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Australian Bar Association

NEW SOUTH WALES BAR ASSOCIATION

THE MULTILATERAL INSTRUMENT & TAX TREATIES

Chair: The Hon. Justice Davies of the Federal Court of Australia

Panelists

David Bloom QC, Aickin Chambers

Roderick Cordara QC, New Chambers

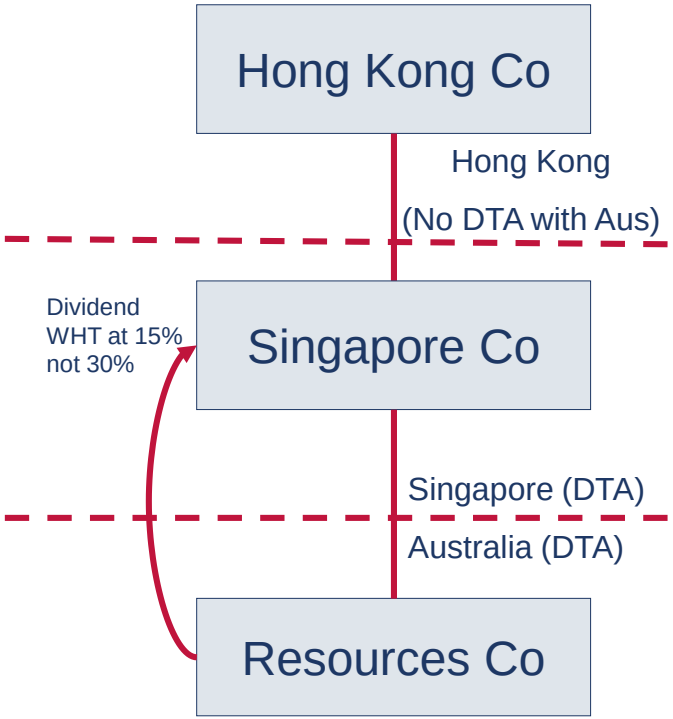
Angela Wood, KPMG

MLI GENERAL ANTI-AVOIDANCE PROVISION

David Bloom QC

Aickin Chambers

MLI General Anti-Avoidance Provision
Withholding Tax Benefit



1. Hong Kong Co establishes Singapore Co in order to hold shares in an Australian resources company.

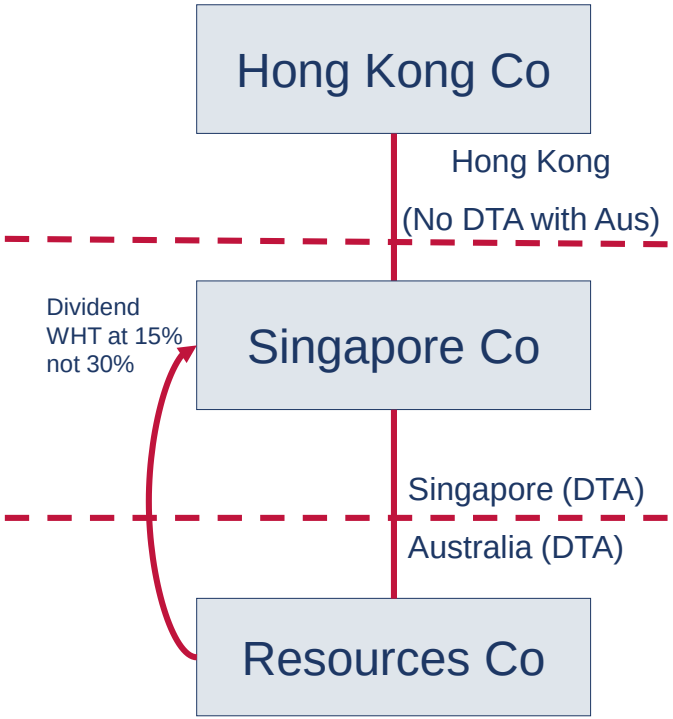
2. No withholding tax is payable on dividends from Singapore Co to Hong Kong Co.

