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By Electronic Delivery

January 28, 2015

Mr. S M Nigam
Member – Income-tax
Central Board of Direct Taxes ('CBDT')
North Block
New Delhi 110 001
India

RE: MAT Assertions against Foreign Funds Harm Investor Confidence

Dear Mr. Nigam:

ICI Global,[1] on behalf of our collective investment vehicle ('CIV')[2] industry members, respectfully requests prompt clarification that the minimum alternative tax ('MAT') does not apply to Foreign Institutional Investors ('FIIs'). This clarification is necessary to resolve industry concerns regarding notices that have been recently issued to FIIs by some tax officers in Mumbai while conducting the scrutiny assessment proceedings for Assessment Year 2012-13, regarding applicability of MAT to their cases. Specifically, the notices (i) ask the recipients to show cause as to why their profits for the year should not be brought to tax under the MAT provisions of the Income-tax Act, 1961 ('Act'), and (ii) require them to file a computation of Book Profits for the period relevant to Assessment Year 2012-13.

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[1] The international arm of the Investment Company Institute, ICI Global serves a fund membership that includes regulated funds publicly offered to investors in jurisdictions worldwide, with combined assets of US$19.2 trillion. ICI Global seeks to advance the common interests and promote public understanding of regulated investment funds, their managers, and investors. Its policy agenda focuses on issues of significance to funds in the areas of financial stability, cross-border regulation, market structure, and pension provision. ICI Global has offices in London, Hong Kong, and Washington, DC.

[2] A CIV, for this purpose, would be defined consistently with the OECD's Report entitled "The Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles" (the "CIV Report"). Specifically, paragraph 4 on page 3 of the CIV Report defines CIVs as "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." Examples of CIVs would include funds organized under the United States' Investment Company Act of 1940 as registered investment companies (RICs) and funds organized under the European Union's Undertakings for Collective Investment in Transferable Securities (UCITS) Directive as UCITS.

We understand that the new Government in India is committed to a stable, non-adversarial, and predictable tax regime. This new approach is most welcome by our members and other FIIs investing in the securities of Indian companies and thereby supporting a growing Indian economy.

The recent notices, however, appear to conflict with the Government's stated objective. Moreover, they appear consistent with practices that have caused the investing community so many concerns over recent years.[3]

Providing clarity on the issue of applicability of MAT to FIIs will prevent investor confusion and potential market disruptions. This letter summarizes the issue and our recommended clarifications. The enclosed memorandum (**Annexure A**) discusses this issue in detail.

I. The Global Mutual Fund Industry

The CIVs that are members of the Investment Company Institute and ICI Global are pooled investment vehicles that are widely used to cost-effectively access the securities markets. The important advantages provided by CIVs include professional management, asset diversification, liquidity, and robust governmental regulation and oversight.

Tax certainty is essential for the CIV industry as all CIV investor transactions are effected at a CIV's net asset value ('NAV'). A CIV's NAV is determined each day by calculating the CIV's assets and liabilities and dividing by the number of outstanding interests. Tax liability (including taxes that will be due on appreciated portfolio securities later sold) can be a material part of an NAV calculation.

The CIV industry therefore requires a stable tax environment to help foster and grow their investments in India. ICI Global, on behalf of our members investing in India, in November, 2013 met with senior officials, including Dr. Shome and Dr. Mayaram, from the Ministry of Finance (MoF) and the Central Board of Direct Taxes (CBDT). Enclosed are a few of the submissions (without detailed Annexures) that we submitted in connection with these meetings.[4] These submissions, we submit, demonstrate our commitment to work collaboratively to resolve FII concerns and thereby encourage investment in India.

II. Basis of taxation of FIIs in India

India is one of the few countries in the world that taxes foreign investors (such as FIIs) on some gains, as well as on dividend and interest income, that they earn from portfolio investment activities that they undertake in local markets (such as India). FIIs were first permitted to conduct portfolio investments in the Indian capital markets in 1993 and have been offering their Indian sourced income to tax in India as per section 115AD of the Act. Section 115AD was introduced in the Act in 1993 with the intention of providing a concessional basis of taxation to FIIs.

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[3] Submissions that we have made to Indian tax officials have addressed matters such as the netting conventions for capital gains (2003); taxing CIV managers (2006); and the GAAR (2012).

[4] These submissions (**Annexures B, C, and D**) were submitted on May 21, 2014 and December 17, 2014.

Currently, FIIs report all their Indian sourced income to tax in India, as per section 115AD of the Act, as follows; where applicable, FIIs also claim tax treaty relief.

Income emanating from sale of Indian securities

- Most FIIs report the profits that they realize from sale of Indian securities to tax in India under the head *"Capital Gains"*, in accordance with the provisions of section 115AD.
- FIIs claim exemption from tax in India, under section 115AD read with section ('rws') 10(38) of the Act, on long-term capital gains ('LTCGs') that they realize on sale of Indian listed securities which they transact on the floor of a recognized stock exchange ('RSE') in India and on which they pay Securities Transaction Tax ('STT').
- FIIs pay tax at the rate of 15%, under section 115AD rws 111A of the Act, on short-term capital gains ('STCGs') that they realize on sale of Indian listed securities which they transact on the floor of a RSE in India and on which they pay STT.
- FIIs pay tax at the rate 10% and 30% respectively, under section 115AD of the Act, on LTCGs and STCGs that they realize on sale of all other Indian securities.

Income from Indian securities

- FIIs claim exemption from tax, under section 115AD rws 10(34) of the Act, on Dividend income that they earn on Indian securities.
- FIIs offer the Interest income they earn on specified Indian debt securities to tax in India at the rate of 5% under section 115AD rws 194LD of the Act, while for all other Interest from securities, FIIs pay tax at the rate of 20% as per section 115AD.

Since the last 22 years the Indian Revenue authorities ('IRA') have taxed FIIs in India on their Indian sourced income by applying the provisions of section 115AD of the Act, and have granted them the necessary tax treaty relief where applicable. Hitherto, the IRA have never sought to levy MAT on FIIs.

In view of the above, this recent attempt by the IRA to levy MAT on FIIs is unwarranted. As noted above, **Annexure A** of this letter details the purported applicability of MAT provisions to FIIs, why these provisions are not applicable, and the legislative history and intent of the MAT provisions as contained in the Act.

III. Impact on Mutual Funds of India's Attempt to Impose Tax

India's attempt to tax CIVs' gains under the MAT regime could have a negative effect on FII willingness to invest in India. The tax authority's attempt to impose tax raises the question of whether India is a reliable investment location. Absent prompt clarification, FIIs may wonder whether additional novel attempts to impose tax will be pursued in the months and years to come.

The costs of this issue can be significant. First, local counsel must be hired to advise on Indian law and to assist in representing the issue before the Indian tax authorities. Second, before the issue can be pursued on appeal, the assessed tax liability must be paid in full or in part; recovery of the assessed tax can take seven years or more. Third, if an appeal were pursued, potentially substantial

legal fees must be incurred. The combination of upfront payments on assessments, a lengthy appeals process, and ongoing costs can be very burdensome to taxpayers.

