

## COMMENT LETTER

August 8, 2019

# ICI Global Submission on India Tax Surcharge Increase (pdf)

By Electronic Delivery followed by Hand Delivery 8 August 2019 Smt. Nirmala Sitharaman Minister of Finance Government of India North Block New Delhi 110 001 India RE: Executive Power Available to Resolve Tax Surcharge Issue for Non-Corporate FPIs Honourable Finance Minister: ICI Global,<sup>1</sup> on behalf of our members and their over \$134 billion invested in India, would like to respectfully point to an executive power that is available to the Indian government to resolve the tax surcharge issue. Specifically, section 2(17)(iv) of the Indian Income-tax Act, 1961 ('the Act') could help resolve the tax surcharge issue for FPIs not treated presently as companies under Indian law. This section allows the Central Board of Direct Taxes (CBDT) to issue a general or special order declaring any institution, association or body, whether incorporated or not and whether Indian or non-Indian, to be a "company" (a foreign company). We request that the Ministry of Finance, acting through the CBDT, consider issuing such an order for the Indian financial year 2019-20 onwards. This order would treat collective investment vehicles 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\$30.2 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.

continued Minister of Finance ICI Global Submission 8 August 2019 Page 2 of 7 (CIVs)<sup>2</sup> that are not set-up as companies or firms (e.g. trusts / AOPs) to be treated as companies (foreign companies) for Indian income-tax purposes. This solution is preferable to formal restructuring, for several reasons. First, the relief can be provided quickly; legislation is not needed. Second, this relief resolves the issue for those CIVs that are precluded by their domestic law from restructuring. Third, for those CIVs for which restructuring is legally available, this solution prevents the CIVs—and, therefore, their moderate-income investors—from incurring any costs or adverse consequences in other countries where the CIVs may invest. Finally, this Indian-driven solution does not create potential legal considerations in the CIVs' domicile. We attached Annexure reproduces section 2(17), describes the notification procedure and explains why any institution, association, or body (which is headquartered outside India) that is declared a "company" under section 2(17)(iv) would then be regarded as a "foreign company." We believe that such an executive action will be a win-win for all; it will send out a very positive signal about the Indian Government's proactive response to policy situations. Please feel free to contact the undersigned if we can provide you with any additional information on the impact of the tax surcharge increase on CIVs. For further details on section 2(17)(iv), please contact Mr. Russell Gaitonde, Partner, Deloitte Haskins & Sells LLP, at +91-22-6815

3100 or at +91-98192 84801; you can email Russell at: [rgaitonde@deloitte.com](mailto:rgaitonde@deloitte.com). You can also contact Mr. Ashutosh Dikshit, Partner, Deloitte Touche Tohmatsu India LLP, at +91-124-679 2901 or at +91-98107 21884; you can email Ashutosh at [adikshit@deloitte.com](mailto:adikshit@deloitte.com). Rajeshree Sabnavis (founder of Rajeshree Sabnavis Associates, and one of ICI Global's outside advisors) will continue to follow up with your office to schedule a meeting to discuss these important issues.

2 We term "CIVs," for this purpose, would be limited to funds that are widely held, hold a diversified portfolio of securities and are subject to investor-protection regulation in the country in which they are established. This is the precise definition adopted by the Organisation for Economic Co-operation and Development (OECD) in their report entitled "We Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles" (the "CIV Report") — <http://www.oecd.org/tax/treaties/45359261.pdf>. This same definition is being advanced by the United Nations' Committee of Experts on International Cooperation in Tax Matters as it develops CIV-specific Commentary for the UN Model Income Tax Convention. See, <https://www.un.org/esa/ffd/wp-content/uploads/2018/08/CRP10-Taxation-of-Collective-Investment-Vehicles-CIVs.pdf>. Importantly, this proposed exception would not apply to investments through private equity funds, hedge funds, or other entities that are designed for the super-rich.

