

THE ASSOCIATION OF GLOBAL CUSTODIANS

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7 June 2011

Via Courier

Mr. Guy Heintz – Directeur  
Administration des Contributions Directes/Ministere des Finances  
45, Blvd Roosevelt,  
L-2982 Luxembourg,  
Luxembourg

**Re: The Status of Luxembourg SICAVs and SICAFs regarding  
Reduced Rates of Korean Withholding Tax under the Applicable  
Double Tax Treaty**

Dear Mr. Heintz:

We write on behalf of the Association of Global Custodians (the "Association")<sup>1</sup> to convey Association members' concerns in respect of a treaty interpretation issued by the Republic of Korea's Ministry of Strategy and Finance ('MoSF'). This treaty interpretation concerns the eligibility of Luxembourg SICAVs and SICAFs to avail themselves of reduced rates of Korean withholding tax pursuant to the Republic of Korea – Luxembourg double tax treaty ('the treaty').

As you may know the Association is an informal group of eleven global banking institutions with affiliates and branches in numerous countries that provide custody services and related securities asset-servicing functions to cross-border institutional investors around the globe. In providing global custody services, Association members routinely seek appropriate tax relief on behalf of their custody clients. The Association also works to eliminate or minimize existing discrepancies in the current tax relief processes and regimes from jurisdiction to jurisdiction, which can be problematic and costly for custodians and their clients.

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<sup>1</sup>

Association Members are listed on the letterhead above.

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### Overview

Various Association members provide custodial services to Luxembourg SICAV and SICAF entities ("Luxembourg funds"). The Luxembourg Tax Authorities ("LTA") have provided -- through a public tax circular (n° II/1425-S38 HE/CG) -- clarification regarding the treaty eligibility of such Luxembourg funds (the "Circular"). For your ease of reference, we attach the Circular as an appendix to this letter. The Circular states that such Luxembourg funds are entitled to claim the benefits of the treaty. As such, general market practice has been to claim reduced rates of withholding tax on Korean investment income paid to a Luxembourg fund. Local-market sub-custodians are generally known to be aware of the Circular. As a related matter, the National Tax Administration of Korea issued a letter of April 21, 1994 (the "1994 NTA Letter") to the LTA confirming that Luxembourg Investment Funds should be considered residents of Luxembourg within the meaning of Article 4 of the Treaty. This letter has been widely circulated and has been seen as further confirmation regarding general treaty eligibility of such funds. (A copy of the 1994 NTA Letter is attached for your reference.)

Association members recently received notification from their Korean sub-custodians that the MoSF have issued an authoritative interpretation of the treaty that states that *Luxembourg funds are not treaty entitled* (the "Korean Interpretation"). We attach to this letter a copy of the relevant notification released by the National Tax Administration of Korea and an unofficial translation of this notification. We note that this Korean Interpretation appears to have been reached based on a misunderstanding of both the purpose and scope of Article 28 of the Treaty, and, further, it appears to state a position that differs from the conclusions expressed in the 1994 NTA Letter.

At this stage it is unclear to members whether the Korean Interpretation has any retroactive effect -- that is, whether tax claims that have been honoured but are still open for inquiry under general statute of limitation principles will be re-examined. This point in itself is of concern to members in that Luxembourg funds are likely to have priced any tax claims made into the calculation of their net asset value. As you will appreciate, a fund's net asset value is important as it sets the price at which an investor into the fund can either buy additional units or sell existing units. However, members believe it unlikely that such funds have been taking a provision for Korean withholding tax. As such if the Korean tax authorities were to demand payment back of withholding tax previously repaid based on claims, this would -- depending on materiality -- have an impact on current investors through a pricing adjustment to the net asset value. In addition, further potential issues and complications would be presented by the levy of

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any associated interest or penalties. Particularly in view of the 1994 NTA Letter, members believe that any retroactive effect would produce inequitable consequences.

