ICI Global

Keith Lawson
DEPUTY GENERAL COUNSEL – TAX LAW

110 Bishopsgate
19th Floor, Suites 19-06 and 19-07
London EC2N 4AY, UK
+44 (0) 207 961 0830
www.iciglobal.org

Suite 715–717, Level 7
Two Exchange Square
8 Connaught Place
Central, Hong Kong
+852 2168 0882

1401 H Street, NW
Suite 1200
Washington, DC 20005, USA
+001 202 326 5800
www.ici.org

+001 202 326 5832
MOBILE: +001 202 957 7226
lawson@ici.org

By Electronic Delivery

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Markus Steiner
Federal Tax Administration
Eigerstrasse 65
3003 Berne, Switzerland

RE: *Supplemental Information from US CIVs to Establish US Tax Residence of CIV Investors*

Dear Markus,

Many thanks for your comprehensive 18 June response to the 29 March ICI Global[1] submission. We appreciate greatly the SFTA's considered attention to our many suggestions and requests. Our members, and those of the Association of Global Custodians, have reviewed the 18 June response carefully. This letter provides additional thoughts from our side.

Introduction

ICI Global shares the SFTA's goal of crafting administrable procedures by which all collective investment vehicles (CIVs) receive appropriate treaty relief. This letter, however, focuses only on administrable procedures for CIVs organized in the United States and taxed as regulated investment companies (RICs).

RICs, as we have discussed, are "domestically distributed" CIVs. The many reasons that RICs are owned almost exclusively by US persons have been explained in prior submissions. The organizational and operational characteristics of RICs, we continue to maintain, make them the beneficial owners of

[1] ICI Global carries out the international work of the Investment Company Institute, the leading association representing regulated funds globally. ICI's membership includes regulated funds publicly offered to investors in jurisdictions worldwide, with total assets of US$29.7 trillion. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of regulated investment funds, their managers, and investors. ICI Global has offices in London, Hong Kong, and Washington, DC.

their income. As our differing views on beneficial ownership did not prevent administrable procedures for RIC determinations of Swiss treaty relief from being agreed in 2001,[2] they likewise should not impede further progress in 2018.

Treaty relief certainty, as we discussed, is important for CIVs, their investors, and the companies in which the CIVs invest. CIVs need certainty regarding the amount of tax that will be recovered so that they can value their shares accurately. CIV investors need this certainty so that they do not pay too much, or receive too little, for their shares. Companies appreciate that tax certainty improves investment attractiveness.

The June 2018 response, in general, helps provide the needed certainty. One "certainty" point for which upfront clarification would be most welcome involves Swiss Form 82R. Specifically, we understand that the June correspondence was crafted to respond directly to the proposed model letter that was enclosed with our March 2018 submission. As our proposed model letter was intended to supplement, rather than replace, the information provided today on the Swiss reclaim form 82R, we assume that the SFTA is not planning to amend the 82R.

We also must observe, however, that in certain respects the additional information that the SFTA appears to request from RICs is more detailed than what was required previously.[3] Moreover, this information is more detailed than what is required in comparable markets. Finally, at least one country that previously imposed extraordinarily burdensome requirements on CIVs to prove the tax residency of their investors is becoming more investor friendly. Specifically, Korea has proposed legislation to treat CIVs meeting certain requirements as "deemed beneficial owners" and allow them to claim treaty relief themselves (rather than on behalf of eligible investors).

The remainder of this letter summarizes points for which (1) confirmation/clarification has been received and (2) further clarification is requested. We would be pleased to schedule a time to talk after you and your colleagues have had a chance to review this letter. Moreover, we would be pleased to discuss any aspect of this issue at any time. If the SFTA contemplate changes to the 82R, for example, we would be pleased to provide the industry's views. Similarly, if individual CIVs make supplemental filings based upon this guidance that the SFTA finds insufficient to support treaty relief, we would be pleased to make the entire industry aware of SFTA concerns.

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[2] This agreement, which we understand remains in effect, allows RICs to receive full treaty benefits so long as at least 95% of the RIC shares are held by US persons. The correspondence regarding the 2001 agreed procedure was included in the industry's 17 June 2016 and 29 March 2018 submissions.

