Tax Alert

Kenya deposits its instrument of ratification of the OECD Multilateral Instrument

January 2025

Background

On 8 January 2025, Kenya deposited its instrument of ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) with the Organisation for Economic Cooperation and Development (OECD). According to the OECD, Base Erosion and Profit Shifting (BEPS) refers to tax planning strategies that exploit gaps and mismatches in the tax rules of various jurisdictions, to artificially shift profits to low or zero tax jurisdictions, resulting in little or no overall corporate tax payment.

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What is the MLI?

The MLI is a multilateral convention agreed by the OECD Inclusive Framework members, which enables modification of existing treaties to align with tax treaty related aspects of the BEPS project.

Kenya joined the OECD/G20 Inclusive Framework on BEPS in January 2017. On 26 November 2019, Kenya signed the MLI and thereafter ratified it. With Kenya's deposit of the instrument of ratification of the MLI with the OECD now complete, the MLI is expected to be applicable effective 1 May 2025.

The MLI provisions relate to various aspects of the BEPS project within scope for double tax agreements. These are hybrid mismatch arrangements (BEPS action 2), preventing tax treaty abuse (BEPS Action 6), preventing the artificial avoidance of Permanent Establishment status (BEPS Action 7) and more effective dispute resolution mechanisms (BEPS Action 14).

What Does the MLI do?

According to the OECD, the MLI covers over 100 jurisdictions and over 1,950 bilateral tax treaties worldwide. Bilateral negotiation of

the almost 2,000 treaties in force worldwide would require significant resources. As the text of the MLI is pre agreed, the MLI enables swift and coordinated updates to treaties, on a multilateral basis, without the need to bilaterally renegotiate specific text to include in existing treaties.

The MLI applies to tax treaties designated as Covered Tax Agreements (CTAs) by both tax jurisdictions to a tax treaty.

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What is the impact of the MLI on Kenya's tax treaties?

Kenya has 15 tax treaties in force and 34 in various other stages such as proposal, consideration, negotiation, conclusion, awaiting signature and awaiting ratification. As per the MLI matching database, Kenya currently has 11 matched agreements. These are Canada, Denmark, France, India, Italy, Korea, Seychelles, Sweden, South Africa, Qatar, and the United Kingdom.

To ensure mutual alignment between the jurisdictions to a tax treaty, both jurisdictions must agree on the specific provisions of the MLI to be included in a matched agreement. Upon agreement by the tax jurisdictions to a treaty, the MLI introduces an additional layer of rules and provisions, to sit alongside the existing treaties.

Where an MLI provision is different from domestic legislation, the MLI position would be expected to have higher legal status. For example, if the MLI position in the Kenya-UK tax treaty incorporates an anti-treaty abuse provision, this provision would likely take precedence over any anti-treaty abuse provisions in Kenya's domestic legislation.

How will Kenya's tax treaties be updated?

- **Existing tax treaties:** We expect that Kenya will engage with matched tax treaty partners to agree on a synthesized text of the bilateral treaties. A synthesized text is a document that combines the text of an existing tax treaty with the provisions of the MLI that are applicable for that treaty based on agreement between the tax jurisdictions. This provides a clear basis to show how the treaty will be modified by the MLI. Synthesized texts enable users to understand how the MLI modifies a specific treaty. Kenya's failure to include specific treaties (Germany, Iran, Norway, UAE, and Zambia) as Covered Tax Agreements is likely to be indicative of Kenya's intention to renegotiate or terminate these treaties.
- **Treaties awaiting ratification:** For the tax treaties awaiting ratification such as the Kenya-Italy treaty, which have been included as matched agreements, these will be modified based on the matched provisions of the MLI. For signed but not ratified treaties, which are not part of the matched agreements (such as China, East African Community, Netherlands), and treaties currently under proposal, consideration, negotiation or conclusion, Kenya may choose to bilaterally negotiate these treaties to include provisions of the MLI.

Conclusion

Kenya's deposit of the instrument of ratification of the MLI with the OECD is a strong indication of Kenya's commitment to modernising its international tax system to align with the OECD's BEPS objectives of preventing treaty abuse, aligning value creation with economic substance and making tax dispute resolution more effective.

For further details, please contact your usual PwC Kenya tax contact or any of the tax experts listed herein.