POINTONpartners
Lawyers

BEPS MLI measure in the Australian Parliament

21 June 2018

Taxation Law

A Bill to enact OECD BEPS Measure 15 was introduced into the House on 28 March 2018, with the government's hope that it will pass the Parliament before the end of the financial year on 30 June 2018. If enacted, this will make Australia one of the first signatories to implement Measure 15.

Measure 15, the Multilateral Instrument (MLI - signed by Australia and 67 other countries on 7 June 2017), will obtain the force of law in Australia by amendment to the *Tax Agreements Act* by *Treasury Laws Amendment (OECD Multilateral Instrument) Bill 2018* with earliest likely effect from 1 January 2019.

The MLI will have the effect that where parties to a bilateral double tax agreement (DTA) were both signatories to the MLI, and had both elected to adopt the same amendments to their DTAs under the MLI, the bilateral DTA would not need to be individually renegotiated. This approach has the opportunity of allowing the OECD BEPS recommendations to be implemented on a world-wide basis in a relatively short period of time, compared to individual renegotiation of bilateral DTAs.

The MLI had some 16 main features which could be elected to be adopted. Note that Australia's recent DTA with Germany had already adopted many of the BEPS recommendations for DTA change.

POINTONpartners
Lawyers

Of particular note is that the OECD BEPs Project ultimately did not deal with E-Commerce separately from other commerce.

Eight DTA Partners Not Signatories

As of 5 June 2018, eight countries with which Australia has DTA's which have decided not to become signatories to the MLI: the US, Philippines, Thailand, Vietnam, Taiwan, Sri Lanka, PNG and Kiribati. It goes without saying that the US decision not to become a signatory to the MLI is very significant. However, from Australia's perspective bearing in mind the propensity to outbound treaty-shop through Malaysia, Malaysia's late decision to sign the Convention (on 24 January 2018) is also quite significant. Malaysia is of interest due to its significant DTA network, its territorial system of taxation, and the application of the Labuan (Malaysia) IBFC under all but around 10 of its DTAs. It may become more utilized if the recent change in the Malaysia government reduces the sovereign risk that had become apparent under the former Prime Minister.

Four DTA Partners didn't nominate Australia as a CTA

Of Australia's 43 DTAs, another four countries have chosen not to nominate their DTA with Australia as a "Covered Tax Agreement", which has the effect that like the nine countries that have not signed the MLI at all, Australia's DTAs with Austria, Korea, Sweden and Switzerland are also unaffected by the MLI.

Australia hasn't Adopted Articles 10 or 12

Australia has decided not to adopt the MLI Article 10 – "Anti-abuse rule for permanent establishment situated in third jurisdictions", and also chosen not to adopt Article 12 – "Artificial avoidance of permanent establishment through commissionaire arrangements and similar strategies".

Whilst planning using permanent establishments (PEs) in third jurisdictions has been limited in the Australian context, there are some structures where an Australian resident company has traded through a Swiss or Singapore branch. However, such strategies were famous elsewhere, such has the Swiss finance branch of a Dutch company. What is also significant to notice about Article 10 of the MLI is, if it had been applied by both Malaysia and Singapore (well known "mid-shore" rather than "offshore" jurisdictions), it would have impacted upon the Labuan, Malaysia branch of a Singapore company, which is of some interest to Australian multinationals with third country trading income.

Australia's decision not to adopt Article 12 is highly significant. Had it done so and Australia's DTA partner also done so, then Australia would have been entitled to tax more income with an Australian source deemed to be associated with a PE in Australia than would currently have been possible, but Australia's DTA partners would have been able to do the same. That is, tax Australian resident companies on profits sourced in their countries which to date have not been taxable due to their being no PE in the foreign DTA partner. It would appear that Australia has not adopted Article 12 as the increased foreign taxation of Australian resident companies would have correspondingly

POINTONpartners
Lawyers

reduced Australia's tax on such companies' income, as Australia would need to give a foreign tax offset for any foreign taxes paid. That is, the adoption of Article 12 by Australia and its treaty partners would have potentially created a net loss of tax to Australia.

However, Australia and Malaysia have both adopted the "Specific Activities Exemption" (Article 13 Option A) which is designed to ensure that the specific activities in DTAs as not constituting a PE, will only continue to be exempt provided they are Preparatory or Auxiliary. Because both countries have adopted the same Option, the provisions of Article 13 Option A will apply between those two countries. Singapore has adopted Article 13 Option B, which also excludes those activities (and unspecified activities unless they are Preparatory or Auxiliary) but as Australia and Singapore have adopted different Options, neither Option will apply between those countries.

US Companies Trading with Australia

As stated above, as the US has not signed the MLI, US companies that do not meet the threshold for being "Significant Global Entities" (SGEs) under the recent amendments to Australia's general anti-avoidance rule (GAAR - Part IVA, particularly the MAAL), will continue not to pay tax in Australia if under the current bilateral DTA, they did not have a PE. If they are not SGEs, income from trading with Australia through E-Commerce will remain untaxed if there are no other law changes.

Singapore and Malaysia Outbound "Stepping Stones" may Survive

Interestingly for treaty-shopping outbound from Australia, whilst Singapore and Malaysia have both become signatories to the MLI, Singapore has only adopted the mandatory Preamble (Article 6) and "Principal Purpose Test" (Article 7) and Mandatory Binding Arbitration (Article 19). Singapore and Australian have not adopted Articles 10 and 12, and so some "stepping stone" through Singapore is likely to still be available. Whilst the MLI has also has welcomed aspects such as Mandatory Binding Arbitration, which Australia and Singapore have both adopted (but not Malaysia), it would be fair to say that Australia and Singapore's choices in relation to being signatories to the MLI, will leave Singapore as an outbound "stepping stone" from Australia if there is sufficient substance to the Singapore company's presence in Singapore.

As Malaysia has adopted Articles 12 & 13 (Option A), it makes the use of Malaysia as a "stepping stone" largely dependent on Malaysia's DTA partners also adopting Articles 12 & 13 (Option A), although E-Commerce should remain unaffected for electronic downloads of software, and for goods sent directly into the customer's country rather than being filled from a stock already warehoused in that country.

E-Commerce

Whilst the BEPS Project did not deal separately with E-Commerce (but may be affected by e.g. Article 13), there are moves afoot in the EU (led by France) to introduce turnover taxation on E-Commerce conducted with EU residents. Also, Australian Treasury is expected to shortly deliver an Options Paper on the topic to the Australian government.

If you have any queries about this article, please contact Robert Gordon or Tony Pointon on 03 9614 7707.