In conclusion, while we cannot predict the precise harm that the proposed assessments will have on the level of foreign investment in India, a lesser degree of interest in Indian securities would seem likely. Firms invariably will consider, at least at the margin, whether opportunities in other countries or regions are preferable. Any reduced investment in India could harm India's economic infrastructure and reduce access to capital, especially for small businesses.

IV. Requested clarifications

ICI Global respectfully requests prompt clarification on the below issues that relate to applicability of MAT in India to foreign companies especially FIIs. Prompt guidance will prevent investor confusion and potential market disruptions.

- Clarification 1 ~ That the MAT provisions do not have extra territorial operation and do not go beyond the charging sections of the Act.

- Clarification 2 ~ That MAT applies only to Indian domestic companies and those foreign companies that have a physical presence on the ground in India by way of a branch office or project office etc., and that are required under the Indian Companies Act or such other Indian law to prepare a separate set of financial statements, including P&L Account and Balance Sheet reflecting the various activities they conduct onshore in India through such branch office or project office.

- Clarification 3 ~ That MAT should be levied only on the Book Profits that are reflected in the India-related P&L Account that is prepared by the foreign company and which is referred to in Clarification 2 above.

- Clarification 4 ~ That FIIs are specifically exempted from applicability of the MAT provisions, especially given the fact that they have their own unique taxing code in section 115AD of the Act.

- Clarification 5 ~ That the IRA should not require foreign companies to whom the MAT provisions do not apply to submit a separate tax computation for MAT purposes.

We would be pleased to discuss further this issue with you at your convenience. I can be reached by e-mail (at lawson@ici.org) or by telephone (at 001-202-326-5832). Alternatively, please do not hesitate to contact our Indian tax advisors: BMR & Associates LLP at your convenience. Thank you.

The contact details of BMR & Associates LLP are as under.

(1) Ms. Rajeshree Sabnavis: Partner - +91 22 6135 7050
(2) Mr. Russell Gaitonde: Partner - +91 22 6135 7045

Yours faithfully,

/s/ Keith Lawson

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Enclosures: Annexure A: ICI Global Memorandum
Annexure B: Representations filed with Dr. Parthasarathi Shome
Annexure C: Representations filed with Dr. Arvind Mayaram
Annexure D: Representations filed with Mr. Shaktikanta Das

cc: Ms. Anita Kapur, Chairperson, CBDT
Mr. Akhilesh Ranjan, Joint Secretary (PT & TR-I)
Ms. Pragya Saxena, Joint Secretary (TPL)

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By Electronic Delivery

January 28, 2015

Mr. Shaktikanta Das
Secretary (Revenue)
Ministry of Finance
128-A, North Block
New Delhi, India

RE: Income-tax issues on MAT Assertions against Foreign Funds

Dear Mr. Das:

ICI Global,[1] on behalf of our collective investment vehicle ('CIV')[2] industry members, today requested prompt clarification from the Central Board of Direct Taxes ('CBDT') that minimum alternative tax ('MAT') does not apply to Foreign Institutional Investors ('FIIs'). This request was made to address notices that have been issued to FIIs by some tax officers in Mumbai while conducting the scrutiny assessment proceedings for Assessment Year 2012-13 regarding applicability of MAT to their cases. Specifically, the notices (i) ask the recipients to show cause as to why their profits for the year should not be brought to tax under the MAT provisions of the Income-tax Act, 1961, and (ii) require them to file a computation of Book Profits for the period relevant to Assessment Year 2012-13.

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Enclosed are the representations that we filed today with Mr S M Nigam, Member - IT, CBDT, with a copy to:

(1) Ms. Anita Kapur, Chairperson, CBDT
(2) Mr. Akhilesh Ranjan, Joint Secretary (PT & TR-I)
(3) Ms. Pragya Saxena, Joint Secretary (TPL)

We humbly request you to take note of the matter.

We would be pleased to discuss further this issue with you at your convenience. I can be reached by e-mail (at lawson@ici.org) or by telephone (at 001-202-326-5832). Alternatively, please do not hesitate to contact our Indian tax advisors: BMR & Associates LLP at your convenience. Thank you.

The contact details of BMR & Associates LLP are as under.

(1) Ms. Rajeshree Sabnavis: Partner - +91 22 6135 7050
(2) Mr. Russell Gaitonde: Partner - +91 22 6135 7045

Yours faithfully,

/s/ Keith Lawson

Keith Lawson
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Enclosures: Representations filed with Mr S M Nigam (including Annexures A, B, C, and D)

cc: Ms. Anita Kapur, Chairperson, CBDT

Annexure A

ICI Global Submission: MAT Assertions against Foreign Funds Harm Investor Confidence

January 28, 2015

This memorandum (Annexure A to ICI Global's January 28, 2015 letter) explains why the recent attempt by the Indian Revenue authorities ('IRA') to levy minimum alternative tax ('MAT') on Foreign Institutional Investors ('FIIs') is unwarranted. More specifically, the memorandum details the purported applicability of MAT provisions to FIIs, why these provisions are not applicable, and the legislative history and intent of the MAT provisions as contained in the Act.

I. Applicability of MAT to the FIIs' cases

MAT was first introduced in the Act in 1996 with the intention of collecting a minimum tax from Indian domestic companies that reported large Book Profits and paid handsome dividends to their shareholders, but for tax purposes paid zero tax or marginal tax or in some instances even reported tax losses, by availing of various tax deductions and exemptions under the normal provisions of the Act. Hence, MAT was introduced in the Act with the intention of forcing such companies to pay a minimum tax in India (to be called MAT), if the tax payable on their Book Profits exceeded the tax that they actually paid under the normal provisions of the Act.

Currently, companies in India are liable to pay MAT at the rate of 18.5% of their Book Profits, under section 115JB of the Act, if the tax payable by them under the normal provisions of the Act is less than 18.5% of their Book Profits. The Book Profits are to be computed as per the provisions of the Indian Companies Act and after giving effect to the various Indian accounting policies, Indian accounting standards etc. As per section 115JB of the Act, certain tax adjustments are to be made to such Book Profits, on which MAT is to be levied.

Unfortunately, the current provisions relating to MAT that are codified in section 115JB of the Act, are not written up in a manner which provides clear guidance on how the MAT provisions are to be applied to corporate taxpayers in India, especially in relation to foreign companies. In fact, the language that is issued in section 115JB of the Act is so sweeping that it could lead one to believe erroneously that the MAT provisions apply to all foreign companies – whether or not they have any economic nexus with India. In this regard, one should take note of the fact that:

(i) Section 115JB is a *"non-obstante clause"*, which has the effect of overriding all the other sections in the Act[1];

(ii) It uses language to the effect that the section applies to *"every assesse being a company"*;[2] and

(iii) It states that the MAT provisions shall apply independent of all the other provisions of the Act[3].

1 Section 115JB(1)
2 Section 115JB(2)
3 Section 115JB(5)

Hence, there is a dire need for the CBDT to clarify how the MAT provisions are to be interpreted and applied in an Indian context, especially when it comes to applicability of MAT to foreign companies in particular those who are registered with SEBI as FIIs.