Minister of Finance ICI Global Submission 8 August 2019 Page 3 of 7 With kind regards on behalf of the CIV industry, Keith Lawson Katie Sunderland Deputy General Counsel, Tax Law Assistant General Counsel, Tax Law ICI Global ICI Global [lawson@ici.org](mailto:lawson@ici.org) [katie.sunderland@ici.org](mailto:katie.sunderland@ici.org) 1 (202) 326-5832 1 (202) 326-5826 cc: Rajeshree Sabnavis Russell Gaitonde Minister of Finance ICI Global Submission 8 August 2019 Page 4 of 7

Annexure A. Section 2(17) of the Income Tax Act, 1961 (the Act), as amended by the Finance (No. 2) Act, 1971, grants CBDT powers to declare any institution, association, or body, whether incorporated or not, to be a company, by general or special order. Section 2(17) of the Act is reproduced below: "company" means— (i) any Indian company, or (ii) any body corporate incorporated by or under the laws of a country outside India, or (iii) any institution, association or body which is or was assessable or was assessed as a company for any assessment year under the Indian Income-tax Act, 1922 (11 of 1922) or which is or was assessable or was assessed under this Act as a company for any assessment year commencing on or before the 1st day of April, 1970, or (iv) any institution, association or body, whether incorporated or not and whether Indian or non- Indian, which is declared by general or special order of the Board to be a company : Provided that such institution, association or body shall be deemed to be a company only for such assessment year or assessment years (whether commencing before the 1st day of April, 1971 or on or after that date) as may be specified in the declaration; We statutory powers under section 2(17)(iv) have been earlier used by CBDT (as stated in the Explanatory Memorandum extracted below), to confer the status of company on entities ('bodies') even though they do not possess the ordinary characteristics of a company limited by shares. We history of this provision and the powers granted to CBDT under this provision as stated in the Explanatory Memorandum to the Finance Bill of 1971 when section 2(17) was amended is reproduced below: "70. Definition of "company" - For the purposes of Income-tax Act, the term "company" is defined to mean: (i) any Indian company; or (ii) association, whether incorporated or not and whether Indian or non-Indian which is declared by a general or special order of the Central Board of Direct Taxes to be a "company" for the tax purposes of the Act. This power to declare any association to be a "company" for tax purposes has been made use of for several years past with a view to conferring the status of a "company" on foreign companies as also on entities which are not otherwise within the scope of that concept. Such declaration is given by the Board, ordinarily, in the case of any entity which possesses the ordinary characteristics of a company limited by shares and which is a legal person according to the laws of the country in which it is incorporated.

Besides declaring companies registered in foreign countries to be "companies" for purposes of taxation in India, statutory corporations established by a Central, Provincial or State enactment, such as road transport corporations, air transport corporations, etc., have been declared to be companies. Foreign corporations in which the capital is held wholly or partly by a foreign Government have also been Minister of Finance ICI Global Submission 8 August 2019 Page 5 of 7 declared as "companies" for the purposes of income-tax, where such corporations are legal entities separate from the Government and are capable of holding property independently and of suing and being sued according to the laws of that country. The provision has also been used, on a few occasions, to confer the status of company on bodies such as chambers of commerce, clubs, etc., even though these bodies do not possess the ordinary characteristics of a company limited by shares. The declaration under this provision has been given in some cases with retrospective effect to cover past years as well. 71. The requirement that a foreign company could be treated as a company for purposes of the Income-tax Act only if it has been declared as a company by the Board generates unnecessary work. Further, giving retrospective effect to declarations made in the case of foreign companies or other non- corporate entities may not be said to be strictly in accordance with the provisions of the law. In order to place the existing practice, that has been followed over the last many years, on a statutory footing and to reduce the number of cases in which declaration as a company has to be given by the Board, it is proposed to amend the definition of "company" for the purposes of the Income-tax Act. Under the proposed definition, the term "company" will include, besides any Indian company, any body corporate incorporated by or under the laws of any country outside India. The term will also include any institution, association or body which is or was assessable or was assessed, under the 1922 Act or the 1961 Act, as a company for any assessment year up to and including the assessment year 1970-71. Further, as under the earlier definition, the Central Board of Direct Taxes will have the power to declare, by general or special order, that any institution, association or body, whether incorporated or not and whether Indian or non-Indian, will be treated as a "company" for purposes of the Income-tax Act. This power of the Board is now being specifically made exercisable even in relation to past assessment years (whether commencing before, or on, or after 1-4-1971) and the declaration will have effect for any assessment year or years specified therein." B. Wherefore, the power to notify entities (whether possessing the ordinary characteristics of companies or not) as companies has been retained with the CBDT under the amended provisions of section 2(17). C. A CIV not set up as a company or a firm, e.g. set-up as a trust, (i.e. an institution, association or body) that is declared a "company" under section 2(17)(iv) the Act, would be regarded as a "foreign company" under section 2(23A) of the Act. This will bring it on par with all FPIs that are CIVs and which are set-up as companies which invest in the Indian capital markets. This is because such a CIV will not be an "Indian company" under section 2(26)(ib) of the Act, as it will not have its registered office or principal office in India [and would therefore be covered by the exclusion stated in the proviso to section 2(26) of the Act]. Consequently, it will not be regarded as a "domestic company" under section 2(22A) of the Act, because it does not fulfil the conditions of that section that either it is an Indian company or that makes the prescribed arrangements for Minister of Finance ICI Global Submission 8 August 2019 Page 6 of 7 the declaration and payment of dividend within India. Consequently, it will be a "foreign company", as defined in section 2(23A) of the Act to mean a company which is not a domestic company. D. The relevant provisions of the Act are reproduced below: (i) Section 2(26) of the Act, as amended by the Finance (No. 2) Act, 1971, deems any institution, association, or body which is declared by the CBDT to be a company, under section 2(17), to be an Indian company. Section 2(26) of the Act is reproduced below: "Indian company" means a company formed and registered under the Companies Act, 1956 (1 of 1956), and includes — (i) a company formed and registered

