

# PwC Tax Newsletter

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### In this issue:

#### Impact of the MLI on Thailand's tax treaties

The majority of Thailand's 61 tax treaties will be revised with effect from 1 January 2023 for withholding tax purposes and from financial year starting on or after 1 January 2023 onward for all other taxes. The changes are a result of Thailand signing the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) on 9 February 2022. The instrument of ratification was deposited on 31 March 2022.

The MLI is a multilateral convention used to modify certain parts of all bilateral tax treaties selected to be included in the MLI (covered tax agreements) by a signatory of the MLI. It has the aim of tackling the inappropriate use of tax treaty benefits that created opportunities for taxpayers to obtain low or no tax through arrangements that were not principally driven by business rationale and/or lacked sufficient substance. It also aims to improve the tax dispute resolution mechanism provided by tax treaties ('Mutual Agreement Procedure' or 'MAP').

The mechanism of the MLI is that the existing wording in certain parts of the bilateral tax treaties, selected by one of the signatories, would be modified or replaced by the standardised wording provided in the MLI or have the standardised wording provided in the MLI added in certain parts of bilateral tax treaties, where the counterparty to the bilateral tax treaties of the MLI signatory is also a signatory of the MLI and selects the

same position on each particular provision in each part of the MLI.

The MLI contains various parts but can be broadly categorised into two types, minimum standards, and optional provisions.

Minimum standards are the parts of the MLI where signatories must adopt either of the choices provided therein and cannot be opted out of entirely.

Optional provisions are those provisions that signatories can opt out of or not opt in entirely.

Below are the minimum standards and optional provisions selected by Thailand and their impact on taxpayers and considerations that taxpayers should bear in mind.

- **Minimum standards**

#### Part III of the MLI which aims to address treaty abuse

Thailand will include or modify the preamble of its covered tax agreements to state that their purpose is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance.

Thailand will also adopt the Principal Purpose Test (PPT). This will allow counterparties to the covered tax agreements to deny granting treaty benefits to taxpayers when it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining tax

treaty benefits is one of the principal purposes of the arrangements or transactions.

#### Impact on taxpayers

Taxpayers with cross-border transactions can have a tax treaty benefit denied if there is a reason to believe, following an objective consideration of the facts and circumstances, that obtaining a tax treaty benefit is one of the principal purposes of the arrangements or transactions.

#### Relevant administrative measures and regulations recently introduced or expected to be introduced in the near future

As the PPT is a general rule, which tends to be subjective in nature, the Revenue Department is in the process of developing guidelines for the application of the PPT and is also considering setting up a board to issue rulings on PPT disputes with taxpayers by Revenue officers.

#### Considerations for taxpayers

Taxpayers with cross-border transactions between Thailand and jurisdictions with which Thailand has a tax treaty with, and the MLI has come into effect, should have their arrangements/transactions reviewed to assess the chance of the treaty benefit being denied. They must also have supporting documents prepared to support the treaty benefit, or explore other mitigative/corrective actions.

#### **Part V of the MLI which aims to improve dispute resolution**

The dispute resolution mechanism provided in tax treaties is called 'Mutual Agreement Procedure' (MAP). The MAP allows designated representatives ('competent authority' or 'CA') in the contracting jurisdictions to engage in resolving cross-border tax disputes that result, or will result, in double taxation.

Following the recent issuances (and further issuances expected in the foreseeable future) of new laws and regulations and measures that impact international taxation, both in Thailand and elsewhere, the number of disputes on international taxation is expected to rise significantly. Therefore, the dispute resolution mechanism provided in tax treaties must become more effective to enable the resolution of a growing number of disputed cases. Each case should also require less time spent to eliminate double taxation in a swift and effective manner. This will ensure that the global economy will not be disrupted by controversies among tax authorities and taxpayers all over the world due to interpretation and/or application of these new international tax laws and measures.

Thailand will revise the MAP article of covered tax treaties to be aligned with the minimum standard of the MAP article for tax treaties provided in BEPS action 14. Effectively, the changes will be as follows:

- Taxpayers that have a dispute on cross-border transactions between Thailand and jurisdictions with which Thailand has a tax treaty, and the MLI has come into effect, can submit a request for the MAP to either the Thai CA or the CA of its residence.
- The deadline for the request for an MAP will also be revised to be the standard deadline of "within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the covered tax agreement".
- More importantly, any agreement reached will be implemented notwithstanding any time limits in the domestic law of the contracting jurisdictions.
- Lastly, the revised MAP article will also add a clause to allow CAs to consult with each other for the elimination of double taxation in cases not provided for in the covered tax agreement, for the

covered tax treaties that have not yet contained this clause.

