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Dear Ms Majola and Ms Collins

## **MULTILATERAL INSTRUMENTS IN SOUTH AFRICA – ADMINISTRATIVE DIFFICULTIES**

1. We herewith take the opportunity to present our comments on behalf of the South African Institute of Chartered Accounts' (SAICA) National Tax Committee (NTC) on the proposed implementation of Multilateral Instrument (MLI) which has been formulated by the Organisation for Economic Co-operation and Development (OECD) with the purpose of preventing base erosion and profit shifting (BEPS) through tax treaty abuse.
2. Our submission includes a discussion of some of the most pertinent implementation matters in relation to the application of the MLI in South Africa which we believe require attention.
3. We would like to thank the NT and SARS for the opportunity to provide constructive comments in relation to the implementation of the MLI. SAICA believes that a collaborative approach is best suited in seeking actual solutions to complex problems.

### **Background**

4. A MLI enables jurisdictions to swiftly modify their bilateral tax treaties to implement measures designed to better address multinational tax avoidance. The MLI offers concrete solutions for governments to close the gaps in existing international tax rules by transposing results from the OECD/G20 BEPS Project into bilateral tax treaties worldwide. The MLI modifies the application of thousands of bilateral tax treaties concluded to eliminate double taxation. It also implements agreed minimum standards to counter treaty abuse and to improve dispute resolution mechanisms while providing flexibility to accommodate specific tax treaty policies.
5. For a bilateral tax treaty to be modified by the MLI, both treaty partners need to have:

- signed and ratified the MLI (that is, the MLI needs to have entered into force for both treaty partners); and
  - identified that particular bilateral tax treaty as a treaty to be covered by the MLI.
6. South Africa signed the MLI on 7 June 2017. Based on the completion of these processes by South Africa and its treaty partners, the MLI will modify South Africa's bilateral tax treaties. These processes have, to date, not yet taken place but we understand that the MLI will enter into force in South Africa three months after the relevant South African authorities have submitted South Africa's 'Instrument of Ratification and Acceptance or Approval' to the OECD. The MLI will then become effective for double taxation agreements (DTAs) entered into between South Africa and other jurisdictions covered by the MLI from the date that the MLI entered into force either in South Africa or in the other jurisdiction, whichever is the latest.
  7. The extent to which the Multilateral Instrument will modify South Africa's DTAs will depend on the final *adoption positions* taken by the other countries involved.

### **NTC Concerns**

8. In our view, the process of adhering to a MLI will be administratively burdensome for SARS, taxpayers and tax practitioners due to various factors impacting the correct interpretation of DTAs, particularly with regard to cross-border transactions.
  9. Any *adoption positions* elected by South Africa and the foreign jurisdiction would have to be considered to determine the potential impact of the MLI on the DTA. Consequently, it would have to be established whether South Africa and the foreign jurisdiction had made any reservations to opt out of a provision of the MLI or to apply optional provisions. Where South Africa or the foreign jurisdiction had made a reservation or optional election in respect of an MLI provision, it would be necessary to determine the other jurisdiction's position in respect of the same provision.
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| <ol style="list-style-type: none"> <li>10. <u>Submission:</u> In order to streamline the interpretation process and promote certainty in the tax system, we suggest that once the MLI enters into force, SARS makes available on its website where all the DTAs are currently found, the following information: whether the specific DTA has been modified by the MLI; if so, the date of entry into force of the MLI and lastly, a synthesised text to help the public better understand the impacts of the MLI.</li> <li>11. The synthesised text is basically a 'consolidated' DTA which clearly indicates how the provisions of the MLI (including the impact of any reservations and/or optional elections made by the respective countries) affect the DTA. Examples of what these synthesised texts look like can be found on the Australian Tax Office's website at <a href="https://treasury.gov.au/tax-treaties/income-tax-treaties">https://treasury.gov.au/tax-treaties/income-tax-treaties</a>.</li> </ol> |
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## **Conclusion**

12. Although it is acknowledged that the synthesised texts do not constitute a source of law and that the DTA and MLI take precedence and remain the legal text applicable, in our view the synthesised texts are a matter of extreme importance to the efficient operation of the tax system in South Africa. The synthesised texts will assist in preventing confusion or misinterpretations from occurring by both taxpayers and SARS.
13. The Australian Tax Office (ATO) has taken the responsibility for preparing synthesised texts on behalf of Australia. We therefore encourage SARS to follow the example of the ATO and to prepare synthesised texts in order to facilitate the understanding of the application of the MLI to a particular DTA by both taxpayers and SARS.

Yours sincerely

Pieter Faber

**Senior Executive: Tax**

**SAICA**

David Warneke

**National Tax Committee Chair**

**SAICA**