



# China Tax Alert

Issue 35, November 2016



## BEPS Multilateral Instrument for worldwide tax treaty updates released by OECD

### Regulations discussed in this issue:

- Organisation for Economic Co-operation and Development ("OECD") document "Multilateral Convention to implement tax treaty related measures to prevent Base Erosion and Profit Shifting (BEPS)", released on 24 November 2016 ("Multilateral Instrument", or "MLI")
- OECD document "Explanatory Statement to the Multilateral Convention to implement tax treaty related measures to prevent Base Erosion and Profit Shifting", released on 24 November 2016 ("MLI Explanatory Statement")
- OECD document "Action Plan on Base Erosion and Profit Shifting", issued on 19 July 2013 ("BEPS Action Plan")
- OECD report "BEPS Action 15: Developing a Multilateral Instrument to Modify Bilateral Tax Treaties", issued on 5 October 2015 ("BEPS Action 15 Report")

### Background

On 24 November 2016 the OECD posted to their website the long-awaited Multilateral Instrument (MLI) for implementing tax treaty-related measures set out under the G20/OECD BEPS Project. The MLI was envisaged by the 2013 BEPS Action Plan (Action 15) as a crucial mechanism for simultaneously updating the thousands of bilateral double tax agreements (DTAs) in existence. It allows for the October 2015 BEPS Deliverables minimum standards and recommendations to be updated to DTAs en masse, without having to go through the time-consuming bilateral negotiations normally required for each new/updated DTA. With over 100 jurisdictions having been involved in the MLI negotiations it is anticipated that in excess of 2,000 DTAs (out of the 3,000 plus in existence globally) will be updated by the time of the formal signing ceremony for the MLI on 5 June 2017, though changes will generally become effective at later dates in 2018 and 2019.

The MLI, as clarified in the accompanying MLI Explanatory Statement, is a highly complex document. It has been designed to allow MLI participant jurisdictions (i) to nominate a selection of their DTAs to be updated for BEPS measures and (ii) to express their detailed preferences for the manner in which they wish their DTAs to be updated. The manner in which these preferences match to the preferences expressed by other jurisdictions determines how the DTAs will ultimately be updated.

The 100-plus MLI participant jurisdictions will, over the next six months, need to carefully consider which DTAs to nominate for update and which BEPS updates to opt for, and evaluate how this will interact with the preferences likely to be expressed by other jurisdictions. The changes that will be made to China's DTA network, and to the DTA networks of other jurisdictions, will profoundly affect the tax treatment of businesses operating and investing cross-border into and out of China. The likely changes made under the MLI should be fully considered by businesses and the need for adjustment to tax strategies and structures considered.

## Regulations discussed in this issue:

- OECD report " BEPS Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances" issued on 5 October 2015 ("BEPS Action 6 Report")
- OECD report " BEPS Action 7: Preventing the Artificial Avoidance of Permanent Establishment Status" issued on 5 October 2015 ("BEPS Action 7 Report")
- OECD report "BEPS Action 14: Making Dispute Resolution Mechanisms More Effective" issued on 5 October 2015 ("BEPS Action 14 Report")
- OECD report " BEPS Action 2: Neutralising the Effects of Hybrid Mismatch Arrangements" issued on 5 October 2015 ("BEPS Action 2 Report")

## Substantive and procedural aspects of the MLI

The October 2015 BEPS Deliverables set out a large number of international tax rule changes with differing levels of optionality. For an overview of the changes see [China Tax Alert Issue 28 \(October 2015\)](#). The core commitments adopted by BEPS participants are the minimum standards. These include:

- BEPS Action 5: Patent box regimes and exchange of rulings
- BEPS Action 6: Anti-treaty abuse rules
- BEPS Action 13: Transfer Pricing (TP) documentation
- BEPS Action 14: Mutual Agreement Procedure (MAP) measures

These were originally committed to by the OECD member states and the G20 nations. With the establishment of the Inclusive Framework on BEPS in June 2016 the minimum standard commitments were broadened to 85 jurisdictions, with an estimated 104 jurisdictions to be onboard by the end of 2016.

The jurisdictions committed to these BEPS minimum standards have made domestic tax law and administrative changes to comply with the patent box, TP documentation and MAP requirements. They have also entered into a range of bilateral and (OECD-sponsored) multilateral arrangements for the exchange of rulings and country-by-country (CBC) reports. OECD-instigated Peer Review arrangements have been further established to ensure that these minimum standards are met. Alongside these measures, the MLI facilitates jurisdictions to satisfy the BEPS minimum standards in relation to the anti-treaty abuse rules and MAP DTA provisions. This is by providing a mechanism through which the relevant provisions of the BEPS-updated OECD Model Tax Convention (MTC) can be imported into their DTAs.