We have summarized below some of the concerns that we have with the way the current provisions relating to MAT have been drafted in section 115JB of the Act and despite this why MAT should not apply to FIIs.

Part A: Concerns with the MAT's ambiguous language (section 115JB of the Act)

We believe that the MAT provisions that are contained in section 115JB of the Act are very widely written and must be interpreted in a reasonable manner; otherwise, absurd taxing outcomes, especially for foreign companies who invest in India, could arise. If one reads the law on a reasonable basis, one would come to the logical conclusion that MAT should apply only to Indian domestic companies and not to foreign companies.

If MAT were to be made applicable to foreign companies then it should apply only to those foreign companies that (i) have an economic nexus with India through a physical presence in India by way of a branch office/project office etc., and (ii) earn Indian sourced income on account of such Indian nexus. In such an instance, MAT should apply only to that part of the Indian-sourced income that is earned by the foreign company through that India presence and not to the global income of the foreign company.

Foreign companies that do not have an economic nexus with India through a physical presence in India by way of a branch office/project office etc., should be specifically exempted from the applicability of MAT. As you would be aware, FIIs conduct portfolio investments in the Indian capital markets by engaging the services of bankers, custodians, and stock brokers in India and they operate cash and custody accounts in India; FIIs do not set-up a physical presence on the ground in India. Hence, they should be exempted from the applicability of MAT to their Indian sourced income.

We have listed below some of our specific concerns with the language that is contained in section 115JB of the Act and the need for clarifications to this effect:

- First and foremost, the provisions of section 115JB(1) of the Act could lead one to believe that *"every assesse being a company"* (whether a domestic company or a foreign company, or whether a foreign company with or without a physical presence on the ground in India by way of a branch office or project office) is liable to pay MAT in India at the flat rate of 18.5% of its Book Profits, if its income-tax liability that is computed under the normal provisions of the Act is less than its MAT liability. There is no mention in section 115JB of the Act that for a company to be subject to a MAT liability in India it must first have an economic nexus with India and should be earning Indian sourced income.

One cannot read the provisions of section 115JB of the Act in such a simplistic manner that MAT applies to *"every assesse being a company"* (whether a domestic company or a foreign company, or whether a foreign company with or without a physical presence on the ground in India). Were this reading correct, each and every foreign company, even those who do not have an economic nexus with India, could be held liable to pay tax in India, if not under the normal provisions of the Act then under the MAT provisions of the Act.

Levying MAT on a foreign company that has no economic nexus with India would be absurd, as it would tantamount to extra territorial operation of the Indian income-tax law. Also, levying MAT on the non-Indian sourced income that is earned by a foreign company, where no activities relating to the earning of such non-Indian sourced income is undertaken in India also would be absurd, as it would tantamount to extra territorial operation of the Indian income-tax law.

We would like to substantiate our point with an illustration. For example, if MAT were to be levied on a foreign company that has an economic nexus with India by applying the rate of 18.5% on the Book Profits of that foreign company, then a part of the Global Profits of the company – which may be unconnected with India – will come within the purview of the Indian tax net. By adopting such an approach, the foreign company's non-Indian sourced income would become liable to MAT in India even though such income does not fall within the purview of the charging sections that are codified in Chapter-II of the Act[4]. Hence, there is dire need for the CBDT to clarify that (i) the provisions of MAT do not have extra-territorial jurisdiction and do not go beyond the provisions of the charging sections of the Act, and (ii) MAT ought to apply only to those instances where a foreign company has an economic nexus with India and also earns Indian sourced income.

- Second, section 115JB(2) of the Act could lead one to believe that every company shall compute MAT liability by preparing its Profit and Loss Account ('P&L Account') in accordance with the provisions of Part II of Schedule VI of the Indian Companies Act or such other law governing such company. Section 115JB(2) also provides that, in preparing the annual accounts (including its P&L Account) for MAT purposes, the accounting policies, accounting standards, methods and rates of calculating depreciation shall be the same as those that have been adopted for the purposes of preparing such accounts (including its P&L Account) and laid before the company at its AGM in accordance with the provisions of section 210 of the Indian Companies Act, 1956[5].

  As you will appreciate, foreign companies prepare their annual accounts (including their P&L Accounts) in accordance with their home country laws and lay such financial statements at an annual general meeting ('AGM') for shareholders as per their respective home country requirements; these annual accounts that are adopted by the company at its AGM are not laid before the company in accordance with the provisions of section 210 of the Indian Companies

4 Sections 4 to 9

5 This section has now been replaced with section 129 of the New Indian Companies Act, 2013

Act. Such annual accounts reflect the global operations of the foreign company, including its global income.

Foreign companies do not prepare separate annual accounts (including P&L Accounts) exclusively for India purposes, unless they are specifically required to do so for Indian corporate law or regulatory purposes. For example, in the case of foreign companies that have a physical presence in India by way of a branch office or a project office, the Indian Companies Act mandates such foreign companies to prepare a separate set of annual accounts (including a P&L Account and Balance Sheet) reflecting the assets and liabilities of such companies in India and reflecting the various activities that they have conducted on the ground in India through their branch office or project office.

Hence, there is a dire need for the CBDT to clarify in the context of foreign companies that (i) MAT applies only to those foreign companies that have an physical presence on the ground in India by way of a branch office or project office etc., and that are required under the Indian Companies Act or such other Indian law to prepare a separate set of India-related financial statements, including an India-related P&L Account and India-related Balance Sheet reflecting the various activities they conduct onshore in India through such branch office or project office, and (ii) MAT should be leviable only on the Book Profits that are disclosed in such India-related P&L Account.

While clarifying the above, in the context of section 115JB(2) of the Act, the CBDT should also make unequivocally clear that those foreign companies that are not required to prepare under any Indian law (be it the Indian Companies Act or any other Indian law) a separate set of India-related financial statements, including an India-related P&L Account and India-related Balance Sheet, should not be forced to draw up such annual accounts, including a India-dedicated P&L Account for the purposes of ascertaining a MAT liability.

The above points are particularly important to FIIs that conduct portfolio investments in the Indian capital markets. Most FIIs do not have an India presence. Hence, they are not required to prepare under any Indian law a separate set of annual accounts in India, including an India-related P&L Account and India-related Balance Sheet. Consequently, they should be specifically exempted from the applicability of section 115JB(2) of the Act.

- Third, over the years section 115JB has been amended to clearly specify whether MAT applies to certain categories of taxpayers that are not required to prepare their annual accounts including a P&L Account under the Indian Companies Act. For example, Banks, Electricity Companies, and Insurance Companies that operate in India are governed by specific laws in India that required them to prepare their annual accounts including a P&L Account in accordance with a format and methodology that is provided under the respective law, be it the Banking Regulation Act, 1949 that applies to all Banks that operate in India, or the respective State Electricity Acts that apply to the Electricity Companies which operate in India, or the Insurance Act, 1938 that applies to all Insurance Companies that operate in India. There was

a debate on whether MAT would apply to such types of companies, as they are not required to prepare their annual accounts under the Indian Companies Act.

