Multilateral Instrument (MLI) and BEPS

Chaired by **Kees van Raad**

Panel Discussion led by **Daniel Erasmus, South Africa & USA.**

Panelists: Rajat Bansal, India - Mukesh Butani, India – Vikram Chand, Switzerland – Shefali Goradia, India - Mindy Herzfeld, USA - Rajesh Ramloll, Mauritius

Dr. Daniel Erasmus, the panel Chairperson, explained that the MLI provisions only become effective as amendments to affected Double Tax Treaties when both signatory states have ratified deposited and locally implemented the MLI into domestic laws.

In those areas such as those affecting changes to the PE provisions, one State may have excluded the broader amending PE provisions in the MLI. That means between the two signatory states, those provisions will not apply, even though the other signatory state acceded to the broader PE amending provisions of the MLI.

In the meantime, the OECD MTC 2017 Commentaries have been amended to include detailed references to the amending MLI DTA provisions, such as on the broader PE provisions. Revenue Authorities may blindly look to the expanded and revised 2017 commentaries to interpret the old un-amended DTAs not affected by the MLI. There is a real danger in this happening.

Dr. Daniel Erasmus pointed out that all signatories to the MLI have committed to improving disputes resolution processes i.e. MAPS.

In South Africa SARS holds the view that a MAP process can overturn the objection process after an additional tax assessment has been raised. However, the MAP process cannot overturn a domestic tax judgement. This gives rise to a practical problem in that before a domestic tax judgment can be pursued, the MAP process would have to be exhausted. MAP processes in developing countries take years. If this is not done, a judgment will simply eliminate any MAP outcome. Surely this is contrary to international tax principles? Mukesh Butani (India) stated this was not a problem in India as legislation provided for a MAP outcome to apply.

Mr Rajat Bansal (India) was asked if the MLI permitted grandfathering for past investments involving India. For instance, the Indian Tax Administration could issue a circular to the effect that until March 31, 2022 the provisions of the PPT or simplified LOB will not be applicable to the investments made in Indian securities by Singapore companies. This would give a window of a couple of years to the Singapore investors to unwind existing structures to eliminate the tax avoidance schemes targeted by the MLI. Would this be seen as a violation of the MLI’s

minimum standard. Mr Bansal did not think this was possible. Grandfathering was not contemplated in BEPS & MLI. Furthermore, any tax abusive structures should not be grandfathered.

Ms Shefali Goradia (India) pointed out the case of the renegotiated India-Mauritius DTA under which grandfathering has been bilaterally committed. The India-Mauritius DTA is at this stage not affected by the MLI. Would the principle purpose test or domestic GAAR be applied for past investments which have been grandfathered?

Mr Rajat Bansal (India) then discussed the application of GAAR applying over the DTA provisions in India. Two sets of rules cannot apply to the same transaction. Anti-abuse provisions are there to prevent abusive structures. The anti-abuse provisions can apply on a parallel basis. Dr Daniel Erasmus stated the new OECD 2017 commentaries state the international tax law (DTAs) should prevail in these instances. Kees van Raad (Netherlands) explained that the Dutch law is in line with the OECD commentaries. Mukesh Butani (India) there should be no choice between domestic GAAR and anti-abuse provisions in treaties. By virtue of section 253 of the India Constitution, the treaty provision overrides.

Shefali Goradia pointed out that with the MLI implementation being in-process, taxpayers may find tax planning difficult. This is because the status of DTAs remains uncertain and may change based on the MLI. Tax planning may to some extent be possible under DTA with US which are least likely to be amended. Though even in such cases the implications of antiavoidance measures under the domestic law may need to be weighed in.

Shefali Goradia was asked to comment on the additional responsibilities on Indian payers making remittances to persons outside India where withholding tax requirement applies. Ms. Goradia pointed out that admittedly there is uncertainty in the MLI regime and the positions of countries may constantly vary. In such cases, the payer would not only have the responsibility to analyze the provisions of each DTA/MLI, but also to make the subjective determinations of whether the recipient is a genuine tax resident; is the beneficial owner of the income; is entitled to tax treaty benefits and satisfies the limitation of benefit provision or principal purpose test. In cases where unrelated parties are involved, it is unlikely that this level of information will be available to the payer. Considering the uncertainty, the forums available for taxpayers to have a confirmed tax treatment such as withholding tax orders, advance rulings should be strengthened going forward.

To what extent will the MLI promote treaty shopping?

Vikram Chand (Switzerland) answered by giving an example of a Dutch company selling products through a commissionaire in France. As both countries have adopted the new MLI provisions on PES, the Dutch company will not have a PE in France. However, it could simply move its operation from France to Switzerland, and escape the new PE provisions. Switzerland has not adopted the new MLI PE provisions.

Shefali Goradia (India) pointed out that this would only be valid as long as some countries did not adopt the MLI positions. Domestic tax avoidance legislation would also have to be considered.

Mindy Herzfeld (USA) pointed out the OECD tried to avoid this happening, but these exclusions in the MLI do not further the BEPS objectives.

Rajesh Ramloll (Mauritius) as party to many OECD discussions around various BEPS actions was surprised that most participating African states had little to comment on the process to the finalized BEPS actions, and the amending provisions in the MLI. This posed a problem in that, can it be said that through silence, there has been consensus? He pointed out that Mauritius was the only country to adopt the arbitration MAP provisions in the MLI.

Prof. Mindy Herzfeld (USA) shared reflections from a recent conference in South America, where she paneled on the topic of anti-abuse rules, BEPS and the MLI, noting that different countries take different approaches in applying anti-abuse rules, something which is not likely to change despite countries entering into the MLI. It was clear each country had its own independent views, with very little convergence internationally.