11 February 2015

[State Administration of Taxation]

[Ministry of Finance]

Re: Applying the PRC Capital Gains Tax

Dear [______________]:

ICI Global,1 on behalf of our collective investment vehicle (CIV) members, requests guidance clarifying how the People’s Republic of China (PRC) 10% capital gains tax applies to non-PRC CIVs. If a final decision has been made to apply the tax retroactively, its scope should be limited. Many issues regarding the tax’s prospective application also must be addressed. We discuss below these issues and our recommendations for resolving them.

Introduction

The State Authority of Taxation (SAT) and the Ministry of Finance (MoF), we understand, have been considering for many years how the PRC capital gains tax should be applied to foreign investors. Prior to the release in November 2014 of Circular (2014) 79 (the “Circular”), however, no guidance had been issued. Moreover, until even more recently, non-PRC CIVs remaining invested in China had never been assessed the tax; indeed, no mechanism is in place, even today, for a non-PRC investor to self-assess and pay the tax.

Many of our member CIVs have been investing in the PRC through the Qualified Foreign Institutional Investor (“QFII”) and Renminbi Qualified Foreign Institutional Investors (“RQFII”) programs. Many now are considering investing through the Shanghai-Hong Kong Stock Connect program. While the Circular provided some limited guidance regarding the tax consequences of these investment routes, many important issues must be clarified promptly.

---

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$192 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.
Background: CIVs’ Need for Tax Certainty

The CIVs represented by ICI Global are widely-held, diversified, and subject to investor-protection regulation in the country in which each CIV is established. Investors generally may acquire or dispose of interests in these CIVs every day. Many of these CIVs have tens, or hundreds, of thousands of individual investors.

One important regulatory requirement for these CIVs is that they generally value their units every day. This calculation – known as determining the “net asset value” or “NAV” of a single CIV unit – is necessary because CIV units are acquired and disposed of by investors at this price.

CIVs need tax certainty because tax is a liability that reduces the value of a CIV’s assets. Among other things, CIVs need to know every day the tax that would be due if they sold that day a portfolio security with an unrealized gain.

Example: Assume a CIV acquires a security issued by a PRC company for 50,000 Yuan Renminbi (¥); the next day the security increases in value by 500 ¥ (to a market value of 50,500 ¥). If the PRC capital gains tax applies, the CIV should record an expected capital gains tax liability of 50 ¥ (10% of 500 ¥) and calculate the security’s net value at 50,450 ¥. If the PRC capital gains tax does not apply, however, the CIV would value the security at 50,500 ¥ (as the net and gross valuations would be identical).

The Impact of Applying the PRC Capital Gains Tax Retroactively

Because application of the PRC capital gains tax was so uncertain, no uniform industry practice developed for creating reserves for tax that might become due in the future on securities sold. If a CIV did not create a reserve for the potential tax liability, the effort required to reconstruct transaction histories and calculate gains and losses will be substantial; moreover, no mechanism would exist to recover the previously-uncollected tax from the CIV’s investors (who may no longer be invested in the CIV). Even for those CIVs that created reserves, the transaction-history-reconstruction effort will be significant (as the reserve calculation methodology would have been made on a “best efforts” basis and might not reflect how the tax ultimately is calculated).

Had application of the tax been clear, the compliance costs would have been modest. The recent apparent decision to collect the tax retroactively will be very expensive indeed. Any limitations on collecting the tax retroactively will help reduce costs.
Retroactive Application of the PRC Capital Gains Tax

The Need for Consistent and Administrable Guidance

Investors have several questions regarding any effort to collect the CGT retroactively. Many of these questions arise because investors’ understanding of developments often is received orally through multiple parties and without any PRC-generated documentation. Written guidance issued by the SAT and MoF on all of these questions is needed to ensure investor understanding and compliance.

One particular source of confusion relates to collection effort responsibilities. We have heard, for example, that collection effort decisions are being made largely by the tax office in which the investor’s custodian is located.

We submit that collection procedures must be applied consistently by each local tax office. To ensure this consistent treatment – which is essential if investors are to be treated fairly (and not taxed differently based upon the location of their custodian) – guidance applicable to all local tax offices must be provided by a central authority such as the SAT. This need for consistency also extends to the proper interpretation and application of income tax conventions that exempt capital gains from double taxation; many of these treaties, such as the one with the United States, exempt from PRC capital gains tax those investors resident in the treaty partner country – unless the investor holds shares of a land-rich company, or more than 25% of the shares of a non-land-rich company, that is domiciled in China.