under any law relating to companies formerly in force in any part of India (other than the State of Jammu and Kashmir [and the Union territories specified in sub-clause (iii) of this clause]; [(ia) a corporation established by or under a Central, State or Provincial Act; (ib) any institution, association or body which is declared by the Board to be a company under clause (17);] (ii) in case of the State of Jammu and Kashmir, a company formed and registered under any law for the time being in force in that State; [(iii) in the case of any of the Union territories of Dadra and Nagar Haveli, Goa, Daman and Diu, and Pondicherry, a company formed and registered under any law for the time being in force in that Union territory:] Provided that the [registered or, as the case may be, principal office of the company, corporation, institution, association or body] in all cases is in India; (ii) ¶ The Memorandum explaining the provisions of the Finance (No. 2) Bill, 1971 also explains the rationale for amending the definition of “Indian company” so as to confer benefits of those corporations that are established by or under a Central, State or Provincial Act, or those institutions, associations or bodies that are declared by the CBDT to be a company under section 2(17) of the Act. ¶ The relevant extract of the Memorandum is reproduced below: “72. Definition of “Indian company” – 4e definition of the term “Indian company” in the relevant provision of the Income-tax Act presently covers only those companies which are formed 3 Now Companies Act, 2013 Minister of Finance ICI Global Submission 8 August 2019 Page 7 of 7 and registered under the Companies Act, 1956 or the law relating to companies formerly in force in any part of India including, Jammu & Kashmir or in the union Territories of Dadra and Nagar Haveli, Goa, Daman and Diu and Pondicherry. It does not cover statutory corporations which, as stated in paragraph 70 have to seek a declaration to be a company for purposes of taxation. Such a declaration does not, however, confer the status of “Indian company” on such statutory corporations. Even under the provisions now proposed to be made in the Income-tax Act as discussed in paragraphs 70 and 71, a statutory corporation established in India will not come within the definition of “Indian company”. Apart ¶ from this, statutory corporations by their very nature do not o ¶ en have a share capital as such and hence such a corporation is not in a position to qualify for being treated as a ‘domestic company’ i.e. an Indian company or a company which has made the prescribed arrangements for the declaration and payment of dividends within India. 4is position sometimes results in unintended difficulties both as regards the rates of tax applicable to the company’s income and also its eligibility to some of the tax concessions, such as the export market development allowance, which are available only to domestic companies. It is accordingly proposed to amend the definition of ‘Indian company’ so as to cover statutory corporations established in India as also any institution, association or body which is declared by the Board to be a company and which has its principal office in India.” (iii) Section 2(22A) of the Act, which defines the term “domestic company”, is reproduced below: “domestic company” means an Indian company, or any other company which, in respect of its income liable to tax under this Act, has made the prescribed arrangements for the declaration and payment, within India, of the dividends (including dividends on preference shares) payable out of such income; (iv) Section 2(23A) of the Act, which defines the term “foreign company”, is reproduced below: “foreign company” means a company which is not a domestic company;