

Tax

Alert

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Let's talk

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SA ratifies BEPS Multilateral Instrument to modify double tax treaties

In brief

On 30 September 2022, South Africa deposited its instrument of ratification of the OECD's Multilateral Instrument ("MLI"), meaning that at least 48 of its double tax treaties will be modified from 1 January 2023.

General

Several of the Actions in the OECD's Base Erosion and Profit Shifting ("BEPS") Project require the modification of existing double tax treaties ("DTTs"). The MLI is the formal legislative mechanism that implements these DTT modifications.

Ratification of the MLI

To date, 100 countries have signed the MLI, including SA (on 7 June 2017).

However, the MLI only comes into effect for a particular country when it:

- completes the domestic ratification process — which SA completed through Parliament on 6 September 2022; and
- deposits its instrument of ratification with the OECD — which SA did on 30 September.

SA has now become the 79th jurisdiction (of 100 signatories) to formally ratify the MLI.

Impact on SA's DTTs

Including SA's ratification, 910 of the world's DTTs will now have been modified by the MLI. For SA specifically, this initially impacts 48 of the country's existing in-force DTTs, since those 48 treaty partners have already ratified the MLI.

Significant countries such as Mauritius, the Netherlands and the UK are included.

More of SA's DTTs will be modified as more countries ratify the MLI.

Although the more detailed impact will require granular analysis on a treaty-by-treaty basis, some examples include:

- Most DTTs will now include an anti-avoidance rule attacking arrangements where obtaining a treaty benefit was "one of the principal purposes".
- Relief for dividends withholding tax could be denied for shareholders who have held the shares for less than 12 months.



- The tie-break for companies with dual residence will in many cases be a mutual agreement procedure, in the absence of which most DTT benefits will not be available.

Entry into force and effect

The MLI will enter into force for South Africa on 1 January 2023. Thus, for SA's 48 "Covered Tax Agreements" that are affected:

- in respect of withholding taxes, the relevant DTT modifications will have effect immediately, i.e. from 1 January 2023; and
- in relation to other taxes, the relevant modifications will start applying for tax years starting on or after 1 July 2023.

There are slightly different effective dates for the modifications in respect of dispute resolution.

Synthesised texts

SA's National Treasury is expected to provide synthesised texts of the modified DTTs, but there is no indication yet of when these texts will be published. The synthesised texts will apparently be prepared jointly by the relevant tax authorities, and represent their shared understanding of the MLI modifications, albeit not binding.

Takeaway

For multinational groups operating in SA, the impact and significance of the MLI ratification will depend on which other territories the groups are active in. The only way to assess the impact will be to pick through the MLI — and the relevant elections and reservations by all parties — on an individual treaty-by-treaty basis. Several technology tools are available to map these impacts.

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