At the same time, beyond the BEPS minimum standards, the 2015 BEPS Deliverables had also proposed other international tax rule upgrades. Revisions to the permanent establishment (PE) tax nexus threshold (BEPS Action 7) were made to the OECD MTC. Recommended changes to domestic law, and facilitative changes to the OECD MTC, were also set out in order to counter hybrid mismatch arrangements (BEPS Action 2). As neither of these were made minimum standards, the MLI facilitates voluntary adoption of these measures. We set out below the substantive DTA changes facilitated by the MLI (minimum standards first, followed by optional updates), and the novel mechanisms set out for their adoption.

### *Substantive changes to DTAs to adopt BEPS measures*

#### *Treaty anti-abuse rules*

BEPS Action 6 on treaty anti-abuse rules contains both minimum standards and recommended (non-obligatory) DTA changes:

- Statement of intent of DTA to avoid non-taxation (minimum standard);
- Three alternative rules to address treaty abuse (minimum standard):
  1. Principal purposes test (PPT) – default option; or
  2. PPT and simplified or detailed limitation on benefits (LOB) rule; or
  3. Detailed LOB and anti-conduit rule.

### Regulations discussed in this issue:

- OECD Report " BEPS Action 5: Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance" issued on 5 October 2015 ("BEPS Action 5 Report")
- SAT Announcement on Administrative Measures for Granting Tax Treaty benefits to non-residents, Gonggao [2015] No. 60, issued on August 27, 2015 ("Announcement 60")
- OECD Model Tax Convention on Income and Capital, issued in 2014

- Minimum shareholding period rule for dividend withholding tax (WHT) relief (optional);
- Integrity provision for WHT relief for capital gains on disposal of land-rich shares (optional);
- Integrity provision for WHT relief on payments to third country PEs in so-called "triangular cases (optional);
- Residence jurisdiction anti-abuse rule "saver" clause (optional).

### MAP minimum standards

BEPS Action 14 on MAP sets out 17 specific minimum standard measures and 11 best practices. Most of these are identified improvements to tax authority internal administrative procedures, but a small number of the minimum standards require updates to DTA provisions. The MLI MAP minimum standard updates would ensure that the MAP articles in all MLI participant DTAs reflect the version included in the 2014 version of the OECD MTC, with some variations permitted.

The MLI also provides for the inclusion of a TP correlative adjustment in DTAs or, in the alternative, a jurisdiction can commit to resolve TP double tax situations through MAP. The MLI also includes an optional mandatory binding arbitration rule, including an option of 'baseball arbitration'. 20 developed countries had committed to adoption of this rule in October 2015 and 27 participated in the negotiations, indicating that more jurisdictions may adhere to it in due course.

### BEPS PE rules

The highly controversial BEPS Action 7 PE rules are designated as optional in the MLI. Countries may adopt all, part or none of the BEPS PE updates. The PE changes are documented in detail in our earlier China Tax Alert ([China Tax Alert Issue 28 - October 2015](#)) and include:

- Expansion of the Dependent Agent PE (DAPE) rule. The new rule looks at whether the local market-based person 'habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the [non-resident] enterprise'. This would replace the prior DAPE rule which turns on whether a non-resident had authorized a local market-based person to habitually negotiate/contract with local customers on the former's behalf;
- Narrowing the independent agent PE rule, denying the PE exclusion where the local person acts largely for foreign related parties;
- PE exclusions for 'specific activities' (e.g. warehousing, purchasing, information collection etc.) may now be each subject to an overriding 'Preparatory and auxiliary' (P&A) test;
- In the alternative, the P&A specific exclusions may be preserved, but subjected to an anti-fragmentation test. Under this, the activities of connected enterprises at the same or separate places in the source country may be aggregated in determining if the P&A threshold has been exceeded, such that a PE exists.

- An anti-contract splitting rule may be introduced into a DTA to deal with arrangements designed to make the duration of a given project fall under the time limit for a construction (and possibly a service) PE. Activities of separate, closely-related enterprises may be aggregated for the purposes of this rule.

#### *Hybrid mismatch arrangements*

BEPS Action 2 sets out non-binding recommendations for jurisdictions to adopt domestic and DTA rules to counter the effects of hybrid mismatch arrangements, including those using hybrid entities, hybrid instruments and hybrid transfers. Recommended changes to domestic law include limitation of dividend participation exemptions, and tweaks to controlled foreign company (CFC) and entity characterization rules. This is as well as a scheme of linking, automatic rules under which taxation in one country, on one end of a transaction, responds to taxation in another country, on the other end of the transaction. The DTA changes are intended to facilitate the application of these domestic rules, and deal with other mismatch arrangements: they are optional for jurisdictions to adopt:

