Executive summary

On 7 June 2017, The Netherlands and 67 other jurisdictions signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (the MLI) during a signing ceremony hosted by the Organisation for Economic Co-operation and Development (OECD) in Paris.¹

At the time of signature, the Netherlands submitted a list of 82 tax treaties entered into by the Netherlands and other jurisdictions that the Netherlands would like to designate as Covered Tax Agreements (CTAs), i.e., tax treaties to be amended through the MLI. Together with the list of CTAs, the Netherlands also submitted a provisional list of reservations and notifications (MLI positions) in respect of the various provisions of the MLI. The definitive MLI positions will be provided upon the deposit of its instrument of ratification, acceptance or approval of the MLI.

The Netherlands has chosen to apply almost all articles included in the MLI to the CTAs that are in scope. It made a reservation to not apply Article 11. Article 11 contains a so-called "saving clause" that clarifies that a treaty does not restrict a jurisdiction's right to tax its own residents, except with respect to certain treaty provisions.
The most important changes that will affect all of the submitted Dutch CTAs relate to the introduction of a principal purpose test (PPT) and an amendment of the preamble that states that the relevant tax treaty is not intended to create opportunities for non-taxation or reduced taxation.

The MLI will enter into force after the first five signatories have notified its ratification to the OECD. The MLI will enter into effect for a specific bilateral tax treaty when a specified number of months have passed after the MLI has entered into force and both parties to the CTA have notified ratification of the instrument to the OECD. For example, for withholding taxes, the MLI will enter into effect on 1 January following notification of ratification by the second party to the CTA.

The Dutch Government has confirmed that the ratification of the MLI is deemed to be “non-controversial,” which means that the ratification process may be set in motion during the formation of the new Government which is ongoing at the moment. The same ratification process applies as the one relating to bilateral tax treaties. As priority is likely to be given to the processing of the Budget and Tax Plan in the fall of 2017, ratification is expected in 2018.

Detailed discussion

Background

The Netherlands was one of 68 jurisdictions to sign the MLI during a signing ceremony hosted by the OECD in Paris on 7 June 2017. Eight other jurisdictions expressed their intent to sign the MLI in the near future. The signing ceremony marks another key milestone in the Base Erosion and Profit Shifting (BEPS) project, in particular with respect to the implementation of the treaty-related BEPS minimum standards. At the time of signature, signatories submitted a list of their tax treaties in force that they would like to designate as CTAs, i.e., to be amended through the MLI. In addition, signatories submitted a preliminary list of their MLI positions in respect of the various provisions of the MLI. The definitive MLI positions for each jurisdiction will be provided upon the deposit of its instrument of ratification, acceptance or approval of the MLI. The OECD has published on its website the list of signatories and country-specific files containing an overview of the CTAs and reservations and notifications as filed as of 7 June by those countries.

One of the main purposes of the MLI is to enable countries to meet the treaty-related minimum standards that were agreed as part of the final BEPS package, i.e., the minimum standard for the prevention of treaty abuse under Action 6 and the minimum standard for the improvement of dispute resolution under Action 14. For the minimum standard provisions, the right to opt-out only exists to the extent the CTA already includes a similar minimum standard.

The MLI also contains a number of alternatives or optional provisions that generally will apply only if all Contracting Jurisdictions to a CTA affirmatively choose to apply a particular alternative or option. Many of these provisions are only applicable if both Contracting Jurisdictions to a CTA do not make a reservation against the provision. However, for some specific articles, Contracting Jurisdictions may choose different options resulting in an asymmetrical application of this provision.

This Alert summarizes the (provisional) positions taken by the Netherlands.

The Netherlands Covered Tax Agreements

The Netherlands has submitted a list of 82 tax treaties that it wishes to designate as CTAs, i.e., to be amended through the MLI.

Accordingly, the Netherlands has chosen to include the vast majority of the jurisdictions that form part of the Dutch tax treaty network. Some of the countries in the Dutch CTA list, however, have not yet signed and/or are not expected to sign the MLI. This relates for example to the United States, Morocco and Panama.

The Netherlands has excluded 12 tax treaties currently in force from the scope of the MLI. This relates to the tax treaties concluded with Belgium, Brazil, Bulgaria, Denmark, Ireland, Kosovo, Kyrgyzstan, Poland, Spain, Switzerland, Taiwan and Ukraine. The reasoning behind this exclusion is that the Netherlands and the underlying jurisdictions are currently (re)negotiating the tax treaties. Furthermore, the tax arrangement with Curacao, which functions similar to a treaty, is also not within scope.