As a more general point, the Association also inquires whether the LTA have received notification of the Korean Interpretation through competent authority channels. For completeness, members confirm that they are not aware of any change in the status or substance of the published LTA position regarding treaty eligibility for such funds.

### **The Association's request**

Association members respectfully request the LTA's assistance as set out below:

1. Please provide us with your views regarding the position outlined in the Korean Interpretation – we specifically draw your attention to our note above regarding the scope and purpose of Article 28 of the Treaty. In particular, to the extent that the Korean view is not shared by the LTA -- and given the potential for a material impact to the Luxembourg funds in question -- members would very much appreciate your intervention on this matter with the Korean Competent Authority with an aim to agree that Luxembourg funds are treaty entitled.
2. To the extent the LTA do agree with the Korean Interpretation, members would appreciate your express confirmation on this point and information about when this view was reached and its technical basis.
3. To the extent it is not possible to reach an accord that Luxembourg funds are treaty entitled, or if the LTA's position on this matter has changed, we request that an agreement be reached with the Korean Competent Authority such that the Interpretation will apply only on a prospective basis – i.e, that it will not have retroactive application.
4. Finally, industry reliance on information provided in the Circular is of fundamental importance in the ongoing administration and application of tax treaties concluded by Luxembourg. It would be helpful to members if you would provide us with information as to which source countries have expressly agreed with the LTA that Luxembourg funds are treaty entitled. As you can appreciate, members

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have a general concern that there may be information now in the market that cannot be relied upon, and in that event members would seek to work proactively with you to identify and potentially resolve any such cases.

\* \* \*

Association members appreciate your attention to the foregoing requests for assistance and look forward to receiving guidance from you in due course. If you have any questions or would like to receive additional information, please contact the undersigned at 312.861.2620 as an initial matter. For completeness, we note that members plan to raise the foregoing concerns directly with the MoSF and with other interested parties.

Sincerely yours,



Dan W. Schneider  
Baker & McKenzie LLP  
Counsel to the Association

Cc Georges Bruch - Chef de division, Division relations internationales  
Keith O'Donnell - Association of the Luxembourg Fund Industry - ALFI

Attachments

**DIRECTION  
DES  
CONTRIBUTIONS DIRECTES**

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N° II/1425-S38 HE/CG

**Note de service**

Objet: Application des conventions contre les doubles impositions aux organismes de placement collectif.

Vous trouvez ci-après une mise à jour des circulaires du 15 février 2000, réf. II/1425-S16 HE/CG et du 30 janvier 2001, réf. II/1425-S23 HE/CG, pour ce qui est des conventions contre les doubles impositions à l'endroit desquelles les SICAV/SICAF peuvent ou ne peuvent pas invoquer le bénéfice conventionnel.

1. Description

Un organisme de placement collectif doit opter pour l'une des formes juridiques suivantes:

- fonds commun de placement (FCP) qui est un ensemble de valeurs mobilières gérées en indivision pour le compte des détenteurs de parts ou indivisaires, lesquels seront alors engagés dans la limite du montant de leurs investissements; les FCP sont dépourvus de personnalité juridique propre et sont ainsi considérés comme des entités transparentes;
- société d'investissement à capital variable (SICAV), organisme ayant sa propre personnalité juridique et dont le capital social est égal à tout moment à la valeur de l'actif net investi;
- autres formes juridiques de sociétés d'investissement qui, elles, sont à capital fixe (SICAF).

On peut définir les OPC comme des organismes

- dont l'objet exclusif est le placement collectif en valeurs mobilières des capitaux qu'ils recueillent;
- qui recueillent ces capitaux par voie d'offres ouvertes au public;

- dont le fonctionnement est soumis au principe de la répartition des risques; et
- dont les parts sont, à la demande des porteurs, rachetées directement ou indirectement à charge des actifs de ces organismes.

D'autre part, il y a les OPC où l'investissement ne se limite pas aux valeurs mobilières. Les trois éléments qui définissent ces organismes sont

- le placement collectif;
- la collecte de l'épargne du public; et
- la répartition des risques d'investissements.