To provide clarity and certainty on the issue of applicability of MAT to such types of taxpayers, the Indian Government in 2012 brought about the necessary amendments in the MAT provisions in the Act to clarify the Government's stance on the matter. For example, to address the concerns that were raised by Banks, Electricity Companies and General Insurance Companies that operate in India, on whether MAT applied to them, the Indian Government vide Finance Act, 2012, amended the provisions of section 115JB(2) of the Act to provide for the levy of MAT to their cases and clarified that for the prior years the Banks, Electricity Companies and General Insurance Companies had the option to consider their annual accounts that were prepared under their respective Indian mother laws for determining their MAT liabilities. Similarly, to address the concerns that were raised by Life Insurance Companies in India, on whether MAT applied to them, the Indian Government vide Finance Act, 2012 inserted a new sub-section 115JB(5A) in the Act, which provided that the MAT provisions would not apply to Life Insurance Companies on the income they earn from their life insurance business; this amendment was made with retrospective effect from April 1, 2001, i.e., the year when the Indian insurance sector was first opened up to private investment, including foreign investment.

Taking a leaf from similar problems that were faced by Banks, Electricity Companies, General Insurance Companies, and Life Insurance Companies in India on whether MAT applies to them, and applying this to the problems that are currently being faced by FIIs in India, the CBDT should clarify that the MAT does not apply to these FIIs; the clarification can be provided either by way of a circular or an amendment to the provisions of section 115JB of the Act.

Part B: Why MAT should not apply to FIIs

- First and foremost, FIIs are a class of non-resident taxpayers that earn income from portfolio investment activities that they conduct globally. They do not establish a physical presence in India by way of setting-up a branch office or project office etc., through which they conduct such portfolio investments in the Indian capital markets. They do not prepare annual accounts for India purposes; hence, if MAT were to be levied on FIIs at 18.5% of their Book Profits, it would result in an extra territorial operation of the Indian income-tax law, as a part of their global income will become taxable in India under MAT. Additionally, the levy of MAT on the global Book Profits of an FII would even be beyond the purview of the charging sections of the Act.

- Second, if the IRA were to seek to levy MAT only on the Indian sourced income of FIIs, it would be very difficult for FIIs to compute their MAT liability as they do not prepare annual accounts including a P&L Account for India tax or regulatory purposes. Requesting FIIs to start preparing annual accounts including a P&L Account for India tax purposes, so that MAT can be levied on them, would cause undue hardship for FIIs.

- Third, from the manner in which the provisions of section 115JB of the Act are drafted, it appears that it was never the intention of the Indian Government to levy MAT on FIIs. This is because FIIs would never have been able to comply with the provisions of section 115JB of the Act, in terms of preparing annual accounts, including a P&L Account in accordance with the provisions of the Indian Companies Act or such other Indian law as may be applicable to them, given that this is a pre-requisite for computing MAT as per sections 115JB(1) and 115JB(2) of the Act.

- Fourth, FIIs have always been provided with a concessional basis of taxation in India by (i) treating their profits realized from sale of Indian securities to be *"Capital Gains"* in nature and not *"Business Profits"*, and (ii) subjecting some of their Indian sourced income to tax in India at concessional tax rates, which we have elaborated in Section II of the cover letter to this Annexure. If MAT were to be levied on FIIs at the rate of 18.5% of their Book Profits, FIIs effectively would lose all the tax concessions that have been afforded to them under section 115AD of the Act, read with sections 10(38), 111A, and 194LD of the Act. Such an approach effectively would repeal sections 115AD, 10(38), 111A and 194LD of the Act. We have illustrated this point in more detail below. For example, by levying MAT on an FII:

  - LTCGs realized by the FII on sale of Indian listed securities on the floor of a RSE (on which STT has been paid) would get taxed in the hands of the FII at 18.5% instead of 0%, as is prescribed in section 115AD of the Act rws 10(38).
  - STCGs realized by the FII on sale of Indian listed securities on the floor of a RSE (on which STT has been paid) would get taxed in the hands of the FII at 18.5% instead of 15%, as is prescribed in section 115AD of the Act rws 111A.
  - LTCGs realized by the FII on sale of other Indian securities would get taxed in the hands of the FII at 18.5% instead of 10%, as is prescribed in section 115AD of the Act.
  - Interest income that is earned by the FII on specified Indian debt securities that qualify for the concessional tax rate of 5% under section 115AD of the Act rws 194LD, would now get taxed in the hands of the FII at 18.5% instead of 5%.

  We do not believe that the intent of the Indian Government was to provide FIIs with a concessional basis of taxation through sections 115AD, 10(38), 111A and 194LD, and then subsequently take these benefits away by imposing MAT on FIIs.

- Fifth, where the Act has provided for a special basis of taxation for a specific type of taxpayer, then such type of taxpayer has been exempted from the provisions of MAT, as otherwise the initial basis of taxation that is applicable to it would become redundant. We would like to enumerate our point, by quoting the example of Life Insurance Companies in India.

  Life Insurance Companies in India are subjected to a special basis of taxation [i.e., on an actuarial valuation basis] vide section 44 of the Act read with the First Schedule to the Act;

they also are subjected to a concessional tax rate in India of 12.5% on the amount of their profits that relate to their life insurance business vide section 115B of the Act; such life insurance companies are specifically exempted from the applicability of MAT by introduction of sub-section 5A in section 115JB of the Act in 2012 with retrospective effect from April 1, 2001. We have discussed this in detail earlier in this letter. Hence, where the Indian Government decided to give a tax benefit to Life Insurance Companies in India by (i) providing them with a specific mechanism for computing their taxable income, and (ii) subjecting their income from life insurance business to tax in India at a concessional tax rate, the Indian Government did not take away this benefit by saddling the Life Insurance Companies with a MAT liability. Likewise, FIIs that also enjoy a concessional basis of taxation in India and concessional tax rates should not be covertly denied these benefits by imposing a MAT liability on them.

- Sixth, if MAT were levied at the rate of 18.5% on the Book Profits of an FII that claims tax treaty benefits (if any), the FII would in essence be denied its respective tax treaty relief. An example of this situation would be where a FII that is tax resident of the US and offers its Indian sourced Interest income to tax in India under Article 11 [Interest] of the India-US tax treaty, at the rate of 15% (on a gross basis), as is provided for in Article 11 [Interest] of the India-US tax treaty; such interest now would become taxable in the hands of the FII at the rate of 18.5% (on a net basis) by virtue of levy of MAT on the FII, thereby denying the FII the benefits of Article 11 [Interest] of the India-US tax treaty. This cannot be the intention of the Indian Government, as its consequence results in a tax treaty override situation by way of introducing various other provisions in the Indian domestic tax law.