MLI provisions

Hybrid mismatches

Part II of the MLI (Articles 3 to 5) introduces provisions which aim to neutralize certain of the effects of hybrid mismatch arrangements based on the recommendations made in the BEPS Actions 2 and 6 final reports released in October 2015.
The provisions cover hybrid mismatches related to transparent entities, dual resident entities and elimination of double taxation. These provisions are all not minimum standard provisions and therefore Contracting Jurisdictions have the right to opt to not apply these provisions to their CTAs.

Article 3 - Transparent entities
This provision addresses the situation of hybrid mismatches as a result of entities that one or both Contracting Jurisdictions treat as wholly or partly transparent for tax purposes. Article 3 is not a provision required to meet a minimum standard and therefore jurisdictions can opt out of this article entirely. The provision will apply in all cases in which all the parties to a CTA agree on its application. If selected, it will apply in place or in absence of an existing provision.

Should a jurisdiction decide to apply paragraph 1 of Article 3, then the income derived by or through an entity or arrangement that one of the Contracting Jurisdictions considers as wholly or partly fiscally transparent will be treated as income of a resident of a Contracting Jurisdiction, to the extent it is treated as income of a resident of that Contracting Jurisdiction for tax purposes in that Contracting Jurisdiction.

The Netherlands has reserved the right to not apply Article 3, paragraph 1 to the CTAs concluded with Japan, the United Kingdom and the United States, as these CTAs already contain a provision in line with the policy aims of this article. With respect to the other CTAs, the Netherlands has not made any reservations to not apply Article 3, paragraph 1. As such, this provision should apply to the other CTAs in scope from a Dutch perspective. It will replace the existing provisions identified through paragraph 6 of Article 3 and will be included in all other CTAs in absence of such a provisions. It should become effective if the other Contracting Jurisdiction has not made a reservation as well.

The Netherlands has not made a reservation to not apply Article 3, paragraph 2. If the other jurisdiction has made the same choice as the Netherlands, the underlying CTA should not provide for a relief for double taxation where the other jurisdiction solely levies tax on the basis of residence (of the partners).

Article 4 - Dual resident entities
This provision would replace the current tie-breaker rules applicable to dual-resident companies (i.e., generally residence is determined by place of effective management) by a mutual agreement procedure (MAP). It should be noted that under the MAP, the Contracting Jurisdictions are not obliged to successfully reach an agreement and in absence of a successful mutual agreement, a dual resident entity is not entitled to any relief or exemption from tax provided by the CTA except as may be agreed upon by the Contracting Jurisdictions.

Pursuant to Article 4, paragraph 4, the Netherlands has provided an overview of the CTAs which already contain specific wording on dual resident entities. If other jurisdictions also apply Article 4, paragraph 4, and include the Netherlands as the other Contracting Jurisdiction, Article 4, paragraph 1 should apply in place of the existing rule for dual resident entities (i.e., in most tax treaties concluded by the Netherlands this means that the place of effective management to determine residency would no longer apply) in the underlying CTA. Consequently, this means that going forward the MAP is the instrument that should be used in case there is a dual resident entity.

Article 5 - Application of methods for elimination of double taxation
Article 5 includes three options for Contracting Jurisdictions for the methods of eliminating double taxation. However, jurisdictions also have the option to not apply any of the options included in Article 5. Where Contracting Jurisdictions to a CTA choose different options, the option chosen by a Contracting Jurisdiction would apply to its own residents only.

The Netherlands has chosen to apply option A to eliminate double taxation in the existing CTAs (switch over clause). Under that option, the Netherlands would not grant an exemption otherwise foreseen in the CTA where the other Contracting Jurisdiction applies the provisions of the CTA to exempt such income or capital from tax or to limit the rate at which such income or capital may be taxed. Instead, the Netherlands would grant a tax credit for the foreign tax on the income or capital (within the ordinary limits that apply to tax credit in the Netherlands). This provision would apply to all the 82 CTAs concluded by the Netherlands which are included in the scope of the MLI. One thing to note is that even though such a switch over clause allows the Netherlands to apply the credit method in the circumstances described, it will depend on the domestic legislation in the Netherlands whether it will actually be able to make use of this provision. If, for example, an exemption is provided in the Dutch Corporate Income Tax Act, the switch over clause will not lead to the creation of a taxing right. Such will be the case if the Dutch participation exemption applies.
**Treaty abuse**

Part III of the MLI (Articles 6 to 13) contains six provisions related to the prevention of treaty abuse, which correspond to changes proposed in the BEPS Action 6 final report (*Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*). In particular, the report contains provisions relating to the so-called “minimum standard” aimed at ensuring a minimum level of protection against treaty shopping (Article 6 and Article 7 of the MLI).