L'autorité étatique chargée d'exercer les attributions de la surveillance des OPC, d'ailleurs soumis à certaines règles spécifiques, est la commission de surveillance du secteur financier (CSSF).

## 2. Les fonds communs de placement

En ce qui concerne les différentes formes des OPC au regard de la Convention contre les doubles impositions, il y a lieu de noter ce qui suit.

Les OPC constitués sous la forme de « fonds communs de placement » ne peuvent sans doute pas personnellement bénéficier des avantages de la Convention (à l'exception de l'Irlande), puisqu'en raison du principe de la transparence fiscale ils ne sont pas traités comme unités imposables. Abstraction faite des problèmes d'ordre pratique, rien ne devrait cependant s'opposer à ce que les associés des fonds communs de placement invoquent personnellement le bénéfice de nos conventions, s'il s'agit de résidents du Luxembourg.

Ainsi, ni l'Administration des Contributions Directes, ni l'Administration de l'Enregistrement et des Domaines ne peuvent émettre des attestations de résidence pour ce qui est des FCP. Ceci vaut également à l'égard de la Convention irlandaise-luxembourgeoise.

## 3. Les SICAV/SICAF

Par contre, la situation se présente d'une autre façon en ce qui concerne les OPC qui ont pris la forme de sociétés de capitaux (SICAV, SICAF). D'après le droit fiscal interne luxembourgeois, ils sont à considérer comme résidents du Luxembourg, s'ils ont au Luxembourg leur siège statutaire ou leur principal établissement, condition qui est toujours remplie.

Or, les SICAV/SICAF ne sont pas toujours en droit d'invoquer le bénéfice des dispositions conventionnelles. Il y a lieu de distinguer les catégories suivantes, et cela en exécution respectivement de la teneur des différentes conventions contre les doubles impositions et de leur interprétation.

A) *Applicabilité des conventions contre les doubles impositions en vertu d'un accord exprès de la partie contractante ou en vertu de l'interprétation d'un texte clair:*

- l'Allemagne
- l'Autriche
- la Chine
- la République de Corée
- l'Espagne (limitée - à voir circ. L.G.-Conv. D.I. n° 52 annexée)
- la Finlande
- l'Indonésie
- l'Irlande
- Malte
- le Maroc
- l'Ouzbékistan
- la Pologne
- le Portugal
- la Roumanie
- la République slovaque
- Singapour
- la Thaïlande
- la Tunisie
- le Viêt-Nam

B) *Non-applicabilité des conventions contre les doubles impositions:*

- l'Afrique du Sud
- la Belgique
- le Brésil
- le Canada
- le Danemark
- les Etats-Unis
- la France
- la Hongrie
- le Japon
- Maurice
- la Norvège
- les Pays-Bas (l'exception: requête collective des détenteurs de parts qui sont des résidents du Luxembourg)
- la République tchèque

le Royaume-Uni  
la Suède

Dans ces cas, ni l'Administration des Contributions Directes, ni l'Administration de l'Enregistrement et des Domaines ne peuvent émettre des attestations de résidence.

#### 4. La procédure

Les attestations de résidence (le cas échéant à l'aide des formulaires existants - à joindre au moins une copie destinée au bureau d'imposition Sociétés VI), éventuellement requises pour bénéficier des dispositions conventionnelles au profit des O.P.C. constitués sous la forme de société de capitaux (SICAV ou SICAF), sont à adresser à l'Administration des Contributions Directes, Bureau d'Imposition Sociétés VI, L-2982 Luxembourg (tél. 40 800-3141).

Toute demande doit être accompagnée d'une attestation de la commission de surveillance du secteur financier (CSSF) certifiant que le requérant revêt la forme d'une SICAV/SICAF et est soumise à sa surveillance.