3. If the shares were held by Hong Kong Co directly, unfranked dividends would be subject to withholding tax at a rate of 30%.

4. Article 8(1) of the *Australia-Singapore DTA 1969* provides for a maximum 15% withholding tax rate on dividends.

5. Commissioner asserts that a principal purpose of obtaining the treaty benefit exists and Article 7(1) of the *MLI* may apply to deny the benefit of a lower withholding tax rate.

MLI General Anti-Avoidance Provision
Withholding Tax Benefit



Article 7(1) of the *MLI* provides:

"…a benefit under the Covered Tax Agreement shall not be granted…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…granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions…."

Article 7(10)(a) of the *MLI* (Simplified Limitation on Benefits) clause would have provided:

*"…a resident of a Contracting Jurisdiction…will be entitled to benefits…if the resident is engaged in the active conduct of a business in [Singapore] and the income derived from [Australia] emanates from, or is incidental to, that business…[but]…**active conduct of a business" shall not include the following activities or any combination thereof…operating as a holding company…providing overall supervision or administration…providing group financing**"*

AUSTRALIAN ADOPTION OF MLI PERMANENT ESTABLISHMENT ARTICLES

Angela Wood

KPMG Law

OECD/G20 Base Erosion & Profit Shifting Project – Focus on Permanent Establishment

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2013 Action 7 – Preventing Artificial Avoidance of PE Status

2014 Review of definition of PE in Article 5 of OECD Model Tax Convention

2015 Final Report recommended changes to PE definition and associated clauses in Article 5

2017 Changes made to Article 5 in OECD Model Tax Convention

Australia: Overview of Adoption of MLI PE Articles

MLI Article	Topic	Did Australia adopt?	Comments
10	Anti-abuse rule for PEs situated in third jurisdictions.	No	
12	Artificial avoidance of dependent agent PE status – "principal role" in contract conclusion e.g. commissionaire / similar arrangements	No	• ATO likely to disregard 'rubber stamping' anyway • Aus/Germany DTA included "principal role" test • Australia to consider adoption bilaterally in future treaty negotiations, on case-by-case basis • Australia enacted Multinational Anti Avoidance Law – went beyond OECD recommendations
13	Artificial avoidance of PE status through specific activity exemptions	Yes Option A	• Must look at activities in the whole to determine whether an entity can satisfy 'preparatory and auxiliary' exemption. Not activity-by-activity
14	Contract-splitting	Yes	• Particularly relevant for large construction projects • Although adopted, Australia will preserve existing bilateral rules re offshore natural resource activity.

MLI – THE NEW MAP & MBA PROCEDURES

Roderick Cordara QC

New Chambers

Co-operation & Conflict

- Closer co-operation and joint endeavours through BEPS and MULTILATERAL INSTRUMENT amended tax treaties
- BUT room for disagreement between States
- Also disgruntled taxpayers to provide for
- MLI Part V: Art. 16-17 MUTUAL AGREEMENT PROCEDURES
- MLI Part VI: Art. 18 – 26: ARBITRATION

PART V: IMPROVING DISPUTE RESOLUTION - MLI – **Arts. 16-17**

- A structured negotiation process involving the taxpayer presenting a case to one of the contracting States.
- States then to consult together, *inter alia* to eliminate cases of '***double taxation .. not provided for in the Covered Tax Agreement***' **[Art. 16.3]**
- **Art. 16.1** replaces earlier tax treaty dispute resolution provisions
- **Art. 16.1** (3 years to petition) replaces shorter pre-existing provisions
- **Art. 16.2** replaces earlier such provisions (etc.)
- But no need for this, if treaties to be brought into line with OECD/G20 BEPS package [**Art. 16.5]**

PART VI: ARBITRATION

- MLI Part VI: Art. 18 – 26: ‘ARBITRATION’ or ‘MANDATORY BINDING ARBITRATION’ or ‘MAB’
- A regime that can be chosen in respect of Covered Tax Agreements, thereby amending them to include it
- Mutual choice needed – ie both States

