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By Electronic Delivery

6 February 2015

Achim Pross
Head, International Co-operation and Tax Administration Division
Organisation for Economic Cooperation and Development
2 rue André-Pascal
75775, Paris, Cedex 16
France

RE: *Interest Deductions and Other Financial Payments*

Dear Achim:

ICI Global,[1] on behalf of our collective investment vehicle (CIV)[2] industry members, appreciates the OECD's recognition, in the BEPS Action 4 discussion draft on interest deductions and other financial payments, of the CIV industry's unique structure. Specifically, we support the proposition in paragraph 38, Scenario 2, that CIVs under the control of the same investment manager should not be treated as "connected parties" for purposes of these proposals if there is no other connection between the CIVs.

CIVs that are managed by the same investment manager, as we have discussed previously,[3] have different portfolio managers with separate fiduciary duties and investment objectives. The

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[3] *See* Investment Company Institute and ICI Global letter to Achim Pross Re: BEPS Action 2, Hybrid Arrangements and Collective Investment Vehicles, dated 2 May 2014.

investment manager typically has an insubstantial, if any, equity interest in the funds it manages. Requiring funds to assess the holdings of other funds in the same fund complex before entering into financial transactions would impose substantial burdens but few, if any, benefits. Therefore, the final interest disallowance recommendations should not apply any connected party rules to CIVs with a common investment management company unless the CIVs affirmatively take coordinated action.

* * *

Please feel free to contact me (at lawson@ici.org or 001-202-326-5832) if you would like to discuss this issue further, or if we can provide you with any additional information. My colleagues Karen Gibian (at kgibian@ici.org or 001-202-371-5432) or Ryan Lovin (at ryan.lovin@ici.org or 001-202-326-5826) also may be called upon for assistance.

Sincerely,

/s/ Keith Lawson

Keith Lawson
Senior Counsel – Tax Law

cc: interestdeductions@oecd.org
Kate Ramm

Keith Lawson
SENIOR COUNSEL, TAX LAW

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6 February 2015

Andrew Hickman
Head of the Transfer Pricing Unit
Centre for Tax Policy and Administration
Organisation for Economic Cooperation and Development
2 rue André-Pascal
75775, Paris, Cedex 16
France

RE: *Application of Transfer Pricing Guidelines to CIV Industry*

Dear. Mr. Hickman:

ICI Global,[1] on behalf of our collective investment vehicle (CIV)[2] industry members, appreciates that business and governments both will benefit from additional, thoroughly considered, and carefully crafted transfer pricing guidance. We support both the OECD's effort and the comments being submitted today by BIAC. This letter summarizes a few issues of particular concern to the CIV industry.

First, the final report on these BEPS Action items, we submit, must stress that a properly-applied arm's length standard remains the most accurate pricing measure for related party transactions. Similarly, transfer pricing analyses must be based upon facts rather than theory. No "one-size-fits-all' approach – particularly one based on economic theory – can account properly for the significant

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differences between industries, and between firms within a single industry. The financial services industry in general, and the CIV industry in particular, present factual issues that are very different from those presented by other industry sectors. Business reality, as the discussion draft recognizes, is paramount.

Second, for similar reasons, we strongly oppose the use of formulary apportionment if any reasonable basis exists for performing a transfer pricing analysis. The various activities performed by an asset manager in the CIV industry create different types of risks and do not contribute equally to the manager's success. Risk management and profitability considerations are different for actively-managed funds that "pick" stocks, for example, than they are for indexed-based funds that seek to mirror the performance of a basket of stocks.

Third, we must emphasize that risk considerations in the financial services industry often are dictated by regulatory requirements. Under the European Union's UCITS IV Directive and the AIFMD,[3] for example, the management company remains responsible and liable for the operation of the CIV, even when certain activities, such as portfolio management, are delegated to another entity either located within that country or another country. Importantly, the management company may not delegate its functions to other entities to the extent that it can be considered to be a "letter-box" entity; the management company must have measures in place that permit it to monitor effectively the entity to which it has delegated functions.

Fourth, we are concerned that many of the extensive changes that are proposed to the transfer pricing guidelines, including those discussed in BIAC's comments, could increase rather than decrease the number of tax disputes with compliant taxpayers. The BEPS timeline, unfortunately, does not provide sufficient time for considering thoroughly the ramifications of these changes and addressing them fully. Consequently, while we appreciate the reasons for the BEPS timeline, we urge that this very productive ongoing dialogue continue beyond the end of 2015.

Fifth, and related to the point immediately above, we reiterate our previously-expressed strong support for including mandatory binding arbitration in the BEPS Action 14 recommendations. Transfer pricing controversies already are disproportionately expensive to resolve and create significant potential for cross-border disputes and double taxation. Without the possibility of mandatory binding arbitration, the likelihood of un-resolvable disputes surely will increase.

Finally, and of central importance to asset managers, it is essential that the guidelines not apply to the financial services industry a "special measure" based upon "appropriate" returns on capital or levels of capital. The capital requirements for financial services industry firms are unique; not only is capital an essential component of financial services firms' business models, but capital adequacy requirements often are imposed by our regulators.