[3] Some of this detailed information also seems unnecessary. The "Swiss income per fund-unit" column, for example, may require information that begins several positions to the right of a decimal point (such as 0.000001 Swiss Francs per share). The *per-share* amount of any single dividend received by a RIC is not needed to determine how much of the withheld tax is entitled to treaty relief. One simply multiplies the amount of tax potentially eligible for treaty relief by the percentage of shares held by US residents (when less than 95 percent of the shares are held by US residents).

Confirmations received

We appreciate that the 18 June response reconfirms that extrapolation will be permitted so long as 50% or more of a RIC's shares are held directly. This long-standing treatment is appropriate; it was agreed in 2001 as an administrable procedure for an industry that is domestic rather than global.

We also appreciate that the SFTA is willing to consider, on a case-by-case basis, whether shares held by nominees should qualify as directly held in applying this 50% test. We have encouraged our members to advance their support in appropriate situations as this administrable procedure will help provide tax certainty. Please feel free, as always, to contact ICI Global if we can provide you and your colleagues with any information regarding situations in which our members assert that nominee-held shares should qualify as directly held.

Finally, we appreciate the industry being reminded that the treaty defines tax residence of US citizens and green card holders by reference to substantial presence, permanent home, or habitual abode. Tax residence determinations, as we have discussed, are made by the regulated party—either the CIV or an intermediary/nominee—that has the relevant information. Considerations such as data privacy in many cases prevent intermediaries/nominees from sharing this investor-specific information.

Clarifications received

We appreciate that CIVs may utilize information from different sources to determine the tax residence of their investors. This important clarification effectively recognizes that CIV shares are purchased through different distribution channels with different degrees of transparency regarding investor tax residence. By permitting alternative approaches for establishing investor tax residence, the SFTA effectively has prevented any one firm or business model from having monopoly pricing power. CIV investors will benefit by receiving appropriate treaty relief at lower cost.

We also appreciate the clarification that the names and addresses of a CIV's investors generally will not be required. This information, as we have discussed in detail, often is not available for indirectly held shares. Moreover, this information generally cannot be provided in any event because of data privacy requirements.

Finally, we appreciate your follow-up e-mail clarification that CIVs should continue to use data from 31 March of the claim year when determining the tax residence percentages reported on the 82R. The example in the June 2018 response, by using 31 March of the year following the claim year, created some confusion. We already have advised our members of this supplemental clarification.

Further clarifications requested

We would appreciate greatly the SFTA's thoughts regarding a few issues for which further clarification seems necessary. As always, we would be pleased to discuss these issues, summarized below, at your convenience.

1. Clarifications regarding Source: Broker Information (Part 1.B)

The June 2018 response states that, while the SFTA does not expect to receive detailed information regarding a CIV's investors, RICs are to "check[] the accuracy of the data provided" by an intermediary or nominee. CIVs certainly can verify the number of shares held by an intermediary on 31 March. Other information to check the accuracy of such information might be available, however, only from the intermediary or nominee.[4] Clarification on precisely what RICs are expected to verify regarding the accuracy of the data provided will be most welcome.

We have two requests for clarification regarding data preservation. First, for what time period are CIVs expected to preserve data received from third parties? Second, is there any specific format in which the data should be preserved? Clarification on these two points will help ensure that CIVs can respond expeditiously to any data requests from the SFTA.

2. Clarifications regarding Source: Proxy Solicitation Firm Information (Part 1.C)

We would like to discuss at your convenience the information that the SFTA requests CIVs to provide for information received from proxy solicitation firms. Specifically, these firms today typically provide CIVs with information for all indirectly held shares on an aggregated basis. Requiring CIVs to disclose "the names of the nominees, intermediaries, trusts, partnerships and estates" for proxy-solicitation-firm-provided information is a significant change; burden and expense will be increased, perhaps substantially.

