaco, Netherlands, New Zealand, Norway, Pakistan, Poland, Portugal, Romania, Russia, San Marino, Senegal, Serbia, Seychelles, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom and Uruguay.
2. See EY Global Tax Alert, *68 jurisdictions sign the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*, dated 7 June 2017.
3. For more detail on the MLI Positions taken by the signing jurisdictions on 7 June 2017, see EY Global Tax Alert, *Signing by 68 jurisdictions of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS highlights impacts for business to consider*, dated 14 June 2017.
4. India-China tax treaty has been bilaterally amended to incorporate the BEPS related changes.
5. Except for a few tax treaties such as India-United Kingdom, India-United States.
6. Exceptions being Greece and Libya.
7. See EY Global Tax Alert, *OECD releases final report under BEPS Action 6 on preventing treaty abuse*, dated 20 October 2015.
8. Illustratively, these countries have also adopted PPT as an interim measure – Canada, Kuwait, Mauritius, Poland etc.
9. Bangladesh, Belarus, Botswana, Canada, Croatia, Denmark, Italy, Lithuania, Mauritius, Montenegro, Nepal, Oman, Philippines, Qatar, Serbia, Singapore, Slovak Republic, Slovenia, Syria, Tajikistan, Tanzania, Ukraine, the United States and Zambia.
10. Belgium, Canada, Italy and the United Arab Emirates.
11. Canada, Egypt, Greece, Italy, Libya, Mexico, Philippines, Switzerland, Turkey and the United Kingdom.
12. Andorra, Australia, Austria, Barbados, Belgium, Canada, Curacao, Fiji, Finland, France, Germany, Greece, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malta, Mauritius, the Netherlands, New Zealand, Papua New Guinea, Portugal, Singapore, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.
13. Australia, Austria, Belgium, Curacao, Finland, France, Georgia, Guernsey, Ireland, Isle of Man, India, Israel, Japan, Jersey, Lithuania, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Poland, Russia, Serbia, Singapore, Slovak Republic, Slovenia, Sweden, then United Arab Emirates and the United Kingdom.
14. See EY Global Tax Alert, *India-China DTAA amended to incorporate BEPS related provisions*, dated 19 July 2019.
15. https://mli.ey.com.

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