- With a view to avoiding double non-tax outcomes, the adoption of one of three rules:
  1. Use of an existing OECD MTC rule which allows a residence country to stop using the exemption relief method, and use the credit method instead, where a DTA exempts/reduces source state taxation;
  2. Switch from exemption to credit relief where a payment was deductible in the source state;
  3. Complete replacement of exemption with credit relief.
- A “transparency” rule applying to partnership and trust arrangements. When choosing whether to apply DTA WHT relief, and selecting the appropriate DTA, the source country for a payment will be guided by the tax treatment in a residence state. It will treat income as arising to a foreign person through a transparent entity where the residence country of that foreign person adopts this taxing position;
- For dual tax residence cases for persons other than individuals, use of a ‘mutual agreement’ approach, in place of the traditional ‘place of effective management rule’;

#### *Procedural rules for making DTA updates*

The MLI uses highly intricate mechanisms to effect the BEPS DTA updates, which allow participant jurisdictions to make a large number of tailored selections. The manner in which these preferences match to the preferences expressed by other jurisdictions determines how the DTAs will ultimately be updated:

- Jurisdictions nominate which of their DTAs, with the other MLI participants, they wish to update;
- For minimum standards, a jurisdiction may select from a number of possible DTA update options. It is intended that the selection made will apply to all of the jurisdiction’s DTAs (i.e. the jurisdiction cannot select that it will apply the BEPS updates, through the MLI, to some of the DTAs it has nominated into the MLI, but not others).

So, for example, in relation to the treaty abuse minimum standard:

- A selection can be made of (i) just PPT; (ii) PPT + LOB (simplified/detailed); (iii) detailed LOB + anti-conduit rule;
- Where the nominated counterparty jurisdiction makes the same selection (e.g. just PPT) then this will be the DTA update made;
- Where the counterparty jurisdiction makes a different selection (e.g. Country A chooses just the PPT, while Country B chooses the PPT + LOB) then further pre-selected preferences by the countries kick in (e.g. default to just PPT, or default to PPT + LOB);
- The net result is that countries must consider carefully in advance which selections their counterparties will (or are likely to) make;
- Countries may also take the position that their existing rules have equivalent effect to the MLI minimum standard updates and make reservations to exclude MLI updates being made;
- Equivalently complex rules exist for making the (non-minimum standard) optional updates, whereby matching selections made by counterparties will result in MLI updates taking effect.

Extensive information must be supplied by jurisdictions to the OECD, which acts as the MLI Depository, including:

- “Lists” of the existing provisions in their DTAs which are to be subject to update with the new MLI provisions. Identifying these provisions is aided by the so-called “compatibility clauses” in the MLI. For example, the PPT is intended to replace, inter alia, all the tax avoidance “main purpose” rules in DTA passive income articles and so countries would need to list these out for the OECD, where they arise in DTAs;
- “Notifications” of DTAs to be altered and the update options selected;
- “Reservations” where jurisdictions do not wish to make a given update to their DTAs. These reservations should, in general, apply to all of a jurisdiction’s DTAs that are nominated for update in the MLI. However, in certain specified cases, reservations to preserve special provisions appearing in a country’s DTAs can be applied. For example, when adopting the transparency rule across its DTAs, if a given jurisdiction includes in some DTAs a provision denying transparency where the trust/partnership is in a third country, then this provision may be optionally preserved by reservation.

Guidance is set out for resolving uncertainties, such as when a jurisdiction makes a reservation on a given DTA update, on the basis that its existing provision is BEPS-compliant, but where the DTA counterparty disputes this. MAP procedures and even a conference of the MLI participants may be called upon to resolve disputes. The BEPS-compliance of the minimum standard DTA updates will ultimately be subject to the Inclusive Framework Peer Review.

Detailed provisions are also set out for nominating additional DTAs into the MLI after initial signing, for withdrawing existing reservations/ introducing new reservations, and for withdrawal from the MLI altogether. The effective dates for DTA changes under the MLI are prescribed, with different effective dates applying for WHT-related provisions and for other clauses.

## KPMG Observations

### *Observations on the MLI content*

In order to satisfy the requirements and preferences of a large number of jurisdictions, the OECD has built a great deal of flexibility and optionality into the MLI. Many of the BEPS rules, which had caused most concern in the tax community, have been made optional and may see more limited adoption than was originally thought likely.

Notably, the BEPS PE rules have all been made optional. The US, the UK and Germany had all been noted as lukewarm on the adoption of the BEPS PE rules. There is also a trend amongst countries to adopt PE avoidance solutions outside the BEPS framework (e.g. diverted profits taxes in Australia and the UK, and prospectively in France and New Zealand). It might therefore be asked (i) what level of take up the BEPS PE rules will see and (ii) whether a diversity of PE approaches could result from BEPS, rather than the uniform approach hoped for.