- Lastly, we humbly submit that FIIs have been investing in the Indian capital markets since 1993 and have been offering their Indian sourced income to tax in India under section 115AD of the Act. The MAT provisions were introduced in the Act in 1996 and have never sought to be applied to FIIs. Thus, since the last 19 years the IRA have adopted a consistent approach of not applying the MAT provisions to FIIs and they should continue with this approach, as it will be in sync with the Indian Government's objective of providing a stable, non-adversarial and predictable tax regime.

Given all of the above, it would be fair to say that it was never the intention of the Indian Government to levy MAT on foreign companies (especially those that do not have a physical presence in India), as it would not be possible for such foreign companies to comply with the MAT provisions as are codified in section 115JB of the Act. Additionally, forcing such foreign companies that do not have a physical presence on the ground in India to pay MAT in India would throw up the above odd taxing outcomes, while not to mention putting them through undue hardship from a compliance perspective. This cannot be the intention with which the recent actions have been taken by the IRA.

It would also be pertinent to examine the intention behind which the MAT provisions were first introduced in the Act. As you will note from the below submission, the Honourable Finance

Ministers in India, at various points in time, have made amply clear that MAT was originally introduced in the Act to levy the tax on domestic companies.

II. Legislative history behind the introduction of MAT

We have provided below extracts from the various Union Budgets that have been presented before Parliament in India, wherein the Honourable Finance Minister has made fairly clear that his intention of levying MAT on companies in India was to levy the tax on domestic companies alone and not on foreign companies.

- First, MAT was first introduced in the Act in 1996 by introduction of section 115JA in the Act. While presenting the Finance Bill, 1996 in Parliament, as part of his Union Budget speech, the Honourable Finance Minister stated the following:

  "90(ii). I propose to introduce a 'Minimum Alternate Tax' (MAT) on companies. In a case where the total income of the company, as computed under the Income Tax Act after availing of all eligible deductions, is less than 30 per cent of the book profit, the total income of such a company shall be deemed to be 30 per cent of the book profit and shall be chargeable to tax accordingly. The effective rate works out to 12% of book profit calculated under the Companies Act. Companies engaged in the power and infrastructure sectors, will however, be exempted from the levy of MAT."

  As you will note from the above speech, the Honourable Finance Minister stated that the effective tax rate for MAT would be 12%. For the Financial Year 1996-97 (relevant to Assessment Year 1997-98), the tax rate that was applicable to domestic companies in India was 40%, while the tax rate that was applicable to foreign companies in India was 55%. Hence, the effective MAT rate of 12% was determined by applying the 30% rate of book profit to the 40% corporate tax rate that was applicable to domestic companies in India, thereby resulting in an effective MAT rate of 12%. Had the Finance Minister intended to levy MAT on foreign companies, then the effective MAT rate would needed to be 16.5% (by applying the 30% rate of book profit to the 55% corporate tax rate that was applicable to foreign companies in India).

- Second, the Finance Bill, 2000 replaced the previous MAT section in the Act, i.e., section 115JA, with the current MAT section in the Act i.e. section 115JB, starting from April 1, 2000.

  The Memorandum to the Finance Bill, 2000 stated the following:

  "As the number of zero tax companies and companies paying marginal tax had grown, Minimum Alternate Tax was levied from assessment year 1997-98. The efficacy of the existing provision has declined in view of the exclusions of various sectors from the operation of MAT and the credit

system. It has also led to legal complications. It is, therefore, proposed to put a sunset clause in the existing provision, so that, it is not applicable after assessment year 2000-20001.

In its place, it is proposed to insert a new provision which is simpler in application.

The new provisions provide that all companies having book profits under the Companies Act, prepared in accordance with Part II and Part III of Schedule VI to the Companies Act, shall be liable to pay a minimum alternate tax at a lower rate of 7.5%, as against the existing effective rate of 10.5% of the book profits. These provisions will be applicable to all corporate entities without any exception. However, export profits under section 80HHC, 80HHE and 80HHF are kept out of the purview of this provision during the period of phasing out of deductions available under those provisions. In view of the changes made in the provisions of sections 10A and 10B, those export oriented units and the units in free trade zones, which are set up before 1.4.2000, would be out of the purview of new provisions of MAT.

No credit of MAT paid under the new provision will be available. However, the credit for the brought forward MAT paid under the existing provisions will be allowed against the regular tax payable but not against the tax payable under the new provision."

The CBDT Circular No 794, dated August 9, 2000, while explaining the provisions of the new section 115JB of the Act, states the following:

"43. Minimum Alternate Tax on companies:

43.1. In recent years, as the number of zero tax companies and companies paying marginal tax had grown, minimum alternate tax was levied under section 115JA of the Income-tax Act from the assessment year 1997-98. The efficacy of the existing provision, however, declined in view of the exclusions of various sectors from the operation of MAT and the credit system. The Act has, therefore, modified the scheme of MAT. The existing section 115JA has been made inoperative with effect from 1st April 2001. In its place, the Act inserts a new provision, section 115JB of the Income-tax Act.

43.2. The new provisions provide that all companies having book profits under the Companies Act, prepared in accordance with Part-II and Part-III of Schedule-VI of the Companies Act, shall be liable to pay a minimum alternate tax at a lower rate of 7.5% as against the existing effective rate of 10.5% of the book profits. These provisions will be applicable to all corporate entities without any exception.

43.3. The new provisions further provide that for purposes of MAT, the company shall follow same accounting policies and standards as are followed for preparing its statutory account.

43.4. The amended provision discontinues the system of allowing credit of MAT in future. However, the taxes paid under the existing provisions of section 115JA shall get the credit.

43.5 The export profits under sections 10A, 10B, 80HHC, 80HHE and 80HHF are kept out of the purview of this provision as these are being phased out. The new provisions also exempt companies registered under section 25 of the Companies Act.

43.6 Certificate from an auditor has also been prescribed with a view to ascertaining the extent of book profits."

The Memorandum to the Finance Bill, 2000 and the CBDT Circular No 794 refer to the effective rate of MAT as being 10.5% of Book Profits. This effective MAT rate was determined by multiplying "30% of the Book Profits" (as was provided in the erstwhile section 115JA of the Act) with the corporate tax rate that was prescribed for domestic companies (i.e., 35%). During the Financial Year 1999-2000 (relevant to Assessment Year 2000-01), the corporate tax rate that was prescribed for foreign companies in India was 48%, which would have thrown up an effective tax rate of 14.4% of Book Profits and not 10.5% of Book Profits. This demonstrates that even when the MAT provisions were re-written in the Act with the introduction of section 115JB in the Act, it was done by taking into consideration the tax rates that were applicable to domestic companies in India and not foreign companies. Hence, the intention of the Indian Government was never to levy MAT on foreign companies.

- Third, the notes on clauses to the Finance Bill, 2002 once again make unequivocally clear that MAT was to be levied only on domestic companies in India. We have provided below the relevant extract from the notes on clauses to the Finance Bill 2002.

  "Clause 49 seeks to amend section 115JB of the Income-tax Act relating to special provisions for payment of tax by certain companies. The existing provisions of the said section provide for levy of a minimum tax on domestic companies of an amount equal to seven and one-half per cent of the book profit, if the tax payable on the total income chargeable to tax as per the provisions of the Income-tax Act, 1961, is less than seven and one-half per cent of the book profits....."