The recommendations we make below are designed to minimize the burden of the recently-announced plan to collect tax retroactively on previously-realized gains. This collection effort, as noted above, will be very burdensome for all investors and particularly challenging for CIVs; because CIVs have constantly-changing investor bases, the realization of the gain and the investor-level consequences of paying the associated tax may occur many years apart and impact investors differently.

Recommendations

Consequently, we request that the impact of this retroactive collection effort be reduced by making the following clarifying announcements:

- Retroactive collection of the tax should be limited to a relatively short period (e.g., three years) given the investor surprise that a tax for which no guidance had been provided now is being collected;
- Interest should not be charged on any amounts collected as there was no mechanism for paying the tax and avoiding an interest charge;
- Penalties likewise should not be charged for any “failure” to pay the tax previously as no payment mechanism existed; and
A substantial period (of more than one year) should be provided for all investors to work with the local tax office to calculate and pay the tax due.

Importantly, guidance should be issued stating clearly that investors may net their realized capital losses against their realized capital gains. Netting procedures are essential for the tax to be applied equitably. If an investor sells two securities for equal amounts of gain and loss (for example, a 100,000 ¥ gain on one sale and a 100,000 ¥ loss on the second sale), the investor has not realized any economic profit from these investments. Taxing gains without providing an offset for losses would be a major departure from international norms.

Clarifying guidance would be welcome regarding the capital gains exemption, discussed above, that typically is provided in PRC income tax treaties. This guidance would resolve any concerns regarding whether a CIV should be recording a liability for tax.

We understand that PRC tax authorities are permitting investors to determine the cost basis of a security sold using either first-in, first-out or weighted average cost. A clarifying announcement to that effect also would be welcome.

Prospective Application of the PRC Capital Gains Tax

Numerous questions also exist regarding how the tax will be applied in the future. Some of these questions involve the scope of the temporary exemption. Other questions involve the tax’s scope once the exemption expires.

Scope of the Temporary Exemption

The value of the temporary tax exemption, which applies to stock sold on or after 17 November 2014, is diminished by substantial uncertainty regarding its scope. Questions include the length of the exemption (i.e., the date on which the exemption ends) as well as the transactions to which it applies. If shares are purchased while the exemption applies, but sold thereafter, does the tax apply? If so, the exemption provides little certainty as the CIV does not know whether or not it will sell the security while the exemption is in place. Hence, a CIV will need to make an assumption about whether the tax will be due when it values the security for daily NAV calculation purposes. Moreover, unless these shares are exempt (whenever sold), the uncertainty regarding the exemption period will impact negatively the attractiveness of Chinese securities.

To maximize the benefit to the Chinese markets of the temporary exemption, the SAT and MoF should provide that any securities acquired during the Circular’s exemption period will be exempt from capital gains tax whenever they are sold. This approach allows the securities to be valued without any uncertainty regarding potential tax liabilities.
Application of the Tax after the Temporary Exemption Expires

Assuming that the tax eventually becomes effective on a prospective basis, investors will need to know how the tax will be calculated, reported, and paid. We recommend that simplified annual reporting requirements be provided that expressly permit the netting of gains and losses. Netting, as noted above, is both equitable and consistent with international norms. This equitable treatment also will make the Chinese capital markets more attractive to non-Chinese investors.

* * *

We appreciate your attention to our request. If you have any questions regarding this letter, or if we can provide you with additional information, please do not hesitate to contact either Keith Lawson, Senior Counsel – Tax Law, at 001-202-326-5832 or lawson@ici.org or Qiumei Yang, CEO, Asia Pacific, at 852-2910-9225 or Qiumei.Yang@iciglobal.org.