In addition to the MAP article, the associated enterprises article of covered tax agreements would also be amended to have the corresponding adjustment clause included in all covered tax agreements that do not yet contain this clause.

#### Impact on taxpayers

Taxpayers will have an improved MAP to resolve disputes on cross-border transactions between Thailand and jurisdictions with which Thailand has a tax treaty, where the MLI has come into effect, in a much more effective manner to eliminate or avoid double taxation.

Moreover, taxpayers would be able to request a corresponding adjustment in the case where there is a transfer pricing adjustment on cross-border transactions between Thailand and the jurisdiction with which Thailand has a tax treaty and the MLI has come into effect.

#### Relevant administrative measures/regulations recently introduced

The Revenue Department released MAP guidance in 2019 to give clear guidance on how to apply MAP application.

Recently, Thailand also issued the following law and regulation to facilitate a more effective MAP:

1. Notification of Ministry of Finance to extend the tax refund period for MAP applications submitted after 23 August 2021 for tax treaties that include the clause "Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting Jurisdictions".
2. The Regulation of the Revenue Department regarding appeals and consideration of appeals under the Revenue Code B.E.2564 (2021), details of which are as follows:

In the case where an appellant for whom the Revenue Department arranges the MAP or an appellant requests that the MAP be arranged abroad, consideration of the appeal by the Revenue officers may be deferred. This is provided that the period between the date on which the appellant obtained a tax assessment letter and the date on which the Revenue Department agreed to arrange the MAP, or has been informed that the appellant has been allowed to arrange the MAP from abroad, does not exceed five years. If the period exceeds five years, consideration of an appeal by the Revenue officers can be given without waiting for the result of the MAP process.

If the MAP has been completed, and the appellant does not agree with the result thereof, or the appellant has agreed, but did not revoke the appeal within 30 days from the date on which the result of the MAP was acknowledged, consideration of the appeal will have to be completed within six months from the date on which the authorised officer gave the instruction to consider the appeal.

Undertaking the MAP arrangements does not defer the payment of tax and duty..

#### Considerations for taxpayers

Taxpayers should consider applying for the MAP whenever a dispute on taxation of cross-border transactions arises in order to avoid double taxation.

#### • **Optional provisions selected by Thailand**

#### **Article 5 of Part II of the MLI regarding the application of the method for elimination of double taxation**

Thailand chose to change the method for the elimination of double taxation

in the covered tax agreements from the exemption to the credit method.

There are alternative options under this Article of the MLI, and where the position of each signatory therein differs, the method chosen by any signatory will be applied only to the resident entity of that particular MLI signatory.

#### Impact on taxpayers

Companies incorporated in Thailand can still enjoy the elimination of double taxation based on the exemption method by virtue of Royal Decrees 300 and 442. The impact would be on the foreign counterparties transacting with Thai companies that are resident in countries that also choose to change their method of elimination of double taxation to the credit method.

#### Relevant administrative measures and regulations expected to be introduced in the near future

Royal Decrees 300 and 442 may be revoked.

#### Considerations for taxpayers

Foreign companies resident in jurisdictions with whom Thailand has a tax treaty, and the MLI has come into effect, that earn income subject to income tax in Thailand must check whether or not their jurisdictions of residence have also chosen to change their method of elimination of double taxation to the credit method.

#### **Part IV pf the MLI regarding the avoidance of permanent establishment status**

Thailand has chosen to modify the definition of the agent type permanent establishment (PE) and the PE exemption criteria so as to tackle the artificial avoidance of PE status through the fragmentation of activities or the splitting of contracts.

#### Impact on taxpayers

Companies incorporated outside Thailand that earn a business profit in Thailand but were not previously subject to income tax thereon since they did not meet the PE definition or pass the PE exemption criteria based on the current tax treaties could be deemed to have a PE in Thailand. They would then be liable to income tax on the profit attributable to the PE in the Thailand after the MLI has come into effect.

On the other hand, Thai companies earning a profit outside of Thailand but were not previously subject to income tax thereon since they did not meet the PE definition or pass the PE exemption criteria based on the current tax treaties could be deemed to have a PE in those foreign countries. They would then be liable to income tax on the profit attributable to the PE in those countries after the MLI has come into effect

#### Relevant administrative measures and regulations expected to be introduced in the near future

Although many jurisdictions made reservation to opt out of the provisions under this part of MLI entirely, the Revenue Department intends to use the PPT to try to deem a PE in Thailand for foreign companies that have made a reservation on this part of MLI.

#### Considerations for taxpayers

Taxpayers impacted should review the facts surrounding their current and planned transactions/ arrangements/ business models. This will enable them to determine whether the change in the agent type PE definition and PE exemption criteria by virtue of the MLI could result in an income tax liability on business profits outside the country of residence. If so, they should then explore the options available to mitigate any liability.

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