- Fourth, we would also like to submit that it is a well settled position in law that circulars that are issued by the CBDT are not only binding on the IRA but, quite apart from their binding character, they are clearly in the nature of contemporaneous exposition furnishing legitimate aids in the construction of the provisions.

III. Conclusion

We recommend the following guidance to provide the necessary and appropriate clarification regarding the inapplicability of the MAT to FIIs. The requested guidance will prevent investor confusion and potential market disruptions.

- Clarification 1 ~ That the MAT provisions do not have extra territorial operation and do not go beyond the charging sections of the Act.

- Clarification 2 ~ That MAT applies only to Indian domestic companies and those foreign companies that have a physical presence on the ground in India by way of a branch office or project office etc., and that are required under the Indian Companies Act or such other Indian law to prepare a separate set of financial statements, including P&L Account and Balance Sheet reflecting the various activities they conduct onshore in India through such branch office or project office.

- Clarification 3 ~ That MAT should be levied only on the Book Profits that are reflected in the India-related P&L Account that is prepared by the foreign company and which is referred to in Clarification 2 above.

- Clarification 4 ~ That FIIs are specifically exempted from applicability of the MAT provisions, especially given the fact that they have their own unique taxing code in section 115AD of the Act.

- Clarification 5 ~ That the IRA should not require foreign companies to whom the MAT provisions do not apply to submit a separate tax computation for MAT purposes.

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May 21, 2014

Dr. Parthasarathi Shome
Adviser to the Finance Minister
Ministry of Finance
North Block
New Delhi, India

RE: Follow-Up to ICI/ICI Global Meeting on
Tax issues for Cross-Border Fund Investments

Dear Dr. Shome:

Thank you for meeting with my industry colleagues, BMR & Associates LLP, and me to discuss income-tax issues of concern to members of the Investment Company Institute[1] and ICI Global.[2] We appreciate greatly the time that you, Mr. Sunil Gupta, Ms. Pragya Saxena, and Dr. VK Singh spent with us and the forthright and informative discussion.

We traveled from the United States to emphasize the fund industry's unique need, due to the daily pricing of each fund's shares, for tax certainty. Essential components of tax certainty include: rules that are clear and disseminated to assessing officers; adherence by assessing officers to those rules and to judicial precedent; and a prohibition on retrospective application of legislative amendments. The tax certainty we seek will improve investor confidence, enhance the funds' investment experience, and promote cross-border portfolio (non-controlling) investment in India.

The enclosed Annexure A responds directly to the discussion we had on four specific tax policy issues raised with you during our meeting. Each of the issues that we discussed, described in Annexure B, is of great importance to our members that are making substantial Indian investments. Also enclosed, as Annexure C, is the letter that we sent to Mr. Joshi, Director General of Income Tax (International Tax) regarding tax administration issues that we discussed directly with him.

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[1] ICI 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 $16.8 trillion and serve over 90 million shareholders.

[2] ICI Global is a global fund trade organization based in London; members include regulated U.S. and non-U.S. based funds publicly offered to investors in jurisdictions worldwide. ICI Global seeks to advance the common interests and to promote public understanding of global investment funds, their managers, and investors. Members of ICI Global manage total assets of $1.4 trillion in non-U.S. funds.

The four issues discussed in Annexure A are: (1) the tax status of foreign business entities; (2) fund reorganizations involving business trusts; (3) the taxation of asset managers when an Indian executive oversees offshore employees; and (4) the taxation of offshore funds managed by Indian-based investment advisers. Other important issues that we discussed, for which no additional detailed information is necessary, include the taxation of indirect transfers and the general anti-avoidance rule ("GAAR").

1. The Tax Status of Foreign Business Entities. Our October submission (Annexure B) explained the difficulties that U.S. funds have when they are organized as business trusts under the laws of one of the United States (such as Massachusetts). We recognize that Indian law does not have a provision that allows a business trust to file its Indian tax returns as a "company." As explained in Serial 1 of Annexure A, however, section 2(17)(iv) of the IT Act allows the Central Board of Direct Taxes ("CBDT") to notify "an institution, association or body, whether incorporated or not and whether Indian or non-Indian, which is declared by general or special order of the CBDT to be a company." Serial 1 explains the operation of funds that are organized in the U.S. as business trusts, the rationale for them filing in India as companies, and why extending company treatment to funds organized as business trusts does not put other trusts at a comparative disadvantage in India.

We submit that the CBDT should exercise its authority under section 2(17)(iv) of the IT Act and clarify that bodies such as business trusts should be treated as companies.

2. Fund Reorganizations Involving Business Trusts. A related issue involves reorganizations of business trusts. As explained in our October submission, funds organized as business trusts are taxed as corporations under U.S. law. These reorganizations, which are tax-free in the U.S., are undertaken to address business and corporate governance issues. Serial 2 of Annexure A explains in greater detail, (1) the reasons for these reorganizations, (2) the tax-free treatment of these reorganizations in the U.S. as corporate mergers, (3) the Indian tax problem faced by any such U.S. fund that reorganizes, (4) that the problem is so severe that some funds do not reorganize, and (5) that funds that reorganize, after divesting their Indian securities, sometimes do not reinvest in India. Importantly, as we discussed, these reorganizations are *not* being done for tax reasons.

We urge an amendment to the IT Act to treat these reorganizations, which are tax-free in the U.S., as tax-free in India.

3. The Taxation of Asset Managers When An Indian Executive Oversees Offshore Employees. Indian law, as explained in our October submission, discourages India-based asset managers from promoting Indian executives to oversee employees of offshore-based companies because of adverse Indian tax consequence concerns. These concerns include having India treat the offshore-based company for which the Indian executive provides oversight support as having a permanent establishment ("PE") in India. One consequence of this PE treatment would be allocating to India a disproportionate amount of the offshore-based company's taxable income. Other countries, such as

Singapore and Hong Kong, that rapidly are becoming significant financial centers provide far more favorable tax treatment for asset managers. Serial 3 of Annexure A describes our concerns in greater detail.

We urge an amendment to Indian tax law, such as by an administrative circular, clarifying that this oversight of offshore-based company employees will not cause the offshore-based company to have a PE in India.

4. The Taxation of Offshore Funds Managed By Indian-Based Investment Advisers. A related issue involves the tax treatment of an offshore fund managed by an Indian-based investment adviser. Our October submission explained our concern that India would treat an offshore fund that is managed by an Indian-based adviser as an Indian fund with a permanent establishment in India (and therefore as subject to 40 percent corporate tax in India or 30 percent tax for non-corporate entities on all of its income (on a net basis), whether earned inside or outside of India). Because offshore funds are unwilling to risk being treated as Indian funds, as explained in Serial 4 of Annexure A, fund managers will not locate an investment adviser in India. We understand that a circular is being prepared to clarify that an offshore fund will not be treated as an Indian fund in this situation.

We urge that the anticipated circular be issued promptly.