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[3] *See* Article 13 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) and Article 20 of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) no 1060/2009 and (EU) No 1095/2010.

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Sincerely,

/s/ Keith Lawson

Keith Lawson
Senior Counsel – Tax Law

cc: TransferPricing@oecd.org

Attachment

ATTACHMENT TO ICI GLOBAL SUBMISSION ON BEPS ACTIONS 8-10

Overview of the CIV Industry

ICI Global's recommendations on these Action Items are informed by CIV industry experiences in the global marketplace and the resulting tax controversies. In this context, it is instructive to consider the nature of a CIV, the reliance on third-party service providers, the roles and responsibilities of these service providers, and the organization of the CIV manager.

The Nature of a CIV

A CIV is a pooled investment vehicle widely used by individuals to cost-effectively access the securities markets. The important advantages provided by CIVs include professional management, asset diversification, liquidity, and robust governmental regulation and oversight.

All functions of the CIV, which does not have employees of its own, are performed by third-parties. The asset manager that has created the CIV often will perform many of these services. A CIV's officers typically will be employees of the asset manager. The typical CIV is overseen by a board of directors or trustees responsible for ensuring that the CIV is operated in accordance with its organizational documents, local law, and the best interests of its investors.

A CIV's investment objective (*e.g.,* stocks or bonds; country-specific, regional, or global; etc.) is prescribed in its offering document. Most CIVs disavow any interest in exercising any control over a company in which they invest. The CIV's portfolio management team decides which specific securities to buy and sell and initiates the securities trades.

Investors' interests in a CIV are acquired either directly from the CIV (with the purchase reflected directly on the CIV transfer agent's/recordkeeper's books) or through a third-party distributor. All CIV investor transactions are effected at the CIV's net asset value (NAV), which is determined each day by calculating the CIV's assets and liabilities and dividing by the number of outstanding interests. Because of this precise calculation requirement, certainty regarding a CIV's tax liabilities is essential.

CIVs may be organized for distribution to one or more specific types of investors (*e.g.,* individuals, pension funds, corporates, etc.). Depending on the type of targeted customer, different methods will be utilized for promoting the CIV and distributing CIV interests. Intermediaries (*e.g.,* banks, broker dealers, financial planners) typically are heavily involved in the distribution process.

The tax treatment provided to CIVs effectively recognizes that CIVs do not carry on business activities. To ensure that CIV investors receive tax treatment comparable to that provided to direct investors, for example, countries typically provide some mechanism to exempt a CIV's income from tax; the exemption mechanism may be an express tax exemption or a targeted tax deduction for amounts distributed to investors. The only tax borne by the typical CIV on its portfolio transactions is any withholding tax that may be imposed when the CIV is a nonresident investor.

A CIV is separate and distinct from the asset manager that created it. The CIV and the asset manager have different owners, their assets are totally separate, and they bear no responsibility for each other's liabilities (including tax liabilities).

Management Companies and Other Service Providers to CIVs

The typical CIV asset manager offers its customers a wide range of financial products and provides them with an array of valuable services. The products may include CIVs, other investment pools (*e.g.,* hedge funds) that are not widely-held, insurance, and banking services. The services provided, in addition to offering these products, may include distribution, investment education, investment advice, wealth management, and/or estate planning.

The services that an asset manager may provide to a CIV could include:

- portfolio selection (which may involve portfolio managers (PMs), analysts, and research assistants);
- asset acquisition and disposition (often through multiple securities dealers);
- assistance in arranging asset custody (typically through a global custodian and regional/local subcustodians);
- regulatory compliance;
- investor recordkeeping (through a "transfer agent"); and
- investor communications (including transaction confirmations and periodic account statements).

Many asset managers create separate entities to distribute CIV interests. These distributors may contact investors directly or work through unrelated third-parties (*e.g.,* broker-dealers). Because the global CIV industry is highly intermediated (*i.e.,* CIV interests typically are acquired through third parties), arm's-length pricing comparables are available for "in-house" distribution activities.

Many management companies operate globally – although their specific activities may vary widely. Companies may distribute their products locally, regionally, or globally. Some may invest globally – even if they distribute only locally or regionally. Still others may consolidate various functions in one (or more) locations to achieve economies of scale.

The manner in which a management company is organized and/or structures its operations also may vary widely. Even within one country, a company may create separate entities; different business lines subject to different regulatory regimes and/or supervised by different regulators frequently will be placed in separate entities. Operations in multiple countries likewise often will be performed by separate companies.

Particularly within the heavily-regulated financial services industry, regulatory considerations often will be the primary (if not exclusive) driver for structuring decisions. Local regulatory requirements, for example, frequently require that a locally-organized CIV be managed by a local management company. To the extent that one country's regulatory regime applies to an entire

entity, companies often will establish separate subsidiaries so that the applicable regulatory regime will apply only to the relevant business activities. When different jurisdictions have different, and potentially inconsistent, regulatory requirements, it often is necessary to set up separate entities (*e.g.,* distributors) in each jurisdiction. Separate entities become even more important when country-specific securities licenses or other permissions are required.

