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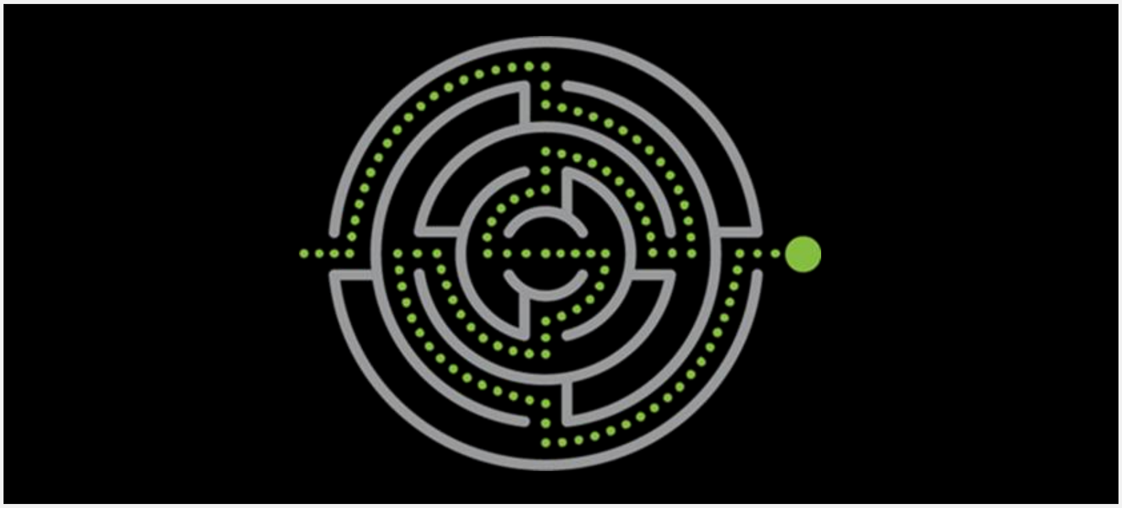

Tax Espresso – Special Alert
Malaysia signs Multilateral Convention

Malaysia Tax Developments: Malaysia signs Multilateral Convention

Malaysia has signed the Multilateral Convention ("MLI") to implement tax treaty related measures to prevent Base Erosion and Profit Shifting ("BEPS") on 24 January 2018.

Briefly, the MLI seeks to facilitate the implementation of tax treaty related measures to counter BEPS. Signatories to the MLI can efficiently update their Double Tax Agreement ("DTA") to incorporate the measures, without the need to re-negotiate each DTA.

Malaysia has submitted a list of agreements with 73 Jurisdictions (see below) that it wishes to designate as Covered Tax Agreements ("CTA"), that is, to be amended through the MLI. The 73 DTAs represents the 71 existing comprehensive tax treaties currently in force and the two tax treaties that have been gazetted but not yet entered into force (i.e. Senegal and Poland new DTA).

1. Albania
2. Australia
3. Austria
4. Bahrain
5. Bangladesh
6. Belgium
7. Bosnia Herzegovina
8. Brunei Darussalam
9. Canada
10. Chile
11. China
12. Croatia
13. Crech Republic
14. Demark
15. Egypt
16. Fiji
17. Finland
18. France
19. Germany
20. Hong Kong
21. Hungary
22. India
23. Indonesia
24. Iran
25. Ireland
26. Italy
27. Japan
28. Jordan
29. Kazakhstan
30. Korea
31. Kuwait
32. Kyrgyz Republic
33. Laos
34. Lebanon
35. Luxembourg
36. Malta
37. Mauritius
38. Mongolia
39. Morocco
40. Myanmar
41. Namibia
42. Netherlands
43. New Zealand
44. Norway
45. Pakistan
46. Papua New Guinea
47. Philippines
48. Poland (new DTA)^
49. Qatar
50. Romania
51. Russia
52. San Marino
53. Saudi Arabia
54. Senegal^
55. Seychelles
56. Singapore
57. Slovak Republic
58. South Africa
59. Spain
60. Sri Lanka
61. Sudan
62. Sweden
63. Switzerland
64. Syria
65. Thailand
66. Turkey
67. Turkmenistan
68. United Arab Emirates
69. United Kingdom
70. Uzbekistan
71. Venezuela
72. Vietnam
73. Zimbabwe

^gazette DTAs, not yet entered into force

Some of the Malaysia's positions on the treaty-based BEPS measures are:

