

Korea Signs Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS

On June 7, 2017, Korea signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Instrument" or "MLI") at a signing ceremony hosted by the OECD in Paris.

The purpose of the MLI is to enable jurisdictions to swiftly modify their bilateral tax treaties to implement measures under the BEPS Project endorsed by G20 Summit held in November 2015. A total of 68 jurisdictions (including 33 OECD members, China, and India) signed the MLI. However, the United States did not participate in the signing.

A particular bilateral tax treaty will only be amended by the MLI where both parties are signatories to the MLI and have made a notification that the MLI applies to the treaty. Tax treaties between MLI signatories will be automatically updated without separate bilateral negotiations.

Among Korea's 91 tax treaties, 45 tax treaties[1] will be affected by the MLI. The main content of the MLI and the MLI provisions adopted by Korea is as follows.

I. Main Content of MLI and MLI Provisions Adopted by Korea

[1] The MLI is expected to apply to tax treaties entered into between Korea and the following jurisdictions (please note that the position of Korea's bilateral treaty partners has not been reflected yet and that the below list of jurisdictions can be changed depending on domestic ratification by Korea and its bilateral treaty partners): Belgium, Bulgaria, Canada, Chile, China, Colombia, Croatia, Denmark, Egypt, Fiji, Finland, France, Georgia, Germany, Greece, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Kuwait, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Pakistan, Poland, Portugal, Romania, Russia, Serbia, Slovak Republic, Slovenia, Republic of South Africa, Spain, Sweden, United Kingdom, Uruguay.

Articles 1 and 2 of the MLI prescribe the scope of application, and Articles 3 to 26 prescribe the content of the BEPS Project to be reflected in tax treaties covered by the MLI. Korea has adopted only the following minimum standards under the BEPS Project: "Purpose of a Covered Tax Agreement" (Article 6); "Prevention of Treaty Abuse" (Article 7); "Mutual Agreement Procedure" (Article 16); and "Corresponding Adjustments" (Article 17).

<Minimum Standards under the BEPS Project>

	Content of MLI Provisions
Article 6 Purpose of A Covered Tax Agreement	• A Covered Tax Agreement shall be modified to **include the following preamble text**: - "**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**"
Article 7 Prevention of Treaty Abuse	• **A benefit under the Covered Tax Agreement shall not be granted if obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit**
Article 16 Mutual Agreement Procedure	① (i) Where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, that person **may present the case to the competent authority of either Contracting Jurisdiction** (ii) **The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement**
	② (i) **The competent authority shall endeavor, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual**

	agreement with the competent authority of the other Contracting Jurisdiction **(ii) Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting Jurisdictions**
	③ (i) The competent authorities of the Contracting Jurisdictions shall endeavor to **resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Covered Tax Agreement** (ii) They may also consult together for the **elimination of double taxation in cases not provided for in the Covered Tax Agreement**
Article 17 Corresponding Adjustments*	• Where a Contracting Jurisdiction includes in the profits of an enterprise of that Contracting Jurisdiction – and taxes accordingly - profits on which an enterprise of the other Contracting Jurisdiction has been charged to tax in that other Contracting Jurisdiction and the profits so included are profits which have accrued to the enterprise of the first-mentioned Contracting Jurisdiction **if the conditions made between the two enterprises had been those which have been made between independent enterprises, then that other Contracting Jurisdiction shall make an appropriate adjustment to the amount of the tax charged therein on those profits**

* Article 17 is a best practice (corresponding adjustment by tax treaty) which is one of the means to implement the minimum standards (each jurisdiction is required to implement a corresponding adjustment by domestic law or tax treaty).

Accordingly, once the MLI comes into effect for Korea's tax treaties, a tax treaty benefit will be denied where one of the principal purposes of an arrangement or transaction is to obtain the benefit. Also, where a taxpayer encounters taxation which is not in

accordance with the intended application of the tax treaty provisions, the taxpayer can present the case to the competent authority of each jurisdiction.

When signing the MLI, Korea has adopted only the minimum standards mandatorily required to be implemented, and if necessary, will consider the possible application of the other BEPS measures contained in the MLI that are not minimum standards. The other MLI provisions are as follows.

- (Article 3) Transparent Entities
- (Article 4) Dual Resident Entities
- (Article 5) Application of Methods for Elimination of Double Taxation
- (Article 8) Dividend Transfer Transactions
- (Article 9) Capital Gains from Alienation of Shares or Interests of Entities Deriving Their Value Principally from Immovable Property
- (Article 10) Anti-abuse Rule for Permanent Establishments Situated in Third Jurisdictions
- (Article 11) Application of Tax Agreements to Restrict a Party's Right to Tax Its Own Residents
- (Articles 12 to 15) Artificial Avoidance of Permanent Establishment Status
- (Articles 18 to 26) Mandatory Binding Arbitration

II. Domestic Procedures

Korea will ratify the MLI in accordance with its domestic procedures. The MLI will enter into force three months after five jurisdictions have deposited their instrument of ratification with the OECD. Each of Korea's 45 tax treaties, which will be modified by the MLI, will take effect three months after both Korea and its bilateral treaty partner have deposited their instrument of ratification to the OECD.

III. Responsive Measures

With the signing of the MLI by a large number of jurisdictions, tax issues for companies carrying out cross-border transactions have become more complicated and difficult, because the relevant tax law, the applicable bilateral tax treaty, and the MLI should be comprehensively reviewed. Accordingly, before carrying out cross-border transactions or making international investments, it is recommended that companies accurately examine tax issues with the help of international tax experts, thereby reducing unexpected risks.

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