5. The Taxation of Indirect Transfers. The Indian legislation retrospectively taxing "indirect transfers" – in response to the Indian Supreme Court's ruling in the *Vodafone* case – is very troubling for the fund industry. Our concerns about this issue were discussed in Serial 10 of our October submission. We appreciate the recommendations made previously by the Expert Committee chaired by you (and which included Mr. Gupta) in the draft report on indirect transfers. Specifically, we support strongly the recommendation that any legislative change to the taxation of indirect transfers not have retrospective application. "Clarificatory" legislation with 52-year retroactive effect, such as that promulgated in response to *Vodafone,* is extremely harmful to investor confidence. We also support strongly the recommendation that non-resident investors in a foreign institutional investor ("FII") not be taxable in India in relation to investments made by the FII in India. We further support the limits recommended in the application of the indirect transfer rule to FIIs themselves. We understand that a circular is being prepared to clarify that non-resident investors in an FII will not be subject to the indirect transfer rule.

We urge that the anticipated circular be issued promptly. The other recommendations of the Expert Committee also should be adopted.

6. GAAR. We appreciate all of the recommendations made previously by the Expert Committee chaired by you (and which included Mr. Gupta) in the final report on the GAAR. One essential recommendation, that we support strongly, is that all investments existing on the date the GAAR provisions commence be grandfathered so that the GAAR provisions are not invoked on exit (such as on the sale of such investments). We also support strongly the recommendation that the FII is the

taxable unit for taxation in India and that, as a result, all non-resident investors in the FII are excluded from the GAAR's purview; such non-residents include persons holding offshore derivative instruments (commonly known as Participatory Notes) issued by the FII.

We urge that the Expert Committee's recommendations be adopted by the Ministry and announced in a circular.

* * *

Once again, thank you for meeting with us. If we can provide you with any additional information, please do not hesitate to contact me or our Indian tax advisors: BMR & Associates LLP at your convenience.

Yours faithfully,

/s/ Keith Lawson

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Enclosures: Annexure A: Detailed response to four specific issues that are being faced by Foreign Institutional Investors that conduct portfolio investments in Indian securities.

Annexure B: Letter to Mr. Manohar, Officer on Special Duty to the Adviser to the Finance Minister, dated October 22, 2013, including 12 issues discussed in Annexure A to that letter.

Annexure C: Letter to Mr. NC Joshi, Director General of Income Tax (International Tax), dated May 21, 2014, regarding tax administration issues.

cc: Mr. Sunil Gupta [Joint Secretary, Tax Planning & Legislation Division (TPL-II), CBDT]
Ms. Pragya Saxena [Joint Secretary, Tax Planning & Legislation Division (TPL-I), CBDT]
Dr. VK Singh [Director, Foreign Tax & Tax Research Division, CBDT]

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May 21, 2014

Dr. Arvind Mayaram
Secretary, Department of Economic Affairs
Ministry of Finance
North Block
New Delhi, India

RE: Follow-Up to ICI/ICI Global Meeting on
Tax Issues for Cross-Border Fund Investments

Dear Dr. Mayaram:

Thank you for meeting with my industry colleagues, BMR & Associates LLP, and me to discuss tax issues of concern to members of the Investment Company Institute[1] and ICI Global.[2] We appreciate greatly the time that you spent with us and the forthright and informative discussion.

We traveled from the United States to emphasize the fund industry's unique need, due to the daily pricing of each fund's shares, for tax certainty. Essential components of tax certainty include: rules that are clear and disseminated to assessing officers; adherence by assessing officers to those rules and to judicial precedent; and a prohibition on retrospective application of legislative amendments. The tax certainty we seek will improve investor confidence, enhance the funds' investment experience, and promote cross-border portfolio (non-controlling) investment in India.

The enclosed Annexures A and B (our May 2014 letter to Dr. Shome and our October 2013 letter requesting the meeting with Dr. Shome) respond directly to the discussion we had with you during our meeting. Each of these issues – including the tax status of foreign business entities; fund reorganizations involving business trusts; the taxation of asset managers when an Indian executive oversees offshore employees; and the taxation of offshore funds managed by Indian-based investment advisers – is of great importance to our members that are making substantial Indian investments. Also

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[1] ICI 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 $16.8 trillion and serve over 90 million shareholders.

[2] ICI Global is a global fund trade organization based in London; members include regulated U.S. and non-U.S. based funds publicly offered to investors in jurisdictions worldwide. ICI Global seeks to advance the common interests and to promote public understanding of global investment funds, their managers, and investors. Members of ICI Global manage total assets of $1.4 trillion in non-U.S. funds.

enclosed as Annexure C is a letter that we sent to Mr. Joshi, Director General of Income Tax (International Tax) regarding tax administration issues.

We request your support for the recommendations we make in our letter to Dr. Shome. We crafted our recommendations to address Indian tax issues that are particularly problematic for cross-border portfolio investors that require tax certainty.

We appreciate your observation that guidance will be issued clarifying that an offshore fund will not be treated as an Indian fund with a permanent establishment in India (and therefore as subject to 40 percent corporate tax or 30 percent tax for a non-corporate taxpayer) simply because it is managed by an Indian-based investment adviser. This clarification will be most welcome by investment funds.

We also request your support for the tax administration recommendations we make in our letter to Mr. Joshi. The Authority for Advance Rulings ("AAR") process, as we explain in our letter to Mr. Joshi, does not provide the tax certainty that funds need when they are making decisions each day whether to invest in specific Indian securities.

Our more general concerns with Indian tax administration are attributable to several factors, including the process by which issues are identified for audit, the manner in which the issues are developed, the legal impossibility of settling without a judicial decision, and the appeal by the Indian Revenue Authority ("IRA") of taxpayer-favorable decisions without any apparent analysis of the costs and benefits of the appeal.

Our most significant tax administration recommendation is to permit tax disputes to be settled administratively after an issue has been assessed. A properly-negotiated settlement, based upon a careful analysis by both parties of the costs and benefits of litigating an issue, would benefit both the Indian government and taxpayers. We urge your support for this sensible change that would enhance the confidence of cross-border investors who have capital available to further India's growth.

* * *

Once again, thank you for meeting with us. If we can provide you with any additional information, please do not hesitate to contact me or our Indian tax advisors: BMR & Associates LLP at your convenience.

Yours faithfully,

/s/ Keith Lawson

Keith Lawson
Senior Counsel - Tax Law
Investment Company Institute and ICI Global

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1-202-957-7226 (mobile)
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Enclosures: Annexure A: Letter to Dr. Shome, Adviser to the Finance Minster, dated May 21, 2014, including the detailed response to four specific issues discussed with Dr. Shome that are being faced by Foreign Institutional Investors that conduct portfolio investments in Indian securities.

Annexure B: Letter to Mr. Manohar, Officer on Special Duty to the Adviser to the Finance Minster, dated October 22, 2013, including 12 issues discussed in Annexure A to that letter.

Annexure C: Letter to Mr. NC Joshi, Director General of Income Tax (International Tax), dated May 21, 2014, regarding tax administration issues.

