

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Entry into effect under Article 35(1)(a)

Opinion of the Conference of the Parties of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

1. This opinion by the Conference of the Parties of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (MLI) seeks to clarify the interpretation and application of Article 35 of the MLI on the entry into effect of its provisions. It was approved by the Parties to the MLI under written procedure on 15 March 2021.
2. The question which has arisen on Article 35(1)(a) is this: when will the MLI have effect for taxes withheld at source where the latest of the dates of entry into force of the MLI for a pair of Contracting Jurisdictions is on 1 January of a given calendar year?
3. The text of Article 35(1)(a) of the MLI reads as follows:
 - "1. *The provisions of this Convention shall have effect in each Contracting Jurisdiction with respect to a Covered Tax Agreement:*
 - a) *with respect to taxes withheld at source on amounts paid or credited to non-residents, where the event giving rise to such taxes occurs on or after the first day of the next calendar year that begins on or after the latest of the dates on which this Convention enters into force for each of the Contracting Jurisdictions to the Covered Tax Agreement; [...]*"
4. For example, if the second of the pair of Contracting Jurisdictions deposits its instrument of ratification on 15 September 2018, the date of **entry into force** of the MLI for that Contracting Jurisdiction pursuant to Article 34 of the MLI will be 1 January 2019. The question which has been raised is whether the inclusion of the word "next" in Article 35(1)(a) means that, in such a case, the MLI **has effect** for events giving rise to withholding taxes which occur on or after 1 January 2019 or on or after 1 January 2020.
5. In accordance with the principles of international law reflected in the 1969 Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Recourse may also be had to supplementary means of interpretation, including the preparatory work of the treaty, in order to confirm the interpretation of a provision.
6. The logical interpretation of Article 35(1)(a) is that, in a case where the MLI enters into force for the second Contracting Jurisdiction on 1 January 2019, the provisions of the MLI should have effect for events giving rise to withholding taxes which occur on or after 1 January 2019. This follows from the use of the words "on or after" when referring to "the calendar year that begins **on or after** the latest of the dates on which this Convention enters into force for each of the Contracting Jurisdictions...". The use of the word "on" can only mean that the date from which the MLI can have effect can be the same as the latest of the dates of entry into force.

7. This reading is confirmed by the intention of the negotiators of the MLI. A review of the preparatory work related to the MLI (i.e. negotiations of the ad hoc Group on the Multilateral Instrument and of previous draft versions of Article 35 on the entry into effect) confirms that the intention was to ensure that the provisions of the MLI entered into effect quickly with respect to withholding taxes on amounts paid to non-residents.

8. This interpretation is further affirmed by the equally authentic French text of Article 35(1)(a) which does not include the equivalent of the word “next”:

"1. Les dispositions de la présente Convention prennent effet dans chaque Juridiction contractante à l'égard d'une Convention fiscale couverte:

a) s'agissant des impôts prélevés à la source sur des sommes payées ou attribuées à des non-résidents, si le fait générateur de ces impôts intervient à compter du premier jour de l'année civile qui commence à compter de la dernière des dates à laquelle la présente Convention entre en vigueur pour chacune des Juridictions contractantes ayant conclu une Convention fiscale couverte ; [...]"

9. Under the interpretation principles embedded in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, all authentic texts are equally authoritative and the terms of the treaty are presumed to have the same meaning in each authentic text.

10. Accordingly, if the latest of the dates of entry into force for the pair of Contracting Jurisdictions is on 1 January 2019, the provisions of the MLI will have effect for events giving rise to withholding taxes which occur on or after 1 January 2019.

11. The same reasoning and conclusion apply to the interpretation of the similar formulations used in Article 35(3) (“... 1 January of the next year beginning on or after ...”) and Article 35(5) (“ ... first day of the next calendar year that begins on or after ...”).