

*By Electronic Delivery*

January 20, 2012

Mr. Byung-Cheol Kim, Director  
Corporation Tax Division  
Ministry of Strategy and Finance  
Government Complex II, 88 Gwanmoonro  
Gwacheon City, Gyeonggi Province, 427-725  
Korea

RE: Treaty Relief for Offshore Investment  
Vehicles Under Article 98-6 of the  
Corporate Income Tax Law and Draft  
Presidential Decree Article 138-7

Dear Sir:

The Investment Company Institute (“ICI”)<sup>1</sup> and ICI Global<sup>2</sup> support administrable rules that allow publicly offered, regulated collective investment vehicles (“CIVs”) to receive the applicable withholding tax relief provided by Korea’s double tax treaties. Because these CIVs generally have several thousand (or more) investors who may buy and sell CIV interests on a daily basis, it is essential that the CIVs be able to make all appropriate treaty benefit claims.

We are pleased that the draft Presidential Decree regarding Article 98-6 of the Korean Income Tax Law (“CITL”)<sup>3</sup> provides rules for qualifying offshore collective investment vehicles (“OCIVs”) that appear designed to address our concerns.<sup>4</sup> In this letter, we request clarification regarding how the

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<sup>1</sup> The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (“ETFs”), and unit investment trusts (“UITs”). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$12.47 trillion and serve over 90 million shareholders.

<sup>2</sup> ICI Global is the global association of regulated funds publicly offered to investors in leading jurisdictions worldwide. ICI Global seeks to advance the common interests and promote public understanding of global investment funds, their managers, and investors. Members of ICI Global manage total assets in excess of US \$1 trillion.

<sup>3</sup> This Decree was issued by MOSF Public Notice No. 2012-3 (January 6, 2012).

<sup>4</sup> Our comments are based upon an unofficial English-language translation of the draft Presidential Decree. We might have additional comments if the unofficial translation is inaccurate.

OCIV rules apply in certain contexts and raise some concerns with the timing for additional guidance (such as the forms that must be filed).

Paragraph 3 of Article 138-7 of the draft Presidential Decree provides that an offshore investment vehicle (“OIV”) that satisfies the requirements of an OCIV, that submits a “Confirmation report of OIV,” and that meets certain conditions will not be required to file beneficial owner details. The three conditions described in this paragraph are that the OIV (1) is “regulated by the financial supervisory authorities of the contracting state”; (2) had an average number of investors during the preceding fiscal year of at least 100; and (3) is not on a list of excluded OIVs under the treaty. These conditions appear to largely follow the changes to the Commentary to the Organization for Economic Cooperation and Development’s (“OECD’s”) Model Treaty that were adopted by the OECD’s Committee on Fiscal Affairs in 2010.

The 100-investor requirement potentially could be problematic in two situations. First, a newly-created OIV might not have 100 investors for a relatively short period after it is formed. If the OIV also has a very short fiscal year (for example, the OIV is organized in November and has a fiscal year ending on December 31), the OIV might have fewer than 100 investors, on average, each day of its fiscal year.<sup>5</sup> As the requirement for treaty benefits is that the OIV meet the 100-person requirement for the preceding year, a start-up fund might lose benefits for the year after it is formed (when it may have no fewer than several thousand investors each day) simply because it did not attract a large investor base immediately upon its formation. To address this concern, we request clarification that an OIV will be treated as meeting the 100-person requirement if it both (1) has at least 100 investors on the last day of its first fiscal year and the first day of the second fiscal year<sup>6</sup> and (2) certifies that it anticipates meeting the 100-person requirement for this second fiscal year.

A second aspect of the 100-investor requirement that could be problematic relates to what we understand to be a requirement that treats an OIV investing in another OIV as a single investor. This condition, if applied broadly, could be problematic in three situations.