Sincerely,

Qiumei Yang
CEO, Asia Pacific

Keith Lawson
Senior Counsel – Tax Law

cc: [CSRC]
2015年2月17日

财政部
税务司
国际司
传真：+86 10 6855 1125

国家税务总局
国际税务司
传真：+86 10 6341 7977

关于：适用中国资本利得税

敬启者尊鉴：

ICI Global 1代表我们的集合投资工具（CIV）的成员，请求澄清中华人民共和国（PRC）10%资本利得税如何适用于非中国CIV的指导方针。如果已经作出要追溯适用该税的最终决定，其范围应该是有限的。关于该税适用前景的很多问题也必须得到解决。下面我们将讨论这些问题，以及我们对解决这些问题的建议。

简介

我们理解，国家税务总局（下称“国税总局”）及财政部（下称“财政部”）多年来一直在考虑如何将中国资本利得税适用于外国投资者。然而，在2014年11月发布的（2014）79号公告（下称“公告”）之前，一直没有发布指导方针。此外，甚至直到最近，剩余在由中国投资的非中国CIV从未被征收该税；实际上，即使在今天，对于自行估税并纳税的非中国投资者，并没有任何到位的机制。

我们的很多会员CIV一直通过合格境外机构投资者（“QFII”）及人民币合格境外机构投资者（“RQFII”）计划在中国投资。现在，很多人都在考虑通过沪港股票市场交易互联互通机制投资。尽管公告就这些投资路线的税务后果提供了一些有限的指导方针，但是仍然有很多重要问题必须及时澄清。

1作为Investment Company Institute的国际分支机构，ICI Global担负着基金会员的作用，包括向全球各司法管辖区的投资者公开提供的受监管基金，合并资产达19.2万亿美元。ICI Global以促进受监管投资基金及对其经理和投资者的共同利益以及促进公众对其了解为己任。其政策议程的重点是金融稳定、跨境监管、市场结构和养老金保障等方面的基础性问题。ICI Global在伦敦、香港和华盛顿特区设有办事处。
背景：集合投资工具需要税务确定性

ICI Global 所代表的集合投资工具被广泛持有，种类多样，而且须遵守每个集合投资工具成立所在国的投资者保护法规。投资者一般可能每天都要收购或处置在这些 CIV 中的利益。很多这些 CIV 都拥有数以十亿、百计乃至千计的个人投资者。

对于这些 CIV，一个重要的监管要求是，他们一般每天都要对自己的单位进行估价。这种计算——称为判定单独一个 CIV 单位的“资产净值”或“NAV”——是必要的，因为 CIV 单位收购是由投资者在这个价位收购或处置的。

CIV 需要税务确定性，因为纳税是减少 CIV 资产价值的一种负担。除其他事项外，CIV 每天还需要知道，如果他们当天卖出具有未实现收益的证券投资组合，应该缴纳的税款。

例如：假设某个 CIV 以 50,000 元人民币 (¥) 收购了一家中国公司发行的证券；次日，这些证券的价值增加了 500 元（达到 50,500 元的市场价值）。如果中国资本利得税适用，CIV 则应记录 50 元的预期资本利得税负担（500 元的 10%），并计算出该证券的净值为 50,450 元。然而，如果中国资本利得税不适用，CIV 将估价该证券为 50,500 元（即使估价和未估价将完全相等）。

追溯适用中国资本利得税的影响

由于中国资本利得税的适用性如此不确定，因此没有形成为该税建立储建金的统一行业惯例，而将来售出证券时则可能征收该税。如果 CIV 没有为潜在的税务负担建立储建金，需要重建交易记录并计算损益的工作将是巨大的；此外，不存在任何机制能够从 CIV 投资者（他们可能不再投资于 CIV）那里追回以前未收的税款。即使对于那些建立了储金的 CIV，交易记录重建的工作也将是巨大的（因为储金计算方法将是在“尽最大努力”的基础之上，可能无法反映储金最终如何计算）。

如果该税的适用性早已明确，合规成本本来是可以适度的。最近对于追溯征收该税的决定较为明显，而成本确实非常高昂。对于追溯征收该税的任何限制都将有助于降低成本。
中国资本利得税的追溯适用

需要连贯一致且可管理的指导方针

投资者对于追溯征收中国资本利得税的所有工作尚有若干疑问。很多这些疑问的产生是因为投资者形成的理解往往是来自多方的口头消息，而没有任何中国政府颁发的文件。国税总局和财政部就这些疑问发布的书面指导方针需要确保投资者理解并遵守。

