NZSUPERFUND
Te Kaitiaki Tāhua Penihana Kaumatua ō Aotearoa

QIC

Tax Treaties,
Transfer Pricing and Financial Transactions Division
OECD/CTPA

Our ref BEPS - Non-CIV Examples Submission from QIC and NZ Super

2 February 2017

By email

Comments on BEPS Action 6 - Treaty entitlement of non-CIV funds examples

Thank you for the opportunity to provide comments on the Public Discussions Draft entitled "BEPS ACTION 6 - *Discussion Draft on non-CIV examples*" which was released for comment on 6 January 2017 (**Discussion Draft**).

This submission is made by Queensland Investment Corporation (**QIC**) and New Zealand Superannuation Fund (**NZ Super Fund**). We also refer to our submission dated 22 April 2016 in which we provided comments on the Public Discussion Draft entitled *"Treaty entitlement of non-CIV funds"* which was released for comment on 24 March 2016 (**April Submission**).

For the purposes of this submission, institutional investors are considered to be widely held entities on the basis that they are either pension funds, sovereign wealth funds (**SWFs**) or widely held unlisted funds. This submission does not consider the treatment of investments made by an individual or controlled entities of an individual.

1. Summary

- The Commentary to the OECD Model Tax Convention (Model DTA) (**Commentary**) should include examples to provide guidance on the application of the principal purpose test (**PPT**) in order to provide institutional investors with certainty on the application of the PPT to non-CIV investments.

- Broadly, we support the inclusion of Example 1. However, we suggest Example 1 would provide greater certainty for investors on the application of the PPT, if it was amended such that:

  - Example 1 is expanded to apply whether RCo is a wholly-owned subsidiary of a Fund (being a single institutional investor) or wholly owned by one or more Funds (all of which are institutional investors); and

  - The reference to "common currency" is deleted. We do not see any rationale for why Example 1 should be limited to the Eurozone.

- Example 3 as <u>currently drafted</u> should not be included in the Commentary. Should delegates decide to include this example in the Commentary, then we submit that it is essential that the following sentence be deleted from the example:

- "*RCo, however, does not obtain treaty benefits that are better than the benefits to which its investors would have been entitled if they had made the same investments directly in these States and had obtained treaty benefits under the treaties concluded by their States of residence.*"
- Where the principal purpose for establishing a non-CIV investment entity in a particular jurisdiction is a non-tax purpose, then that non-CIV entity should not be restricted from assessing treaty benefits, even where the availability of treaty benefits was one of multiple considerations in determining the location of the non-CIV entity.

1 Importance of including guidance on the PPT

We thank the OECD Working Party 1 for their work to date and emphasise the importance of including guidance in the Commentary on the application of the **PPT.** This will provide institutional investors with certainty which is critical in respect of both bidding for and structuring of cross-border investments.

Unlike the limitation of benefits (**LOB**) approach, the PPT is inherently a principles based approach and absent additional guidance in the form of worked examples, there is a risk that the PPT may be subject to conflicting interpretations and application by investors and government authorities. Uncertainty on the potential application of the PPT and consequently the taxation consequences of cross border investment translates to increased risk for investors and hence an additional barrier for long term institutional investors, particularly in long term low yield environments common to non-CIV investments.

More broadly, we support the position that where the principal purpose for establishing a non-CIV investment entity in a particular jurisdiction is a non-tax purpose, then that non-CIV entity should not be restricted from accessing treaty benefits, even where the availability of treaty benefits was one of multiple considerations in determining the location of the non-CIV entity.

Accordingly, we support including examples in the OECD Commentary to illustrate how the PPT applies to non-CIV entities used by institutional investors.

2 Specific comments in relation to the Examples

2.1 Example 1 to apply where RCo is wholly owned by <u>one or more</u> institutional investors

Broadly, we support the inclusion of Example 1 in the Commentary to the OECD convention. However, we suggest Example 1 would provide greater certainty for institutional investors on the application of the PPT, if RCo is a wholly-owned subsidiary of one or more funds, all of which are institutional investors.

As discussed in our April Submission, the breadth of geographies and asset classes in which institutional investors participate mean that it is necessary to establish a non-CIV investment entity in jurisdictions outside their country of residence for many of their investments. Whilst it is difficult to generalise, it is common for institutional investors from the southern hemisphere to co-invest in non-CIVs with other institutional investors resident in either Europe or North America. Taking into account the residence of the local manager, the asset location and time zone differences, it would not make commercial sense to set up a non-CIV in Australia or New Zealand for these investments.

The relative size of a fund is a significant factor in determining its operations and investment capabilities. In particular, a smaller fund (like NZ Super Fund) is unlikely to have its own wholly owned regional investment structure and would tend to co-invest with other like-minded institutional investors. Non-CIV investment entities can also vary significantly based on the underlying investment made (e.g. pooled versus wholly owned), the operational management of the investment (e.g. in sourced or out sourced) and in market or regional platforms.

In order to accommodate the breadth of real world fund investors, we consider that it is important to expand Example 1 to cover co-investments that are wholly owned by one or more institutional investors.

2.2 Example 1 – Remove reference to regional 'common currency' in Example 1

We submit that the Example 1 reference to a regional group common currency as a relevant factor when considering the commercial reasons to establish RCo, should be deleted as follows (deletions to the example wording have been indicated by a ~~strikethrough~~):

"…The decision to establish the regional investment platform in State R was mainly driven by the availability of directors with knowledge of regional business practices and regulations, the existence of a skilled multilingual workforce, State R's membership of a regional grouping ~~and the use of the regional grouping's common currency,~~ and the extensive tax convention network of State R, including its convention with State S, which provides for low withholding tax rates."

We consider the inclusion of the reference to regional currency may unintentionally be interpreted as a requirement, limiting the application of Example 1 to the Euro Zone as opposed to providing indicative factors which merely provide context to the commercial basis for the investment.

2.3 Example 2 – Securitisation company example

Other than to acknowledge that institutional investors do engage in securitisation transactions, we have no comments on the inclusion of this example in the Commentary.

2.4 Example 3 – Investor profile

As noted in our comments on Example 1 above, it is common for institutional investors from multiple jurisdictions to co-invest in large projects. However, depending on the project, institutional investors may not have visibility over the entire range of members in the fund, for example smaller or minority members.

As such, it is possible that RCo may obtain treaty benefits that are better than the benefits to which some of its investors would have been entitled if they had made the same investments directly in these States under the treaties concluded by their States of residence.

As currently drafted, Example 3 states that RCo does not obtain treaty benefits better than those available to any of the members of RCo had they invested directly. Similar to our comments at 2.2 above, we are concerned this aspect of the example may be interpreted to be a mandatory minimum requirement rather than merely one of many indicative facts provided by way of context. We submit that this approach may inadvertently adversely impact institutional investors by either denying treaty benefits to collective funds in which they have invested or motivating institutional investors not to invest in the fund in the first place, reducing liquidity for investors and consequently the users of capital.

Accordingly, we submit that it is essential that the following sentence be deleted from the example:

> "*RCo, however, does not obtain treaty benefits that are better than the benefits to which its investors would have been entitled if they had made the same investments directly in these States and had obtained treaty benefits under the treaties concluded by their States of residence.*"

If this suggestion is not accepted by delegates, then we suggest that Example 3 is removed in its entirety from inclusion in the Commentary.

* * * * *

If you have any questions in relation to our submission, we would be pleased to discuss our comments further.

Yours faithfully

John Payne	Vince Quagliata
Head of Tax	Head of Tax
New Zealand Superannuation Fund	QIC