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December 17, 2014

Mr Shaktikanta Das
Secretary (Revenue)
Ministry of Finance
128-A, North Block
New Delhi, India

RE: Income-tax issues for Cross-Border Fund Investments

Dear Sir:

The Investment Company Institute (ICI)[1] and ICI Global[2] urge clarification in the Union Budget of several Indian income-tax issues that may impact negatively investment in the Indian capital markets and the broader Indian economy. This letter summarizes, and attaches for your reference, representations on these issues that we filed on May 21, 2014.

The representations emanated from meetings that were held in New Delhi on November 12 and 13, 2013 with the below senior members of the Ministry of Finance and the Central Board of Direct Taxes (CBDT). The meetings were attended by my industry colleagues who are members of ICI and ICI Global, BMR & Associates LLP, and me:

(1) Dr Parthsarthi Shome: Adviser (at the level of Minister of State) to the Indian Finance Minister and his team consisting of Mr Sunil Gupta, Ms Pragya Saxena, and Dr VK Singh. A copy of the representations filed with Dr Shome are enclosed in **Annexure 1**.

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[1] The Investment Company Institute (ICI) is the world's leading association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's U.S. fund members manage total assets of $17.4 trillion and serve more than 90 million U.S. shareholders.

[2] The international arm of the Investment Company Institute, ICI Global serves a fund membership that includes regulated funds publicly offered to investors in jurisdictions worldwide, with combined assets of US$18.9 trillion. ICI Global seeks to advance the common interests and promote public understanding of regulated investment funds, their managers, and investors. Its policy agenda focuses on issues of significance to funds in the areas of financial stability, cross-border regulation, market structure, and pension provision. ICI Global has offices in London, Hong Kong, and Washington, DC.

(2) Dr Arvind Mayaram: Secretary, Department of Economic Affairs. A copy of the representation filed with Dr Mayaram is enclosed in **Annexure 2**.

(3) Mr N C Joshi: Director General of Income-tax, CBDT. A copy of the representation filed with Mr Joshi is enclosed in **Annexure 3**.

The representations discuss four core Indian income-tax issues that are of primary importance to our members. For many of these issues, we suggested administrative clarifications. We now urge that all of these issues be addressed in the Union Budget.

(1) The tax status of foreign business entities

The Indian income-tax laws are not clear regarding the status of a US mutual fund that is organized as a business trust under the laws of one of the states of the US and which files its tax returns in the US as a corporation.

Our representations urged the CBDT to exercise its authority under section 2(17)(iv) of the Income-tax Act, 1961 (IT Act) and clarify that bodies such as business trusts should be permitted to elect company treatment for Indian income-tax purposes.

(2) Fund reorganizations involving business trusts

Certain reorganizations involving business trusts – that are implemented for commercial and administrative reasons and are treated as tax neutral in the US and most other jurisdictions – could give rise to adverse Indian income-tax consequences if the fund holds Indian securities. These adverse consequences arise as there are no provisions under the Indian income-tax laws – unlike in the US and most other jurisdictions – that accord tax neutrality to such reorganizations. Tax-neutral treatment, in contrast, is provided by a codification in the Indian income-tax laws when a merger of overseas corporate entities results in the transfer of shares of an Indian company.

Our representations urged that the IT Act be amended to treat as tax-free in India a reorganization involving investment funds formed as business trusts when such reorganization is tax-free in the US or another jurisdiction.

Alternatively, the IT Act could be amended to treat as tax-free those reorganizations involving institutional investors registered with the Securities and Exchange Board of India as Foreign Portfolio Investors.

(3) The taxation of asset managers when an Indian executive oversees offshore employees

Indian law discourages India-based asset managers from promoting Indian executives to oversee employees of offshore-based companies because of adverse Indian tax consequence concerns to the offshore-based company. This typically would arise when a senior level executive who is employed with the Group's Indian entity (such as an Indian asset management company, equity research entity, or portfolio management company) oversees the activities of offshore employees who may be housed in the Group's offshore entities.

Our representations urged an amendment to Indian tax law, such as by an administrative circular, to clarify that this oversight of offshore-based company employees will not cause the offshore-based company to have a permanent establishment in India. Concerns that providing the Indian executive with oversight responsibilities would cause the offshore entity to be taxed in India on more of its income than is taxed currently effectively prevents the Indian executive from being promoted. This arm's-length standard for attributing income is based on the principles enunciated by the Honourable Supreme Court of India in the case of Morgan Stanley.[3]

(4) The taxation of offshore funds managed by Indian-based investment advisers

Our concern about an offshore fund being treated as an Indian fund subject to full Indian tax liabilities was addressed, in part, in the recent interim Union Budget 2014; by characterizing the income earned by foreign portfolio investors as '*capital gains*,' the potential negative tax consequences to an overseas mutual fund of using India-based fund managers have been reduced. The above step, while a welcome indication that India seeks to become a more conducive jurisdiction for investment funds and investment fund managers, does not eliminate our concerns.

Specifically, we are concerned that the above amendment does not address fully the risk that an offshore fund might be regarded as "controlled and managed" from India if it is managed by an India-based investment adviser.

For non-corporate offshore funds, there is the risk that such a fund might be regarded as an Indian tax resident. This tax residency would subject the offshore fund to Indian tax on its global income and preclude claiming any tax treaty benefits with respect to its Indian-source income.

Separately, for all offshore funds, there is the risk that any Indian-sourced "Interest" income would be treated as business profits (under Article 7) – taxable in India at a rate of 40% (for a corporate taxpayer) or 30% (for a non-corporate taxpayer) – rather than as Interest (under Article 11). This risk would arise if the Interest were considered to be effectively connected to a permanent establishment in India of the India-based investment adviser.

To address our concern fully, as discussed in the previously-filed representations, we urge an amendment to Indian tax law, such as by an administrative circular, clarifying that an offshore fund will not be treated as an Indian tax resident fund simply because it is managed by an Indian-based investment adviser (regardless of how that adviser is treated for Indian tax purposes).

Two key and more generic Indian Income-tax issues

Separately, our representations also raised concerns on two key and more generic Indian income-tax issues: (1) the retroactive Indian indirect transfer provisions; and (2) General Anti-Avoidance Rules that are proposed to be implemented with effect from April 1, 2015. We urge the Government to consider the recommendations made by the expert committees on both the above issues.

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[3] DIT vs. Morgan Stanley & Co Inc (292 ITR 146).

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Thank you very much for taking our representations into account. Owing to paucity of time, it may not be possible for representatives of ICI and its members to personally come down to India to meet and discuss the Indian income-tax concerns discussed above. If we can provide you with any additional information, please do not hesitate to contact me or our Indian advisors: BMR & Associates LLP at your convenience. The contact details of BMR & Associates LLP are as under.

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Yours faithfully,

/s/ Keith Lawson

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Enclosures: Annexure 1: Representations filed with Dr Parthasarthi Shome
Annexure 2: Representation filed with Dr Arvind Mayaram
Annexure 3: Representation filed with Mr N C Joshi