First, many shareholders in OIVs acquire their interests through intermediaries that then hold the OIV shares for their customers in nominee accounts. An intermediary easily could hold shares for

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<sup>5</sup> For example, the OIV might have only one investor (the fund manager) for the first 10 business days of its operation, 50 investors for the next 10 business days, and 125 investors for the final 10 business days. In this example, the average number of investors for the previous fiscal year would not be at least 100 – although the 100-investor threshold would have been met by the end of the fiscal year and the fund could anticipate meeting the threshold during the next fiscal year.

<sup>6</sup> Alternatives could be advanced, such as taking the average for a specified period around the end of the fiscal year (*e.g.*, the average of investors for the last five days of the first fiscal year and the first five days of the second fiscal year). If an alternative is considered, the length of the period during the second fiscal year should be short, as OIVs will need to instruct their custodians before the first payment subject to relief that the 100-person requirement has been satisfied. Our proposal to require the OIV to certify that it anticipates meeting the 100-person requirement for the second fiscal year is intended to address the same concern about basing a determination only on the shareholder base for the last day of the fiscal year.

thousands of individual investors. Since the Presidential Decree uses the term “investors,” and the individuals holding through the intermediary are the ones whose money is being invested in the OIV, we assume that the 100-person limit is determined by treating these individuals as the “investors.” To address any ambiguity, we request that an OIV that offers its shares through intermediaries be permitted to satisfy the 100-person requirement based upon the number of investors holding shares in the OIV through intermediaries (which should not be treated as OIVs under the Presidential Decree).

A related issue involves individuals who invest in an OIV through a regulated insurance product such as a variable annuity or a variable life insurance contract. In this situation, as in the first, the individuals acquiring the variable insurance product are the ones whose money is “invested” in the OIV. As in the first situation, we assume that the 100-person limit is determined by treating these individuals as the “investors.” To address any ambiguity, we request that an OIV that offers its shares to insurance companies, that in turn make the OIV available to individual investors through variable insurance products, be permitted to satisfy the 100-person requirement based upon the number of investors in the variable insurance products offered by the insurance companies that are invested in that OIV.

A final issue involves so-called master-feeder funds where the investing (portfolio) OIV may be held only by other OIVs that offer their shares to the general public. This structure can allow different small financial firms to invest in the same portfolio but offer their “own” fund to their clients. If each “secondary OIV” were treated as a single investor, the “master” (portfolio) fund would not meet the 100-person requirement even though it would be held, effectively, by many thousands of investors. To address this concern, we request clarification for a master-feeder fund structure that is created under the laws of a foreign country which are similar to the master-feeder fund structure provided for by Article 233 of the Financial Investment Services and Capital Markets Act (Law No. 8635 (2007) as amended. Specifically, we request that a “master” (portfolio) OIV in a master-feeder fund be permitted to satisfy the 100-person requirement based upon the number of shareholders in the secondary OIV feeder funds investing in the master fund.<sup>7</sup>

We understand that the relevant forms (such as the “OIV Confirmation Report” and the “Application of Reduced Withholding Tax Rates”) have not been issued. OIVs and their custodians would like to study each such form when released in due course in order to provide comments such as suggested fill-in instructions and to request clarification regarding a form’s requirements in specific factual situations. We urge the Ministry to release these forms, perhaps only in draft form, to allow sufficient time to comment and ensure compliance by the July 1, 2012 effective date for the new requirements.

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<sup>7</sup> A similar issue might arise for the “fund of funds” structure where one fund invests only in other funds with differing investment objectives. In this case, the first (“top tier”) effectively allocates its investors’ money into “lower tier” funds to gain asset diversification that can be adjusted to reflect changing market conditions. The investors in the upper-tier fund should be taken into account in determining whether the lower-tier fund meets the 100-person requirement. Clarification of this point also would be appreciated.

January 20, 2012

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We appreciate your consideration of our requests. A Korean-language translation of this letter will be provided soon. Please feel free to contact me (at [lawson@ici.org](mailto:lawson@ici.org) or 001-202-326-5832) or my colleague Pinank Desai (at [pinank.desai@ici.org](mailto:pinank.desai@ici.org) or 001-202-326-5876) if ICI or ICI Global can provide you with any additional information.

