MEMO# 28570

December 11, 2014

For Your Review and Comment - First Draft of ICI Global Comment Letter on OECD BEPS 6 Tax Treaty "Abuse" Paper

[28570]

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TO: TAX COMMITTEE No. 41-14
ICI GLOBAL TAX COMMITTEE No. 22-14
INTERNATIONAL COMMITTEE No. 41-14 RE: FOR YOUR REVIEW AND COMMENT - FIRST DRAFT OF ICI GLOBAL COMMENT LETTER ON OECD BEPS 6 TAX TREATY “ABUSE” PAPER

The attached draft comment letter responds to the discussion draft document entitled “Follow Up Work on BEPS Action 6: Preventing Treaty Abuse” [1] that was released by the Organisation for Economic Co-operation and Development (OECD) in November 2014. [2] The discussion draft requests additional input on several issues that were included in the BEPS Action 6 Report that was delivered to the G20 Finance Ministers in September 2014 (the “2014 Deliverable”). [3] The 2014 Deliverable adopted comments that we submitted in April [4] supporting inclusion in the BEPS Action 6 Report of the recommendations made by the OECD in 2010 (the “2010 Report”) regarding treaty eligibility for widely-held collective investment vehicles (CIVs). [5]

The CIV Report

This draft letter responds first to the OECD’s request for additional input on whether recommendations made by the OECD in the 2010 Report continue to be adequate and whether any improvements should be made to those conclusions. Specifically, the letter explains why the recommendations of the 2010 CIV Report are sound and should not be modified. The letter then explains why we oppose providing a “preferred approach” for CIV tax treaty entitlement issues. Finally, with respect to the 2010 Report, the letter urges that “equivalent beneficiaries” [6] be treated as treaty-eligible investors under any limitation on benefits (LOB) provision.

Non-CIVs

Any consideration of non-CIVs, the letter suggests, could be advanced through an Informal Consultative Group like the one that developed the CIV Report. The letter stresses, however, that any work on non-CIVs should not impact the CIV Report or its conclusions.

The letter's recommendations for applying treaties to pension funds are that:

- A tax exemption should be provided for a pension fund's portfolio investments;
- A pension fund should be defined broadly for this purpose;
- LOB (and principal purpose test (PPT)) clauses should be applied narrowly, if at all, to pension fund cross-border investments; and
- Any LOB should treat as "good" participants/beneficiaries any person who is resident in any country with which the source country provides a pension fund exemption.

LOB and Related Issues (More Generally)

The letter recommends that treaties be applied to CIVs by treating all equivalent beneficiaries as residents of a treaty partner and by looking through any street name/nominee account to the underlying investors.

Publicly-Listed Entities

The letter states that CIVs that trade on recognized stock exchanges should be eligible for any treaty relief provided to publicly-listed entities. Trading on exchanges in multiple jurisdictions should not impact negatively a CIV's ability to rely on the publicly-listed rule.

Principal Purpose Test

The letter recommends that CIVs generally be exempt, expressly or effectively, from any PPT. We welcome the example of a CIV that distributes its income currently and is distributed primarily within a single country as a fact pattern to which a PPT generally should not be applied. We also urge a second example in which (1) a majority of the CIV's investors are resident in any country with which the source country provides treaty relief comparable to that provided to the treaty partner and (2) the CIV retains rather than distributes its income. This recommendation effectively would embed into the PPT the equivalent beneficiary approach that we submit is essential to provide appropriate treaty relief to globally-distributed CIVs.

If a PPT nevertheless is applied to a CIV, the letter urges effective and expeditious mechanisms, such as administrative procedures that involve committees of experts and mandatory arbitration, for reviewing and resolving a country's unilateral application of the test.

TRACE

Finally, the letter urge countries to adopt the OECD's Treaty Relief and Compliance Enhancement (TRACE) implementation package [7] as they implement other investor-related initiatives (including any arising from BEPS Action 6).

Request for Comments

Please provide any comments on this draft letter to Keith Lawson (at lawson@ici.org or 202-326-5832) by Friday, 26 December 2014. A conference call to discuss a revised draft, reflecting comments received, will be held on Monday, 5 January 2015. The letter will be submitted to the OECD prior to the 9 January 2015 deadline.

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Attachment

endnotes

[1] The OECD's November 2014 discussion draft is available at: http://www.oecd.org/ctp/treaties/discussion-draft-action-6-follow-up-prevent-treaty-abuse.pdf.

[2] See, ICI Memorandum #28538, dated November 24, 2014 (available at: http://www.ici.org/iciglobal/pubs/memos/memo28538).

[3] The OECD's 2014 Deliverable on BEPS Action 6 is available at: http://www.oecd.org/ctp/beps-2014-deliverables.htm. See also, ICI Memorandum #28375, dated 17 September 2014 (available at: http://www.ici.org/my_ici/memorandum/memo28375).

[4] ICI Memorandum #28024, dated 9 August 2014 (available at: http://www.ici.org/my_ici/memorandum/memo28024).

[5] The OECD's 2010 Report is available at: www.oecd.org/tax/treaties/45359261.pdf. See also ICI Memorandum #23186, 15 January 2009 (available at http://www.ici.org/policy/tax/foreign_tax/memo23186).

[6] Equivalent beneficiaries, in the CIV context, are those investors in the CIV who are resident in any country with which the source country (the country from which the CIV is receiving the income) has a comparable tax treaty relief provision.

[7] http://www.oecd.org/ctp/exchange-of-tax-information/TRACE_Implementation_Package_Website.pdf.