Memo

To	*Jacques Sasseville, OECD Paris*
From	*EPRA (Fraser Hughes / Jean Edouard Carbonnelle / Ronald Wijs, GiuseppeAndrea Giannantonio)*
Cc.	*Philip Charls, CEO EPRA*
Date	*Tony Edwards, NAREIT*
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RE **BEPS Action 6 – REITs and Treaty Abuse**

Introduction

1 During our meeting of Friday January 30 last, we discussed the above subject and the position of REITs. Reference is also made to our previous submissions, a copy of which is attached for your convenience.

2 We discussed the absence of a reference to the position of REITs in the OECD's publications on Action 6 and the OECD 2007 REITs report[1]. We have observed with great interest the discussions that you had with NAREIT and we welcome the fact that the OECD recognises that more attention should be given to the specific position of REITs (not being CIVs or non-CIVs) as residents of tax treaties.

3 We promised you to provide you with a brief and 'to-the-point' outline of our views on the position of REITs under the proposed LOB rule and the PPT. Below, we will outline why we think REITs are *inherently* not in the game of "tax treaty shopping" and we make a brief proposal for including an example to the proposed amendment to the Commentary to the Model Convention, as well as a proposal for a simplification of the LOB rule.

Why REITS are inherently not Abusive

4 Part of the OECD definition of REITs is that these are widely held (often on the basis of a stock listing). In the vast majority of cases REITs are 'self-managed' (unlike CIVs) and have adequate and transparent governance systems in place. REITs benefit from a 'flow through' regime: the point of taxation is moved from the company to the shareholders (on the basis of an obligation to distribute the annual profit or earnings). All REIT regimes in OECD countries contain detailed and specific anti-abuse provisions in order to avoid that the REIT residence country would lose its taxing rights in respect of the REIT income.

Also the OECD REIT model tax treaty provisions (2007) take into account that the REIT residence country will always levy withholding tax (Commentary to article 10, paragraphs 67.1 to 67.7).

[1] "Tax treaty issues related to REITs in Model Tax Convention on income (OECD 2007).

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The domestic REIT laws, together with the OECD model tax treaty provisions on REITs, already enforce sufficient anti-abuse rules to avoid the undesired use of tax treaties by REITs. Therefore, REITs can be seen as a solid and robust concept to prevent the proliferation of offshore property schemes and aggressive international tax structures, being exactly the type of structures that the BEPS Action 6 work is looking to clamp down on.

REITs and LOB Rule

5 We explained to you that REITs working cross border may face serious problems with the proposed LOB rule, in particular in situations where a REIT of Country A, has subsidiaries in Country B (**REIT Subsidiaries**) that will invest in Country C. REIT Subsidiaries may often not qualify for the LOB rule mainly due to the structure of the current "derivative benefits test". Introduction of the LOB rule in its current form would discourage REITs to grow internationally, hamper essential cross-border investment and make the international capital markets less transparent.

6 Therefore, EPRA would like to make the suggestion to delete the requirement that "each intermediate owner is itself an equivalent beneficiary" (delete "provided that in the case of indirect ownership, each intermediate owner is itself an equivalent beneficiary" in the proposed article X, paragraph 4, subparagraph a). EPRA is of the view that treaty entitlement should be available if at least 95 per cent of the aggregate voting power and value of the shares of the company claiming the treaty benefits is owned, directly or indirectly, by seven or fewer persons that are classified as equivalent beneficiaries. According to our understanding, this would be in line with the derivative benefits test, included in various US tax treaties.

REITs and PPT

7 Under the proposed Principal Purpose Tests, treaty benefits can be denied if one of the principal purposes of an arrangement is obtaining that benefit. In the current version of the proposed Commentary on article X, paragraph 7, nothing is said about the position of REITs under the PPT (while ample attention is given to CIVs, including an example in the proposed Commentary on CIVs and the PPT[2]).

8 We believe that the specific features of a REIT, the importance of REITs for international capital flows and the elaborate 2007 OECD work on REITs advocate for including special attention to REITS in the proposed commentary on the PPT. This could be done by taking up the following example in the draft Commentary.

Example [..]: RCo, is a resident of State R, RCo is a self-managed "real estate investment trust" (REIT) under the tax laws of State R. RCo holds the shares of SCo, a company resident in State S that owns a portfolio of real estate properties. The shareholders of the REIT are resident in various states. Pursuant to the applicable REIT regime, RCo is

[2] Page 72, 2014 Deliverable: Preventing the granting of treaty benefits in inappropriate circumstances, OECD Base Erosion and Profit Shifting Project, OECD Publishing.

obliged to distribute annually almost all of its profits to its shareholders. Under the tax convention between State R and State S, the withholding tax rate on dividends is reduced from 25 per cent to 5 per cent and REITs are considered to be "residents" for purposes of the said tax convention. RCo's investment decisions take into account the existence of tax benefits provided under State R's extensive tax convention network. A number of investors in RCo are residents of States with which State S does not have a tax convention.

In accordance with the 2007 OECD definition of REITs, RCo's shares are widely held, RCo derives its income primarily from long-term investment in real estate, RCo is under the obligation to distribute most of that income annually, and RCo does not pay income tax on income related to real property that is so distributed. Consistent with the 2007 OECD REIT report, the fact that RCo does not pay tax on its real property income is the result of tax rules in State R that provide for a single level of taxation in the hands of the investors in RCo (with corresponding withholding tax obligations imposed on RCo with respect to its distributions to investors resident in countries other than State R).

State R's domestic REIT legislation contains specific provisions aimed at ensuring that profits cannot be shifted free of tax to foreign investors. RCo's annual mandatory distribution obligation means that taxes are being paid in State R on RCo's profits each year. That is, taxation of investors in RCo is safeguarded and also the recommended tax treatment for REIT dividends under the OECD Model Tax Treaty provisions (see Commentary on article 10, paragraph 67) is included in the tax conventions that State R has concluded. This enables State R to impose – under all circumstances - withholding tax on distributions by resident REITs, like RCo, to foreign shareholders. Given these circumstances, including the taxation of investors in REITs, RCo is not a vehicle of a type that typically would be used for any tax avoidance purpose.

Investors' decisions to invest in RCo are not driven by any particular investment made by RCo, and RCo's investment strategy is not driven by the tax position of its investors. The intent of tax treaties is to provide benefits to encourage cross-border investment. The Commentary on article 10 on "Distributions by Real Estate Investment Trusts" (paragraph 67.2) acknowledges the importance and globalization of investments through REITs. Given the specific context in which RCo (being a REIT) is making the investment in State S, unless RCo's investment is part of an arrangement or relates to another transaction undertaken for a principal purpose of obtaining the benefits of the convention, it would not be reasonable to deny the benefit of the State R-State S tax convention to RCo.