Sincerely,

*/s/ Keith Lawson*

Keith Lawson  
Senior Counsel – Tax Law

*By Electronic Delivery*

January 18, 2012

Mr. Madhu Kannan  
Managing Director & Chief Executive Officer  
Bombay Stock Exchange, Limited  
Phiroze Jeejeebhoy Towers  
Dalal Street  
Mumbai- 400001  
India

RE: Transactional Data Provided to Indian  
Tax Authority

Dear Mr. Kannan:

The Investment Company Institute (“ICI”)<sup>1</sup> and ICI Global<sup>2</sup> respectfully request that the Bombay Stock Exchange (“BSE”) provide foreign investment fund transactional data to the Indian tax authority based upon settlement date, rather than trade date, information. This procedural change will alleviate substantial, unnecessary disputes with the Indian tax authority that cannot be resolved without extensive and expensive reconciliation efforts.

We understand that the Indian tax authority periodically obtains data on transactions entered into by foreign investment funds, registered as either foreign institutional investors (“FIIs”) or subaccounts on the BSE, through a data extract. The transactional data provided by this extract includes trade date, trade time, scrip code, scrip name, trade number, trade value, trade quantity, order number, broker code, and client code. The tax authority uses this data to validate investment income reported by the funds on their Indian tax returns.

The tax disputes arise whenever the Indian tax authority cannot reconcile the BSE’s trade date data with the corresponding tax return information. These reconciliation difficulties have resulted in

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many funds being charged with underreporting their Indian investment income. While some funds have demonstrated successfully that all transactions have been reported correctly, the appeals process is lengthy and expensive.

The Indian tax authority's reconciliation difficulties arise because the trade date data provided by the BSE often is incomplete or inaccurate. The data deficiencies are attributable to various factors. One such factor arises from the exchange's procedure, which we support, permitting broker participants to enter a single Permanent Account Number ("PAN") client code for an order, even if the order is for several funds belonging to the same client group (or for a fund other than the one for which the PAN is provided). This procedural simplification nevertheless causes substantial tax reconciliation confusion because the BSE trade data provides no discernible way to allocate trades among the various funds (FIIs and/or subaccounts.) A second factor is that, even when the trade data purports to identify the transacting fund, the wrong PAN may be entered.

These reconciliation difficulties would be addressed by providing the Indian tax authority with trade data based upon settlement date information. By settlement date, any trades for which the simplified trade date reporting procedure was utilized will be allocated correctly to the appropriate fund(s) based on instructions received from the respective individual FIIs or subaccounts. Moreover, any errors made in providing the correct PAN for a single trade should have been detected by the fund or its custodian since custodians must confirm transactions prior to settlement date (so that payment and/or securities can be paid into the clearinghouse).

Our proposal to provide the Indian tax authority with settlement date data would simplify greatly the authority's tax return reconciliation effort. Funds also would benefit from avoiding the cost of appealing deficiency orders based on incomplete and inaccurate information.

The National Stock Exchange of India ("NSE") already provides transaction data to the Indian tax authority based upon settled trades. Because settlement date data can be reconciled easily with tax return information, the problems created by the BSE's trade date reporting practice have not arisen for foreign investment funds trading on the NSE. Consequently, we urge the BSE to adopt our proposal and conform its reporting practices to those of the NSE.

We greatly appreciate your consideration of our request. If there is any additional information that we can provide, please contact my colleague Pinank Desai (at [pinank.desai@ici.org](mailto:pinank.desai@ici.org) or 001-202-326-5876) or me (at [lawson@ici.org](mailto:lawson@ici.org) or 001-202-326-5832).

Sincerely,

*/s/ Keith Lawson*

Keith Lawson  
Senior Counsel – Tax Law