**Article 6 – Purpose of a CTA**

All CTAs concluded by the Netherlands - provided that the other Contracting Jurisdiction has chosen the same preamble - will be amended to include the following preamble text:

*Desiring to further develop their economic relationship and to enhance their co-operation in tax matters.*

Furthermore, the preamble of the existing CTAs appointed by the Netherlands (exception holds for France) as being in scope for the MLI will be replaced - if the other Contracting Jurisdiction also applies Article 6, paragraph 4 - or will be broader - if the other Contracting Jurisdiction does not apply Article 6, paragraph 4 - by the first paragraph of Article 6. Article 6, paragraph 1 prescribes the following:

*Intending to eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions).*

**Article 7 – Prevention of treaty abuse**

All CTAs concluded by the Netherlands will be amended to include a PPT. According to the minimum standard on treaty abuse as included in the final report on Action 6, countries should include in their tax treaties one of the following provisions (i) the PPT, (ii) a detailed limitation on benefits (LOB) provision modeled on the one contained in the US Model Tax Treaty supplemented by specific rules targeting conduit financing arrangements, or (iii) a combination of PPT and a simplified LOB provision. Options (i) PPT and (iii) simplified LOB in combination with a PPT, are included in the MLI. Where the other Contracting Jurisdiction has opted for a detailed LOB provision, the Netherlands has not affirmatively agreed to either a symmetrical application of the simplified LOB, or an asymmetrical approach by allowing the simplified LOB application by the other Contracting Jurisdiction. Therefore, only the PPT will be applied in that case.

The PPT is worded as follows:

*Notwithstanding any provisions of a CTA, a benefit under the CTA shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the CTA.*

A PPT analysis will be very case-specific. It is not a substance-test, but refers to the purpose of an arrangement or transaction. Where treaty access is relevant, it will therefore be important to properly document the purpose and intention of a transaction.

The Netherlands had also opted into the derivative benefits test included in paragraph 4 or Article 7 of the MLI, which grants treaty benefits when similar benefits would result if the arrangement of transaction would not have been used.

In addition, the Netherlands has made a notification with respect to the existing CTAs that already include a similar anti-abuse rule which should be replaced by the PPT (for example, China, Mexico and the United Kingdom).

**Article 8 – Dividend transfer transactions**

This provision is intended to deal with abuse in relation to dividend withholding tax exemptions or reductions by among other things introducing a minimum holding period.

The Netherlands has chosen to apply the underlying rule to dividend transfer transactions, whereby for the CTAs whereby the Netherlands is a Contracting Jurisdiction the main amendment will be the twelve month holding period. In this respect, it should be noted that the Dutch legislator published a consultation document containing proposals to broaden the scope of the domestic exemption to withhold Dutch dividend withholding tax on dividend distributions made to companies established in a tax treaty jurisdiction. Should the proposal be introduced, companies - provided that certain anti-abuse rules are met - can rely on the application of the domestic exemption that does not have a minimum holding period, instead of relying on the tax treaty going forward.
Article 9 – Capital gains from alienation of shares or interests of entities deriving their value principally from immovable property

Article 9 incorporates an anti-abuse rule with respect to capital gains realized from the sale of shares of entities deriving their value principally from immovable property. The Netherlands has decided to apply this article for all CTAs which include an existing provision in this respect and has provided an overview of the CTAs which already include a similar provision. For example Canada, France, Germany and the United Kingdom already include a similar provision with respect to capital gains on the transfer of interests in entities which main assets consist of immovable property. If these jurisdictions have also chosen to apply Article 9, the provision included in the existing treaty will be replaced by the underlying measure.

Article 10 – Anti-abuse rule for permanent establishment situated in third jurisdictions

This provision deals with situations where an enterprise of one Contracting Jurisdiction has a permanent establishment (PE) in a third country to which income derived from the other Contracting Jurisdiction is allocated and exempt from tax in the first-mentioned state (triangulation situations). If the income is taxed at a low rate (less than 60% of the tax that would be imposed in the jurisdiction of the head office), the benefits of the CTA will not apply. The provision is modeled on the “triangulation clause” found in US treaties.

The Netherlands has not made any reservations with respect to the application of Article 10 and as such this article will either replace (i.e., United Kingdom and United States) or be added to the relevant existing CTAs as part of the MLI initiative.

Article 11 – Application of tax agreements to restrict a party’s right to tax its own residents

Article 11 contains a so-called “saving clause” that clarifies that a treaty does not restrict a jurisdiction’s right to tax its own residents, except with respect to certain treaty provisions. The Netherlands (and 45 other countries) reserved its right not to apply this provision.