Given that the SFTA has been accepting proxy solicitation firm information on an aggregated basis, we would appreciate understanding the reason for this change. Perhaps an alternative, less burdensome, approach can be agreed to address the SFTA concern (assuming the SFTA decides additional information is essential to verify the information presented). The more it costs to recover treaty relief, the less attractive the investment.

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[4] CIVs, as we have discussed, typically have limited abilities to demand detailed client-specific information from intermediaries and nominees with direct client contact. Data privacy rules also limit the information that CIVs can review for accuracy-determination purposes.

3. Clarifications regarding Source: Sales restrictions (Part 1.D)

We request two clarifications regarding using sales restrictions to establish US tax residence.[5] First, how should a CIV document the sales restriction? Is it sufficient to describe the sales restriction and provide website link (such as to SEC website) for accessing information (such as the relevant prospectus language)? If something more must be provided, is an electronic copy of the document sufficient or must a hard copy be provided?

Second, because CIVs file claims on a calendar year basis, but often have non-calendar fiscal years, which "current" prospectus should be provided? Should CIVs with non-calendar fiscal years (such as one with a 30 June fiscal year) provide the prospectus for the fiscal year that includes (1) 31 March of the claim year (which is the date for determining tax residence percentages) or (2) 31 December of the claim year? Alternatively, should both prospectuses be provided when a CIV that does not have a calendar (31 December) fiscal year? As these sales restrictions are core features of a fund, it is not apparent to us why a CIV would need to provide two prospectuses to document a sales restriction.

4. Clarifications regarding the Overview (Part 1.E)

Clarifying guidance is needed regarding financial statements and prospectuses for which fiscal year(s) are to be provided to support a claim. Because, as noted above, a CIV's fiscal year and a claim period may not overlap completely, CIVs need to know whether they are to provide these documents for both portions of a claim period or only for one portion (such as the portion that includes 31 March).

This new requirement to provide prospectus and financial statement information is unique. No other source country of which we are aware asks for such detailed information before providing treaty relief. The need for this information is not apparent to us.

Nevertheless, CIVs obviously can provide this information, and will do so if required. The cost and relative burden of complying, however, will vary depending on what the SFTA will accept. We would urge the SFTA to allow cheaper alternatives—such as a link to SEC website pages that contain the relevant documents or electronic (PDF) copies of the relevant documents—if the SFTA insists on this data. Requiring CIVs to provide hard copies of the documents (which can be quite long) would be unduly burdensome.

[5] We understand the SFTA view that sales restrictions relate to eligibility to invest and not merely to jurisdiction in which promotional materials are distributed.

5. Clarifications regarding Beneficial Owner Information (Part 3)

Finally, clarification is requested on the treatment of trusts, foundations, partnerships, estates and joint accounts.[6] First, we request confirmation that proportionate determinations of US tax residence are appropriate if less than all underlying investors are US persons. Second, we request clarification regarding what "further information and declarations" are to be provided regarding the underlying investors in these investor categories. Any such additional information might be disproportionately burdensome relative to the generally very small percentage of shares held by these categories of investors. Similar to some of the other new requirements discussed above, this information is not requested from CIVs by other source countries.

Conclusion

On behalf of the US CIV industry, we appreciate your response. Please let us know how it would be most efficient and effective to continue our ongoing dialogue. My colleague Katie Sunderland (1-202-326-5826 or katie.sunderland@ici.org) and I will be happy to provide any additional information requested by the SFTA. You also may contact our counsel at Baker & McKenzie LLP – Professor René Matteotti (+41 44 384 13 60 or Rene.Matteotti@bakermckenzie.com) or Mary Bennett (+1-202-452-7045 or mary.bennett@bakermckenzie.com).

Sincerely,

Keith Lawson
Deputy General Counsel, Tax Law

cc: Pascal Duss (Ministry of Finance)
Urs Duttweiler (Ministry of Finance)
Oliver Oppliger (Federal Tax Administration)
Professor René Matteotti (Baker & McKenzie)
Mary Bennett (Baker & McKenzie)
Katie Sunderland (ICI Global)

[6] We understand that the SFTA only treats these investors as beneficial owners (despite being US residents) if all underlying investors are US persons.