MEMO# 31060

January 29, 2018

Industry Coalition Letter On Korean Capital Gains Tax Proposal

[31060]

January 29, 2018 TO: ICI Members
ICI Global Members SUBJECTS: International/Global
Tax RE: Industry Coalition Letter On Korean Capital Gains Tax Proposal

The attached coalition letter, crafted by ICI Global and signed by 12 associations,[1] expresses profound concerns with a Korean proposal to lower the ownership threshold from 25 percent to five percent for taxing the capital gains realized by non-Korean investors on the stocks of Korean listed companies. Reducing the ownership threshold, absent industry-requested modifications, could result in collective investment vehicles (CIVs) losing 11 percent of their total sales proceeds to inappropriate withholding.

Our most significant concerns, which illustrate why the proposal should be reconsidered, are that:

- no clarity is provided regarding whether the ownership threshold is applied at the level of (i) the CIV or (ii) the CIV's investors;
  - applying the ownership threshold rule at the CIV investor level in any meaningful way is neither possible nor appropriate;
  - applying the ownership threshold rule at the CIV level could cause some CIVs to incur capital gains tax (even though no CIV investor's indirect interest would meet any ownership threshold);
- substantial uncertainty exists regarding the related party and aggregation rules — whether those rules are applied at the level of either the CIV or the CIV investor;
- the information required to calculate the gain or loss on any CIV portfolio security — whether at the CIV or CIV investor level—is not available to the broker;
- substantial implementation time would be required if the proposal were advanced in any form;
- implementation for previously-acquired shares is not feasible as the cost basis information for these shares is not readily available and cannot be reconstructed; and
- because the 80 percent reduction in the ownership threshold (from a 25 percent ownership interest to a 5 percent ownership interest) would increase substantially brokers' liability concerns about potential under-withholding penalties, the potential for extensive over-withholding will be substantial—and damaging to the Korean market.

If the proposal nevertheless is advanced, the letter recommends industry-specific modifications as well as changes of general applicability (such as prospective-only application after a reasonable implementation period). The most-pressing "high-level" industry-specific requests are for guidance that:

- Korea will apply the guidance included in the OECD's CIV Report for treating CIVs as treaty-entitled and allow CIVs to demonstrate their treaty entitlement by providing Certificates of Tax Residence;
- any threshold for non-treaty-entitled CIVs, consistent with OECD guidance, will be based upon how the CIV is organized and operated (either as opaque or as transparent);
- treats every CIV, for related party purposes, as unrelated to its investment manager and to every other CIV or investment pool—whether or not offered by its investment manager; and
- brokers may rely upon (i) CIV attestations regarding treaty entitlement and satisfaction of applicable ownership thresholds absent actual knowledge that the attestations are false or (ii) Certificates of Tax Residence.

The letter contains detailed support for these recommendations and others that are developed therein.

Keith Lawson
Deputy General Counsel - Tax Law

Attachment

endnotes

[1] The twelve associations are: Association Française de la Gestion financière (AFG); Association of Global Custodians; Association of the Luxembourg Fund Industry; Assogestioni; EFAMA - European Fund and Asset Management Association; Financial Services Council (Australia); Hong Kong Investment Funds Association; ICI Global; The Investment Association; The Investment Funds Institute of Canada; Irish Funds Industry Association; and SIFMA AMG.