Avoidance of PE status

Part IV of the MLI (Articles 12 to 15) describes the mechanism by which the PE definition in existing tax treaties may be amended pursuant to the BEPS Action 7 final report to prevent the artificial avoidance of PE status through:

(i) commissioner arrangements and similar strategies (Article 12); (ii) the specific activity exemptions (Article 13); and (iii) the splitting-up of contracts (Article 14). Article 15 of the MLI provides the definition of the term “closely related to an enterprise,” which is used in Articles 12 through 14.

Article 12 – Artificial avoidance of PE status through commissioner arrangements and similar strategies

This article sets out how the changes to the wording of Article 5 of the OECD Model Tax Convention to address the artificial avoidance of PE status through commissioner arrangements and similar strategies can be incorporated in the CTAs specified by the parties. Article 12 also provide specific rules with respect to the concept of dependent agent PE and the independent agent.

The Netherlands decided to apply Article 12 as a whole, which means that both the rules that determine that a commissioner arrangement may create a PE and the rules regarding the concept of dependent agent PE and independent agent are opted into. All CTAs are in scope of these rules from a Dutch perspective. These rules should apply if there is the other relevant jurisdiction has also chosen to apply (part) of these rules.

Article 13 – Artificial avoidance of PE status through the specific activity exemptions

This article addresses the artificial avoidance of PE status through the specific activity exemptions included in Article 5, paragraph 4 of the OECD Model Tax Convention. Action 7, Preventing the Artificial Avoidance of Permanent Establishment Status, recommended that this exemption should only be available if the specific activity listed is of a preparatory or auxiliary character. The MLI provides two options for implementing the changes. Option A is based on the proposed wording in Action 7 (i.e., this exemption should only be available if the specific activity listed is of a preparatory or auxiliary character), while option B allows the Contracting Jurisdiction to preserve the existing exemption for certain specified activities.

Furthermore, Article 13, paragraph 4 contains the anti-fragmentation clause, pursuant to which the exemptions with respect to activities of a preparatory or auxiliary character will not apply in situations where the business activities constitute complementary functions that are part of a cohesive business operation. This implies that if the same company or related company within a group performs different activities in the same jurisdiction, which among others consist of activities that have a preparatory or auxiliary character, the exception
that this company does not have a deemed permanent establishment for its preparatory and/or auxiliary activities should not apply. Consequently, the company will have a permanent establishment in the relevant jurisdiction going forward despite that part of the activities have a preparatory or auxiliary character.

In amending the exemptions as included in Article 5, paragraph 4 of the OECD Model Tax Convention, the Netherlands has chosen to apply option A. As such, all the underlying CTAs as included within the scope of the MLI from a Dutch perspective should - provided that the other jurisdiction applies for the same option - be amended in a way that the exemption only applies to specific activities of a preparatory or auxiliary character. Furthermore, the Netherlands has not made any reservation with respect to the anti-fragmentation clause of Article 13, paragraph 4, which implies that the anti-fragmentation clause should - provided that the other jurisdiction has also not made any reservation in this respect - apply going forward from a Dutch perspective.

Article 14 - Splitting-up of contracts

Article 14 will include provisions in the existing CTAs - if adopted by both jurisdictions - that creation of a PE can no longer be prevented by splitting up contracts. The Netherlands has made a reservation to not apply this article with respect to provisions of its CTAs relating to the exploration for or exploitation of natural resources. Examples of CTAs that include a provision on the exploration for or exploitation of natural resources are Canada, Indonesia, Kazakhstan, Russia, South Africa and the United Kingdom. However, with respect to the CTAs with Germany, Norway and Suriname, the Netherlands wants to replace the existing provision with Article 14.

Article 15 - Definition of a person closely related to an enterprise

Article 15 describes the conditions under which a person will be considered to be “closely related” to an enterprise for the purposes of Articles 12, 13 and 14 of the MLI. As the Netherlands has not made a reservation to not apply Articles 12, 13 or 14 entirely, this article should apply.

Dispute resolution

Article 16 - MAP

Part V of the MLI (Articles 16 and 17) introduces provisions which aim to introduce the minimum standards for improving dispute resolution (the BEPS Action 14 minimum standards) and a number of complementing best practices. The Netherlands has chosen to implement the minimum standard for the MAP. Most CTAs already contain an option to initiate a MAP, but due to the minimum standard the procedure will be similar in all CTAs.

Article 17 - Corresponding adjustments

This provision is meant to apply in the absence of provisions in CTAs that require a corresponding adjustment where the other treaty party makes a transfer pricing adjustment.