The Tour

- **Article 19 : MANDATORY BINDING ARBITRATION r**equires:
  - Choice to have the MBA system, under the MLI amendment process
  - If so, it replaces any non-MBA resolution mechanism in the pre-existing treaty
  - Scope under the pre-existing treaty for taxpayer to initiate a case
  - Non-resolution of that case, between the States, for 2 years (or possibly 3 years: **[Art 19.11]**)
  - Request in writing from taxpayer
- Involves:
  - Mandatory reference to '**arbitration in the manner described in this Part, according to any rules or procedures agreed upon by'** the States under Art **19.10**
  - Sub-reservations can be made as to procedures

1. Arbitration – ‘But Not As We Know It’

- Arbitration is usually an alternative to and untouched by parallel Court proceedings
- But if ‘**one or more of the same issues is pending before court or administrative tribunal’** during the 2 year waiting period, the MBA procedure is suspended **[Art. 19.2]**
- Taxpayer can also agree to suspend the 2 year waiting period
- Decision is binding, only
  - if taxpayer accepts the MAP implementation of the MBA
  - and ends any Court/Tribunal proceedings on the issue **[Art. 19.4.b.iii]**

2. Arbitration – ‘But Not As We Know It’

- Decision not binding ‘**if a final decision of the courts of one of the Contracting Jurisdictions holds that arbitration decision is invalid’ [Art. 19.4.b.i]**
- Indeed the arbitration request ‘**shall be considered not to have been made**’
- How did the Court become seised of arbitration decision?
- How invalidate a baseball-style decision?
- Or does it just mean a parallel case on the issue?
- The process is rescinded *ab initio*

3. Arbitration – ‘But Not As We Know It’

- At any time, the States can reach ‘**a mutual agreement to resolve the case’** thereby ending the arbitration **[Art.22]**

BUT

- This can happen up to 3 months after the arbitrators have issued their decision [**Art. 24.2]**
- So States can take back complete control
- Suppose taxpayer terminates Court case first?

Mechanics of the Arbitration

- 3 Arbitrators '**with expertise or experience in international tax matters' [Art. 20.2.a]**
- Chair to be a non-national of both States **[Art 20.2.b]**
- All members to be '**impartial and independent of the competent authorities, tax administrations, and ministries of finance .. and all persons connected with the case..' [Art. 20.2.c]**
- OECD appoints arbitrators or chair in default **[Art. 20.3-4]**
- Fully confidential proceedings **[Art 21]**

Option 1: Baseball (an ‘either/or’ arbitration)

- Written position papers are exchanged.
- Key element is ‘**specific monetary amounts (for example, of income or expense) or, where specified, the maximum rate of tax charged..’ [Art. 23.1.a]**
- **‘The Arbitration Panel shall select as its decision one of the proposed resolutions for the case submitted by the competent authorities…’**
- **‘…and shall not include a rationale or any other explanation of the decision’ [Art. 23.1.c]**
- Simple majority voting

Option 2 : Normal reasoned decision

- A State may reserve a right not to have a ‘baseball’ type procedure
- And have a normal reasoned decision, indicating ‘**sources of law relied on and the reasoning which led to the result’ [Art. 23.2.c]**
- PROBLEM: Where a State that has made this reservation is up against a State that has not (but which has left open the option of reaching a compromise with States that have) – they will have to reach a compromise procedure **[Art. 23.3]**

Implementation of Decision

- Arbitration decision (if binding) to be implemented through the mutual assistance procedure [Art. 19.4.a]
- Taxpayer must be agreeable
- No Court in either State must go near the issue
- But MBA decisions have ‘no precedential value’ [**Art 23**]

Sovereignty

- Part Vi is a delicate step into a difficult area, where States tentatively agree to give up a slice of sovereignty
- Domestic courts represent sovereign power - Arbitrators less so
- But the MLI and MBA are public international law instruments
- They tread cautiously.
- Baseball's advantage is silence – no loss of face for one side?
- No precedential value
- Let us see how it works……