It is also apparent from the content of the MLI that many of the “work in progress” BEPS items have not been finalized for inclusion in the MLI:

- The October 2015 BEPS Action 6 report included a number of proposed DTA rules, drawn from the summer 2015 draft updated US MTC. These included a rule denying WHT relief for payments to foreign enterprises benefiting from “special tax regimes” and a rule providing that treaty benefits could be denied where there were major changes to a counterpart’s tax system, post-DTA signing. Neither of these rules have made it to the MLI, and plans for them are unclear;
- An OECD consultation had taken place in 2016 in relation to nuancing the treaty abuse rules, in particular the LOB, for the circumstances of collective investment vehicles (CIVs) and so-called “non-CIVs” (e.g. private equity funds, sovereign wealth funds, etc.). No CIV/non-CIV specifics appear to have been adopted in the MLI. Indeed, a detailed LOB is not included in the MLI at all - it is left to jurisdictions adopting a detailed LOB to design one “in line with” BEPS minimum standards.

### *Implications for China’s DTA network*

The release of the MLI opens up many crucial questions concerning how China’s DTA network will be updated. China has, with 105 DTAs, the world’s third most expansive DTA network after the UK and France. Having been centrally involved in MLI discussions as a G20 member, it is widely expected that China will make DTA updates through the MLI, though which updates it will make, and to which of its DTAs, is as yet unclear. The following observations may be made:

*PE:* China was an early adopter of the BEPS PE changes, with the May 2015-signed China-Chile DTA even adopting the BEPS PE rules pre-finalization by the OECD. However, subsequent new/updated DTAs/protocols have not made further BEPS PE updates. The new BEPS DAPE rule focuses on local persons “convincing” customers to buy the goods/services of a foreign enterprise - this could create significant risk and uncertainty for foreign enterprises doing business in China, if adopted across China’s DTA network. The challenges are heightened by ambiguities in China’s guidance on PE profit attribution.

Furthermore, there is a possibility that the anti-contract splitting rule might be applied to the service PE articles of Chinese DTAs, as was done in the Chile DTA. However, with the BEPS PE provisions being made optional, it remains to be seen how China takes them forward.

*Treaty abuse rules:* The PPT has been set as the default treaty abuse rule in the MLI, and it is generally considered that China prefers PPT adoption over the LOB. This would be in line with the manner in which Chinese tax authorities have been energetically applying the domestic law general anti-avoidance rule (GAAR) to cross-border tax avoidance cases in recent years. The SAT had also clarified in SAT Announcement 60 [2015] that challenges to treaty abuse would be based on the GAAR (or treaty-based anti-abuse rules) and follow GAAR procedures.

While the recent Chile and Russia DTAs had adopted LOBs, many more China treaties contain tax avoidance “main purpose” rules. Many of these rules are embedded in the passive income articles of China’s DTAs and, per the MLI, these would be replaced with full-fledged PPTs. It remains to be seen whether adoption of PPTs across China’s DTA network would lead to any nuanced approaches to enforcement, and whether the BEPS PPT guidance would be drawn on in enforcement cases. It also remains to be seen how China would adopt the integrity rules for dividend and capital gains relief (already integrated in many China DTAs through specific provisions or administrative practices) and the triangular PE rules.

*MAP:* The SAT has recently been bulking up its resources to resolve MAP cases - the MLI may update the MAP wording in some of China’s older DTAs and so lend further support to these efforts. However, China has not indicated any intent to adopt arbitration any time soon.

*Hybrid arrangements:* Adoption of hybrid mismatch rules in China are complicated by the difficulties of updating the Corporate Income Tax law and so the status of any such updates is unclear. As regards the hybrid-related provisions of the MLI, it might already be noted that many of China’s most recent DTAs have already adopted the ‘mutual agreement’ approach to resolving dual residence cases for enterprises. The recent China-France DTA set out detailed transparency provisions. Whether the related provisions of the MLI are adopted by China remains to be seen.

It should be noted that as Hong Kong and Macau have separate tax systems from Mainland China, separate arrangements would need to be made if these were to join the MLI – this remains to be clarified

### *Next steps*

The MLI will open for signing from 31 December 2016, and the following six months, up to the formal signing ceremony will be crucial for the future of the global DTA network. In this time China and the other MLI participants will determine which of their DTAs they wish to update and how they wish to update them. Particular attention will be on the DTA update selections made by other countries, given how this interacts with counterparty selections in producing MLI DTA update outcomes.

The 2017-notified MLI DTA updates will take effect throughout 2018 and 2019, against the backdrop of further BEPS changes (e.g. TP profits splits guidance), new global tax initiatives under the G20 “tax certainty” agenda and global automatic tax information exchange, as well as national rollout of BEPS rules in domestic law and other measures. Businesses operating cross-border with China should keep well informed of developments.

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