一个特定混乱的来源与税务征收工作职责有关。我们听说，例如，税务征收工作的决策大部分是由负责监管投资者的税务机关作出。

我们主张，各地方税务机关必须统一——一致地适用税务征收程序。为了确保这种一致性在——投资者若要得到公平对待（而不是基于其监管机构的地点而被区别征税），这是必不可少的——适用于所有地方税务机关的指导方针必须由一个中央机构提供，例如国税总局。这种对于一致性的需求也延伸到了从双重征税中免除资本利得的所得税协定的适当解释与适用：很多这些条约，例如与美国的一项条约，即免除居住在条约伙伴国的那些投资者的中国资本利得税——除非该投资者持有注册地在中国的土地丰富公司的股份，或者 25% 以上非土地丰富公司的股份。

我们提出以下建议的目的是要尽量减少最近宣布的对先前实现收益追溯征税这一计划带来的负担。税务征收工作，正如上文所述，对于所有投资者而言都将是非常繁重的，对于 CIV 尤其具有挑战性：因为 CIV 的投资者群体不断变化，所以收益的实现与投资者层面缴纳相关税款的最终结果可能会相距多年发生，并且会对投资者产生不同的影响。

建议

因此，我们通过以下澄清声明，请求减少这种追溯征税工作的影响：

- 考虑到现在就要征收一个未曾提供指导方针的税项会令投资者出乎意料，追溯征税应限定在一个相对短的时期内（例如 3 年）；
- 对于征收的任何税额都不应该再收取利息，因为没有纳税和避免收取利息的机制；
- 对于任何先前“未能”纳税的行为不应收取类似罚款，因为之前并不存在纳税机制；并且
- 应该为投资者提供一个相当长的时期（一年以上），以便其与地方税务机关合作，计算并缴纳应缴税款。

重要的是，应该发布指导方针，明确表示投资者可以按照其实现的资本利得减去其实现的资本损失计算净利。净利程序对于公正地适用该税必不可少。如果投资者卖出利得与损失数额相等的两笔证券（例如，一笔售出利得 100,000 元，第二笔售出损
ICI Global 关于中国资本利得税适用性的致函
2015 年 2 月 17 日
第 4 页，共 5 页

失 100,000 元），投资者并未从这些投资中实现任何经济利润。对没有抵消损失的利得课税将严重背离国际规范。

就以上讨论的资本利得免税阐明指导方针将大受欢迎，通常在中国所得税条约中会有提供。此指导方针将解决任何有关 CIV 是否应该记录纳税负担的顾虑。

据我们了解，中国税务机关允许投资者采用先入先出或加权平均成本之中的一种方法来确定出售证券的成本基础。有关此意的澄清公告也会受到欢迎。

中国资本利得税的预期适用

关于该税将来如何适用还存在很多疑问。其中有些疑问涉及临时免税范围。其他疑问涉及免税到期之后该税的范围。

临时免税的范围

适用于 2014 年 11 月 17 日或之后卖出股票的临时免税的价值由于其范围的巨大不确定性而被减弱。这些疑问包括免税长度（即免税结束的日期），以及其所适用的交易。如果股票是在免税开始时购买，但在免税结束之后售出，是否适用该税？如果这样，免税则缺乏确定性，因为 CIV 不知道它是否要在免税期间卖出证券。因此，当其为了每日资产净值计算的目的而对证券进行估值时，CIV 将需要假设是否需要缴纳该税。此外，除非这些股票免税（每当卖出时），否则免税期的不确定性将对中国证券市场的吸引力产生负面影响。

为了尽力造福于临时免税的中国市场，国税总局和财政部应该规定，在公告免税期间买入的任何证券，无论何时卖出，均将免征资本利得税。这种方法可使证券估值避免任何潜在税务负担方面的不确定性。
临时免税到期之后该税的适用

假设该税在某个预期基础之上最终生效，投资者需要知道该税将如何计算、申报和缴纳。我们建议提供简明版的年度报告要求，明确允许按照利得和损失计算净利。如上所述，计算净利不仅公平公正，而且还与国际规范相一致。这种公平待遇还会使中国资本市场对外国投资者更加具有吸引力。

* * *

感谢您关注我们的请求。如果您对本函有任何疑问，或者如果我们能够为您提供更多信息，敬请联系税法高级顾问 Keith Lawson，电话：001-202-326-5832，电子邮件：lawson@ici.org，或者联系亚太区首席执行官 Qiumei Yang，电话：852-2910-9225，电子邮件：Qiumei.Yang@icipcglobal.org。

此致，

Qiumei Yang
亚太区首席执行官

Keith Lawson
税法高级顾问

抄送：[CSRC]