

Emergency Committee for American Trade  
Financial Executives International  
Financial Services Forum  
Investment Company Institute  
National Foreign Trade Council  
Securities Industry and Financial Markets Association  
Software Finance & Tax Executives Council  
U.S. Chamber of Commerce  
United States Council for International Business  
U.S.-India Business Council

May 8, 2012

The Hon. Pranab Mukherjee  
Finance Minister  
Ministry of Finance  
North Block  
New Delhi  
110001

Dear Finance Minister Mukherjee:

**Re: Clarifications to the Finance Bill 2012**

The undersigned associations, whose members are primarily global corporations with significant long-term investments and economic presence in India, welcome your May 7 statement before the Parliament regarding the Finance Bill 2012, particularly the proposed amendments to the General Anti-Avoidance Rule (GAAR) and the valuable opportunity for further deliberation and discussion regarding those provisions.

Despite these welcome steps on the GAAR, our associations have a number of remaining questions regarding the pending tax measures, which we outline below. We understand that the Lok Sabha has voted already today on the proposals, but we respectfully urge further clarification on these points to confirm the intention in advance of final action on these measures:

**Taxation of indirect transfers —**

- Your May 7 statement helpfully indicates that the “retrospective clarificatory amendments now under consideration of Parliament will not be used to reopen any cases where assessment orders have already been finalized”. While foreign investors would react most favorably to purely prospective application, we would appreciate confirmation that relief from retrospective application will extend at a minimum to cases in which:
  - (1) The examination has been concluded without passing an assessment order, or
  - (2) The usual 6-year period for passing an assessment order has expired without passage of an order, even if no return was filed to report the gains at issue, or
  - (3) The transaction at issue closed prior to March 16, 2012.

- To avoid potential questions regarding the application in practice of these provisions, we would also welcome confirmation that, where such relief from retrospective application is promised, the proposed provisions regarding tax collection and refund (Clause 113 of the Finance Bill) and withholding agent obligations (the amendments to Section 195 of the Income Tax Act proposed by Clause 75 of the Finance Bill) will *not* apply.
- Your previous statements that participatory note (P-Note) holders and portfolio investors would not be taxed under these new provisions were very encouraging, but foreign institutional investors (“FIIs”) unfortunately are still being advised that this may not be sufficiently clear from the proposed statutory language. We would welcome further confirmation that the new provisions will not be applied to P-Note holders or portfolio investors.
- Confirmation is also requested that these provisions do not have the unintended consequence of taxing commonplace intra-group restructurings of foreign companies.

#### **Other Retrospective Provisions —**

- The May 7 statement appears to offer welcome protection against the reopening of cases to apply the other “retrospective clarificatory amendments” currently under consideration. We would appreciate confirmation that this protection also will be extended to the following proposals of particular concern to foreign investors:
  - (1) The definition of the term royalty, as it relates to payments for computer software or for transmissions by satellite, cable, or optic fiber, and other amounts described by the proposed amendments to Section 9(1)(vi) of the Income Tax Act, and
  - (2) The broad discretion granted to the Central Board of Direct Taxation to define terms used in tax treaties.
- As in the case of the indirect transfer provisions, while foreign investors would react most favorably to purely prospective application, we would appreciate confirmation that relief from retrospective application will extend for these provisions at least to cases in which:
  - (1) The examination has been concluded without passing an assessment order, or
  - (2) The usual 6-year period for passing an assessment order has expired without passage of an order, even if no return was filed to report the gains at issue, or
  - (3) The transaction at issue closed prior to March 16, 2012.

#### **Definition of Royalties —**

- The provisions related to payments for computer software or for transmissions by satellite, cable, or optic fiber were not addressed in the most recent statement and no relief has been offered to date. Further, we believe these provisions go

beyond mere clarification and change the meaning of terms contained in the US-India tax treaty as they were understood at the time the treaty was ratified. We respectfully urge relief on these provisions as well.

**Treaty Overrides —**

- The May 7 statement helpfully confirms that the indirect transfer provisions of the Finance Bill 2012 will not be applied to override the provisions of the Double Taxation Avoidance Agreements (DTAAs) that India currently has in place with 82 countries. We would appreciate further confirmation that the other provisions of the Finance Bill 2012 will, similarly, not be applied to override the provisions of any of India's DTAAs, including any future DTAAs or amendments to DTAAs currently in force.

While we understand that Parliament is in the process of considering these matters, in light of your May 7 statement we respectfully request that you issue further clarifying language addressing the above provisions in the Finance Bill 2012 ahead of any final decision. From the perspective of global companies, a predictable and transparent tax regime is essential to operating and investing in India and to the efficient functioning of capital markets. Only clear, consistent rules that adhere to international norms and practices will fully allay current fears regarding the investment climate in India.

Sincerely,

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