BEPS Action (*indicates minimum standards)	Malaysia Implementation Notes	Key Takeaways
ACTION 6* Prevention of treaty abuse	Malaysia will: • Adopt the Principal Purpose Test ("PPT") to prevent treaty abuse. Under the PPT, treaty benefits will be denied if it is "reasonable to conclude" from the facts that "the principal purpose or one of the principal purposes" of entering into a transaction or an arrangement was to obtain such tax benefits (unless the transaction is in accordance with the object and purpose of the treaty); and • Include a statement of intent that a DTA is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance	Action 6 aims at providing an additional level of protection against treaty shopping where another test must be met before treaty benefit is granted. For example, in applying reduced withholding tax rate for interest under Article 11 of a treaty, apart from meeting the treaty conditions (e.g. tax residency, beneficial ownership, non-attribution to PE, arm's length test etc.), the PPT needs to be fulfilled. Multinational corporations would need to revisit their existing holding and financing structures to ensure that they are BEPS compliant.

ACTION 7 Preventing the Artificial Avoidance of Permanent Establishment ("PE") Status	*Agency PE* Malaysia will adopt the following positions: - • Creation of agency PE when the agent habitually plays principal role leading to conclusion of contracts with routine approval of the principal; • Agent will not be considered to be an independent agent if he acts exclusively or almost exclusively on behalf of a *closely related enterprise* *Specific activity exemption* • Malaysia has chosen to apply the proposed wording in Action 7 (i.e. PE exemption should only be available if specific activity listed is of a preparatory or auxiliary character) • Malaysia has not opted out the anti-fragmentation provision and thus	With the adoption of Action 7, the operating models of multinational corporations need to be analysed with a view to assessing the implications. A non-PE position taken previously may no longer be valid. An operating model involving a marketing company in another country (or in Malaysia) may now create a PE due to the lowering of the threshold for PE. The reliance on the PE exclusion in the past may no longer be tenable given that each activity now has to be of "preparatory or auxiliary" in character. In addition, with the anti-fragmentation provision, it is also crucial to analyse the operations of the company or its related companies in another jurisdiction holistically to

	the anti-fragmentation clause will apply *Splitting-up of contracts* • Malaysia has reserved its rights not to include treaty-based measures in this respect	assess whether a PE could arise although a part of the operation may be able to satisfy the "preparatory or auxiliary" condition. Where a PE is created, profit attribution exercise could be a complex one and is often subject to debate.
ACTION 14* Dispute Resolution	• Malaysia will fully adopt the Mutual Agreement Procedure Article in its DTAs. When a Malaysian resident taxpayer encounters taxation, which is not in accordance with the intended application of the DTA provisions, the taxpayer can seek assistance from the Malaysian Inland Revenue Board ("MIRB") to contact the treaty partner to resolve the dispute • Malaysia has opted not to adopt the mandatory arbitration provisions	Malaysia's full adoption of MAP Article is welcomed. Separately, the MIRB had updated "Guidelines on MAP dated 5 December 2014" (new version dated 19 December 2017) in order to be aligned with the BEPS Action 14 minimum standards.

Action 15 Multilateral Convention	• Malaysia intends for the MLI to apply to all of its 71 existing in force comprehensive DTAs (except for Poland) and two tax treaties that have been gazette but not yet entered into force (i.e. Senegal and Poland new DTA). Once both treaties are in force, they will be CTAs. • With respect to a specific tax treaty, the changes to the DTA will enter into effect after both parties to the treaty have deposited instruments of ratification, acceptance or approval of the MLI and a specified time has passed.	As a next step, Malaysia will work towards the ratification of the MLI.

Closing thoughts

The MLI is a major step in the BEPS implementation process. The signing of the MLI signifies Malaysia's commitment to implement BEPS action plans and reflects its serious intent to adopt international standards and combat international tax avoidance.

With the signing of the MLI, the introduction of Country-by-Country Reporting (CbCR) and the constant review of the robustness of its tax incentives, Malaysia has demonstrated its commitment to implement the four minimum standards under the BEPS project in the areas of harmful tax practices, tax treaty abuse, country-by-country reporting requirements for transfer pricing, and improvements in cross-border tax dispute resolution.

Apart from the four standards, Malaysia would also adopt other non-minimum standards given the proposed Earning Stripping Rules in Budget 2018 (in line with Action 4) and opt-in of Action 7. It appears that Malaysia has reserved its right not to include treaty-based measures related to Action 2 (Neutralising the Effects of Hybrid Mismatch Arrangements) except for provision relating to transparent entities.

As a next step on the MLI, Malaysia will work towards the ratification of the MLI. It is therefore crucial for multinational corporations to understand the different positions adopted by the treaty countries to determine how the MLI affect a particular tax treaty.

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