



CHANGES TO THE NETHERLANDS – KAZAKHSTAN TAX TREATY DUE TO THE MULTILATERAL INSTRUMENT

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On 24 June 2020, Kazakhstan notified the OECD that it has completed its internal procedures for the entry into effect of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (Multilateral Instrument or MLI).

This means that MLI will apply to the Netherlands – Kazakhstan DTT as per 1 January 2021 with respect to withholding taxes and with respect to other taxes (on tax book years starting) as per 1 April 2021.

The MLI is a legal mechanism to ensure that the anti-BEPS (i.e. Base Erosion and Profit Shifting) actions are deemed included in existing double tax treaties (DTT) without the actual amendment thereof, provided that both parties of the DTT have enacted MLI and therefore consider a particular DTT as ‘Covered Tax Agreement’ and, with respect to the optional provisions, only if and insofar the two countries have chosen the same options on how the articles of the MLI should apply to all of their existing treaties.

Please find below a summary on the relevant articles of the MLI which will change the provisions of The Netherlands – Kazakhstan DTT.

Dual resident entities – article 4 MLI

The tax residency of companies will be determined by way of a mutual agreement procedure (MAP) between the tax authorities of The Netherlands and Kazakhstan (instead of the current allocation method based on the place of effective management). In absence of any mutual agreement,



a company will in principle not be entitled to any tax relief or exemption provided by the DTT.

Prevention treaty abuse (principle purpose test) - article 7 MLI

The application of The Netherlands – Kazakhstan DTT will depend on observing a new anti-abuse provision, the so-called principle purpose test (PPT). The PPT is worded as follows:

“Notwithstanding any provisions of a CTA (i.e. Covered Tax Agreement), a benefit under the CTA shall not be granted in respect of an item of income or capital 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 it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the CTA.”

Capital gains of real estate rich companies - article 9 MLI

Allocation of taxing rights to the state of source with respect to capital gains derived from the alienation of shares (or other rights of participation) in an entity which derives 50% or more of its value from immovable property situated in a jurisdiction at any time during 365 days preceding the alienation.

Avoidance of permanent establishment clauses - articles 10 to 15 MLI

These articles are amongst others aimed at combatting the artificial avoidance of permanent establishment status.

Mutual agreement procedure (non-binding) - article 16 MLI

Based on this article, the Netherlands and Kazakhstan are required to set-up a MAP. Tax payers have the option to present their cases to either competent authorities within three years from the first notification of the action resulting in taxation that is not in line with The Netherlands - Kazakhstan DTT.



Competent authorities are required to try to resolve the case under a MAP if no solution can be found unilaterally and are required to implement MAP's regardless of time limits in domestic law. If the component authorities would not be able to resolve the case, the tax payer has however no possibilities for appeal (e.g. through binding arbitration).

Conclusion

Application of MLI provisions (e.g. PTT and MAP clauses) by Kazakh and Dutch tax authorities may lead to discussions on treaty benefits entitlement, tax residency of Dutch and Kazakh companies or a change in allocation of levy rights between jurisdictions. In connection therewith, we recommend assessing whether your investment structure meets the current and future requirements of the DTT, whether any actions should be taken to mitigate any potential adverse consequences and verify this (in any case) with a Kazakh tax counsel.

We would be pleased to share our comments and answer your questions on the upcoming application of the MLI to The Netherlands - Kazakhstan DTT.

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