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OALP
Newsletter

6th November 2017

Recent Developments On Base Erosion And Profit Shifting Multilateral Convention

Base erosion and profit shifting action plan and multilateral instrument

1. Base erosion and profit shifting (**BEPS**) are tax avoidance strategies that are adopted by multinational enterprises (**MNEs**) to take advantage of the mismatches and gaps that exist in the tax laws of different jurisdictions to artificially shift profits to a jurisdiction with a low or no tax exposures. The Organisation of Economic Cooperation and Development (**OECD**) and G20 countries[1] have made consistent efforts towards the implementation of the fifteen (15) tax treaty-related action plans (**BEPS Action Plan**)[2] initiated to prevent BEPS. This BEPS Action Plan are therefore aimed at ensuring that MNEs are taxed in the countries where they have economic substance and value creation as well as prevents MNEs from being exposed to double taxation.

2. Pursuant to Action 15 of the BEPS Action Plan, the OECD developed a multilateral instrument to be adopted by countries that wish to implement the BEPS Action Plan. Following the formulation of a Multilateral Convention ("**Multilateral Instrument**" or "**MLI**"), each country is required to submit a list of its bilateral treaties to be designated as Covered Tax Agreements (**CTA**). The designated CTAs will be modified by the MLI in a consistent manner to accommodate the tax-treaty related BEPS Action Plan. The country is also to provide a list of reservations and notifications at the time of signature.

3. On 7 June 2017, it was reported that representatives from 68 jurisdictions convened at the Paris offices of the OECD to sign the MLI. Mauritius, Cameroon and Nigeria have also signed the MLI, bringing the total number of current signatories to seventy one (71). Six (6) other countries expressed their desire to sign the MLI as soon as possible and are actively working towards signature.

4. Notwithstanding the signing of the MLI by countries, the MLI will only come into force where it is ratified, accepted and approved by at least five (5) countries and after expiration of three (3) months from such ratification, acceptance and approval. After the expiration of the three (3) months period, the MLI will however apply to the countries that have ratified, accepted and approved the MLI under their domestic laws.[3]

Ratification, Acceptance or Approval of the MLI – Recent Developments

5. Notably, under international law, a multilateral treaty like the MLI is not enforceable in the States that are signatories to the treaty,

1. These are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saidi Arabia, South Africa, South Korea, Turkey, United Kingdom, United States, and European Union.

2. Action 1 – Digital Economy, Action 2 – Hybrids, Action 3 – CFC Rules, Action 4 – Interest Deductions, Action 5 – Harmful Tax Practices, Action 6 – Treaty Abuse, Action 7 – Permanent Establishment Status, Action 8-10 – Transfer Pricing, Action 11 – BEPS Data Analysis, Action 12 – Disclosure of Aggressive Tax Planning, Action 13 – Transfer Pricing Documentation, Action 14 – Dispute Resolution, Action 15 – Multilateral Instrument.

3. Article 34 of the MLI

if the treaty has not been ratified. Therefore, by the MLI, signature of the country is to be followed by ratification, acceptance or approval, depending on the domestic legal requirement of the signatory country. Once the domestic procedures have been completed, an instrument of ratification, acceptance or approval must be deposited with the depository of the OECD.

6. Since the MLI was signed by countries, it is worthy of mention that two countries (The Republic of Austria[4] and Isle of Man[5]) have ratified and deposited their respective ratification instruments with the depository of the OECD. The Republic of Austria submitted thirty eight (38) bilateral treaties to be covered by the MLI, with thirty four (34) reservations. Similarly, the Isle of Man, submitted eight (8) bilateral treaties and made thirty three (33) reservations.

Conclusion

The signing on the MLI by seventy one (71) countries and the subsequent ratification by Man of Isle and the Republic of Austria, no doubt marked a significant global achievement by the OECD and the G20 countries in the implementation of the BEPS Action Plan, as well as indicates a growing commitment by countries to be bound and to implement the BEPS Action Plan. In view of the ratification by Republic Austria and Isle Man, the further ratification by three(3) countries will bring it to five (5) , which is the threshold required for the MLI to come into force. It remains to be seen however if State parties will demonstrate their commitment by concluding their domestic ratification procedures as this will determine when the changes have effect for each tax treaty.

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4. Austria deposited their instrument of ratification on 22 September, 2017.
5. Isle of man deposited its instrument of ratification on 25 September, 2017