Where one Contracting Jurisdiction to a CTA makes a reservation to not apply Article 17 and the other Contracting Jurisdiction does not, Article 17 of the MLI will not apply to the CTA, and there is no expectation created under the MLI that the Contracting Jurisdiction that has not made the reservation will make a corresponding adjustment. However, it should be guaranteed under the minimum standard on Action 14 that all transfer pricing adjustments that lead to double taxation will be granted access to MAP.

The Netherlands decided to apply Article 17 to its submitted CTAs. It has already included a similar paragraph in most of its tax treaties.

Mandatory binding arbitration

As part of the options contained in the MLI, jurisdictions can opt into mandatory binding arbitration (MBTA), an element of BEPS Action 14 on dispute resolution. Currently, 26 countries, including the Netherlands, have committed to adopt and implement MBTA in their CTAs.

The MBTA provision will apply to all cases of taxation not in accordance with the provisions of the relevant CTA, unless a jurisdiction has made a reservation specifying a more limited scope. The MLI provides flexibility for jurisdictions to bilaterally agree on the mode of application of the MBTA, including the form of arbitration. However, the default rules defined in the MLI will apply if jurisdictions do not reach such an agreement before a case materializes that is eligible for arbitration. For those jurisdictions that choose to implement MBTA through the MLI, the MLI provisions would apply to all CTAs that do not have such a provision, or instead of existing provisions that provide for MBTA.

The Netherlands has not made any reservations to the scope of application of the provision and is flexible in respect of the type of default rules to apply, allowing countries with a strong preference to choose the form of the default rule.
Implications

The Netherlands currently wishes to apply MLI provisions to 82 CTAs, i.e., the vast majority of those which make up its tax treaty network. Only those countries are excluded from the MLI where bilateral negotiations are ongoing. This certainly constitutes an unprecedented moment for the Netherlands from an international taxation perspective with the implementation of the treaty-based BEPS recommendations in the Netherlands.

The provisional reservations and notifications made by the Netherlands at the MLI signature seem quite balanced and consistent with the double tax treaty negotiation policies followed by the Netherlands during the past years, in particular with respect to developing countries and taking away uncertainty for the trade and industry. The fact that the Netherlands, together with another 25 jurisdictions, have opted in for the mandatory binding tax arbitration, reinforces the role of the Netherlands as a jurisdiction which is willing to adopt BEPS recommendations and uses its best efforts to resolve disputes involving other Contracting Jurisdictions as efficiently as possible.

Timing

The MLI will enter into force after five jurisdictions have deposited their instrument of ratification, acceptance or approval of the MLI. During the ratification process the choices made by jurisdictions may still change. With respect to a specific bilateral tax treaty, the measures will only enter into effect after both parties to the treaty have deposited their instrument of ratification, acceptance or approval of the MLI and a specified time has passed. The specified time differs for different provisions. For example, for provisions relating to withholding taxes, the entry into force date is 1 January of the following year after the last party has notified of its ratification. It is possible that the changes made as a result of being a party to the MLI would be effective in 2019, though some CTAs may be affected as early as sometime in 2018.

Endnotes

1. For more background on the global significance of the MLI signature, see EY Global Tax Alert, 68 jurisdictions sign the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, dated 7 June 2017.

2. For more background on the MLI, see EY Global Tax Alert, OECD releases multilateral instrument to modify bilateral tax treaties under BEPS Action 15, dated 25 November 2016 and EY Global Tax Alert, OECD releases multilateral instrument to implement treaty related BEPS measures on hybrid mismatch arrangements, treaty abuse, permanent establishment status and dispute resolution, dated 2 December 2016.

3. Albania, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Yugoslavia – Bosnia and Herzegovina, Canada, China, Croatia, Czechoslovakia – Czech Republic, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Hong Kong, Hungary, Iceland, India, Indonesia, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Korea, Kuwait, Latvia, Lithuania, Luxembourg, Macedonia, Malawi, Malaysia, Malta, Mexico, Moldova, Yugoslavia – Montenegro, Morocco, New Zealand, Nigeria, Norway, Oman, Pakistan, Panama, Philippines, Portugal, Qatar, Romania, Russian Federation, Saudi Arabia, Yugoslavia – Serbia, Singapore, Czechoslovakia – Slovak Republic, Slovenia, South Africa, Sri Lanka, Suriname, Sweden, USSR – Tajikistan, Thailand, Tunisia, Turkey, Uganda, United Arab Emirates, United Kingdom, United States, Uzbekistan, Venezuela, Viet Nam, Zambia and Zimbabwe.

4. Andorra, Australia, Austria, Belgium, Canada, Fiji, Finland, France, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Mauritius, the Netherlands, New Zealand, Portugal, Singapore, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.
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