En ce qui concerne les demandes relatives aux retenues allemandes sur le revenu des capitaux mobiliers, la phrase suivante est à inscrire obligatoirement à chaque demande:

« La requérante n'est pas une société holding au sens de la législation particulière luxembourgeoise régie actuellement par les lois du 31 juillet 1929 et du 27 décembre 1937 ».

Pour ce qui des Etats avec lesquels le Luxembourg a conclu une Convention contre les doubles impositions, mais qui n'ont pas clairement indiqué si les SICAV ou SICAF peuvent se prévaloir du bénéfice conventionnel<sup>1)</sup>, il appartient à l'Administration des Contributions Directes, Bureau d'Imposition Sociétés VI, L-2982 Luxembourg, de remplir des certificats de résidence sur la base du formulaire annexé. L'Administration de l'Enregistrement et des Domaines n'est donc plus habilitée à délivrer des attestations de résidence.

Luxembourg, le 24 octobre 2001

Le Directeur des Contributions,

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<sup>1)</sup> la Bulgarie  
la Grèce  
l'Italie  
la Fédération de Russie  
la Suisse





[ 세 목 ]      국조                      [ 문서번호 ]      국제조세협력과-252                      [ 생산일자 ]      2011.05.16

[ 제 목 ]

룩셈부르크 집합투자기구 SICAV, SICAF가 조약의 제한세율 적용대상인지 여부

[ 요 지 ]

룩셈부르크 간접투자회사인 SICAV, SICAF는 한-룩셈부르크 조세조약의 제한세율 적용대상이 아님

[ 회 신 ]

룩셈부르크 간접투자회사인 SICAVSICAF는 한-룩셈부르크 조세조약 상 제한세율 적용대상이 아님

[ 관련법령 ]    한-룩셈부르크 조세조약 제28조 【일부법인의 제외】

NTS National Tax Law Information System

[Tax Items] KookJo

[Document No.] International Corporation Division-252

[Issuance Date] 2011.05.16

[Title]

SICAV/SICAF ( Luxembourg Collective Investment Scheme )'s applicability of Double Tax Treaty (DTT) rate

[Purport]

SICAV/SICAF, Collective Investment Company in Luxembourg, is not eligible for DTT between Luxembourg and Korea

[Reply]

SICAV/SICAF, Collective Investment Company in Luxembourg, is not eligible for reduced tax rate specified in DTT between Luxembourg and Korea

[Concerned Ordinance] Article 28 of DTT between Luxembourg and Korea (Exclusion of Certain Companies)

*The transactions are for your reference only. In case of discrepancies, the formal Korean version shall prevail. Citibank makes no warranty as to the accuracy or completeness of translations*

**NATIONAL TAX ADMINISTRATION**

108-4 SUSONG-DONG, CHONGNO-GU,  
SEOUL 110-140,  
REPUBLIC OF KOREA

OUR REF: K1-94-13  
YOUR REF: II/133-94 SR/G

FAX: (02) 732-0901  
TEL: (02)

DATE: Apr. 21, 1994

Mr. Martin Schroeder  
Head of the division of  
International Relations  
Direction des Contributions Directes  
45, bd Roosevelt  
Luxembourg

I/123-84

Dear Mr. Martin Schroeder :

This is a response to your letter dated Nov. 14, 1991 and Nov. 10, 1993 regarding the question on whether the Luxembourg Investment Funds are to be considered as residents of Luxembourg in the meaning of Article 4 of the Convention between Korea and Luxembourg.

I would like to inform you of our views that the Luxembourg Investment Funds having adopted the form of a public limited company should be considered as residents of Luxembourg for the application of Korea-Luxembourg Tax Convention if they have comprehensive tax liability based on the residence, place of head or main office or any other criterion under the Luxembourg tax laws. The criterion of the comprehensive tax liability, in our view, does not require an effective taxation in Luxembourg.

I would like to ask your excuse for my late reply to your letter.

Yours sincerely,

*For*  
*Young Mok Kim*

Se-Won Chang  
Assistant Commissioner  
for International Taxation