CIV Industry Competitiveness

The CIV industry is extremely competitive. CIVs routinely advertise their performance (investment return) both in real terms and relative to their competitors. Independent research firms (*e.g.,* Morningstar*)* often are a primary source for the data required to make these comparisons.

Performance and reputation are key for CIVs and their asset managers. CIVs that generate strong returns and outperform competing investment products are rewarded with shareholder investment inflows. CIVs that underperform face shareholder redemptions. Because an asset manager's fees are calculated based upon assets under management (AUM), managers are incentivized to generate strong performance.

Perhaps the biggest driver on performance (other than portfolio management) is the fee paid by a CIV to its manager. Because all fees paid by a CIV come directly from the CIV's assets, fees have a direct and negative impact on performance. The more a CIV pays in management fees, the lower its investment return. The CIV industry, therefore, is extremely price-sensitive.

Management companies also are incentivized to keep fees low. The lower the CIV's expenses, the higher the returns, and the greater the investor demand for the CIV. The larger the CIV, the higher the gross management fee.

Management Company Expense Considerations

Management companies seek to control all of their expenses. Business efficiency, including consolidating functions operationally and/or geographically, play an important role in cost containment. Costs between related parties are charged by applying the arm's-length standard.

All management company operations, importantly, do not have the same impact on profitability. In the CIV industry, a management company's reputation and success are driven largely by the attractiveness of the CIVs it offers to investors. Developing innovative products (*e.g.,* exchange traded funds) or identifying new investment opportunities (*e.g.,* micro cap stocks) can generate growth. Because performance is key, however, portfolio management (*e.g.,* stock picking) is a key profitability driver. Administration and infrastructure costs (*e.g.,* regulatory compliance such as legal services and accounting, transfer agency, custodial, and information technology costs) are very important to a successful operation and may constitute a significant portion of a CIV's operating costs – but they have less impact on a CIV's performance.

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6 February 2015

Andrew Hickman
Head of the Transfer Pricing Unit
Centre for Tax Policy and Administration
Organisation for Economic Cooperation and Development
2 rue André-Pascal
75775, Paris, Cedex 16
France

RE: *The CIV Industry and the Use of Profit Splits*

Dear. Mr. Hickman:

ICI Global,[1] on behalf of our collective investment vehicle (CIV)[2] industry members, submits that the arm's length method is the most appropriate basis for determining global value chain profitability within the CIV industry. The profit split methodology should be used only as a last resort, when no other measure can be applied fairly. Moreover, the profit split methodology should never be applied as a "check" on pricing determined under the arm's length standard; arm's length pricing is the most accurate measure of the value created by parties to a transaction. As we support the comments being submitted today by BIAC, this letter summarizes a few issues of particular concern to our industry.

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First, we submit that the final report on BEPS Action 10 must stress that the benefits of using the profit split method can vary significantly across industries and within an industry. The financial services industry in general, and the CIV industry in particular, present factual issues that are very different from those presented by other industry sectors. The Report on the Attribution of Profits to Permanent Establishments approved in 2010 by the CFA and the Council illustrates this point. The Report addresses general considerations and then specific considerations for various aspects of the financial services industry. While banking, global trading of financial instruments, and insurance all are addressed specifically, asset management in general and the CIV industry in particular are not analysed separately.

Second, for similar reasons, we are concerned that over-inclusive use of the profit split method effectively will lead to formulary apportionment. We strongly oppose formulary apportionment as the various activities performed by an asset manager in the CIV industry create different types of risks and do not contribute equally to the manager's success. Risk management and profitability considerations are different for actively-managed funds that "pick" stocks, for example, than they are for indexed-based funds that seek to mirror the performance of a basket of stocks.

Finally, we reiterate our previously-expressed strong support for including mandatory binding arbitration in the BEPS Action 14 recommendations. The use of the profit split method, because the results are so heavily dependent on the factors used and the relative weight given to each factor, may increase substantially both the number of tax controversies and the difficulties of resolving them. Without the possibility of mandatory binding arbitration, the result surely would be more cross-border disputes and greater double taxation of income.

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Please feel free to contact me (at lawson@ici.org or 001-202-326-5832) at your convenience if you would like to discuss this issue further or if we can provide you with any additional information. My colleagues Karen Gibian (at kgibian@ici.org or 001-202-371-5432) and Ryan Lovin (at ryan.lovin@ici.org or 001-202-326-5826) also may be called upon for assistance.

Sincerely,

/s/ Keith Lawson

Keith Lawson
Senior Counsel – Tax Law

cc: TransferPricing@oecd.org

Attachment

6 February 2015

ATTACHMENT TO ICI GLOBAL SUBMISSION ON BEPS ACTION 10

Overview of the CIV Industry

ICI Global's recommendations on BEPS Action 10 are informed by CIV industry experiences in the global marketplace and the resulting tax controversies. In this context, it is instructive to consider the nature of a CIV, the reliance on third-party service providers, the roles and responsibilities of these service providers, and the organization of the CIV manager.

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