March 29, 2012

Dr. Manmohan Singh
Honorable Prime Minister of India
South Block, Raisina Hill
New Delhi 110011

Re: Finance Bill 2012

Dear Sir,

We are writing to express deep concerns about many of the tax provisions proposed in the Finance Bill 2012. We are independent trade associations, described in the attached statements, that together count more than 250,000 companies as members. Our member companies are engaged in a wide spectrum of industries throughout the world and based in many different countries, but they share a number of serious concerns about proposals advanced in the Finance Bill.

If enacted, these proposals will significantly alter the Indian taxation of our member companies, with retroactive effect extending back for as much as half a century, and reverse many decided cases. Some of our member companies had already begun reevaluating their investments in India due to increasing levels of controversy and uncertainty regarding taxation in recent years. The sudden and unprecedented move in the Bill has undermined confidence in the policies of the Government of India toward foreign investment and taxation and has called into question the very rule of law, due process, and fair treatment in India. This is now prompting a widespread reconsideration of the costs and benefits of investing in India.

Every nation has a sovereign right to legislate, but these proposals are disturbing to investors from India's trading partners in several major respects. Their policy direction is inconsistent with prevailing international norms, which, together with India's current difficulties in resolving international tax disputes, creates an intolerable risk of double taxation. Their unfettered retroactivity also departs significantly from the practice followed in other countries, which prohibit or carefully limit the use of retroactive tax legislation. Their disregard for the judiciary is particularly striking when compared with the practice of other countries, which respect their court decisions and the principle of *res judicata*. The proposals also create serious uncertainty about whether India intends to take unilateral action to upset the balance of its existing treaty obligations, as they authorize the Central Board of Direct Taxation to define many terms used in tax treaties, with effect from the date on which each treaty entered into force. Together, these proposals make it impossible for companies to predict the costs and risks of doing business in India or to have confidence that their results in past years will stand.

Other provisions of the Bill would protect the Government of India from having to return taxes previously collected as payments and deposits even if required to comply with court decisions, and would specifically grant the tax department powers to demand and collect tax from taxpayers notwithstanding court decisions to the contrary. This appears to permit revenue authorities to act unchecked by the judiciary and must be addressed.

Although presented as clarifications, these changes are seen as in clear reaction and contradiction to a long series of recent rulings and judgements rendered by Indian tribunals,

High Courts and the Supreme Court of India, and they would likewise affect many currently pending cases and audits. The most prominent of the judgements that the proposals appear designed to reverse is the very recent Supreme Court ruling in the Vodafone case, holding that it is a well-established principle of Indian law that an overseas transaction cannot be taxed in India even if it has the indirect effect of changing control of a company in India. The Bill also would expand the definition of 'royalty' retroactively to 1976 to include, among other things, consideration received for computer software and for transmission by satellite, cable, optic fibre or similar technology. This provision appears designed to nullify a number of recent rulings and court decisions, including those in cases involving Asia Satellite Telecommunications, Ericsson, Factset Research Systems, Infosys Technologies, Intelsat, ISRO Satellite Centre, Lucent Technologies, Motorola, and TV Today Network. These are only a few of some two dozen retroactive provisions in the Bill. If tax law changes are made, they should not apply retroactively. Past court decisions must stand despite subsequent legislation.

There appears to be an assumption, often expressed by Indian tax authorities, that India's ability to attract foreign investment is not affected by its taxation policies and practices. This simply is not the case, especially as other countries adopt tax reforms and trade and regulatory measures to encourage foreign direct investment. India will lose significant ground as a destination for international investment if it fails to align itself with policy and practice around the world and restore confidence in the relevance of the judiciary.

Respectfully submitted,

Business Roundtable

Canadian Manufacturers & Exporters

Capital Markets Tax Committee of Asia

Confederation of British Industry

Japan Foreign Trade Council, Inc.

National Foreign Trade Council, Inc.

United States Council for International Business

cc: Shri Pranab Mukherjee
Honorable Minister of Finance
Ministry of Finance
North Block
New Delhi – 110001

Shri Salman Khurshid
Honourable Minister for Law & Justice
Ministry of Law and Justice
A-Wing, 4th Floor, Shastri Bhawan
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Shri Anand Sharma
Honorable Minister of Commerce & Industry
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David M. Cote
Honeywell International, Inc.
Vice Chairman

Andrew N. Liveris
The Dow Chemical Company
Vice Chairman

Robert A. McDonald
The Procter & Gamble Company
Vice Chairman

John Engler
President

Tita Freeman
Senior Vice President

LeAnne Redick Wilson
Senior Vice President

March 30, 2012

Business Roundtable (BRT), the association of chief executive officers of leading U.S. companies, represents member companies with over $6 trillion in annual revenues and more than 14 million employees. BRT member companies comprise nearly a third of the total value of the U.S. stock market and invest more than $150 billion annually in research and development -- nearly half of all private U.S. R&D spending. Our companies pay $163 billion in dividends to shareholders and generate an estimated $420 billion in sales for small and medium-sized businesses annually.

The Business Roundtable shares the concerns regarding the Finance Bill 2012 tax proposals discussed in the attached letter and urges that those proposals be reconsidered.

Sincerely,

John Engler

Canadian Manufacturers & Exporters

Manufacturiers et Exportateurs du Canada

March 30, 2012

Canadian Manufacturers & Exporters (CME) is Canada's largest trade and industry association, and the voice of manufacturing and global business in Canada.

Since 1871, we have made a difference for Canada's manufacturing and exporting communities. Fighting for their future. Saving them money. Helping them grow.

The association represents more than 10,000 leading companies nationwide. More than 85 per cent of CME's members are small and medium-sized enterprises. As Canada's leading business network, CME - through various initiatives including the establishment of the Canadian Manufacturing Coalition - touches more than 100,000 companies from coast to coast, engaged in manufacturing, global business and service-related industries.

CME's membership network accounts for an estimated 82 per cent of Canadian manufacturing production and 90 per cent of goods and services exports.

CME shares the concerns regarding the Finance Bill 2012 tax proposals discussed in the attached letter and urges that those proposals be reconsidered.

Sincerely,

Jean Michel Laurin
Vice President, Global Business Policy

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Capital Markets Tax Committee of Asia

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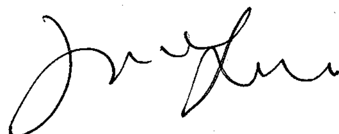
30 March 2012

Capital Markets Tax Committee of Asia ("CMTC") is a financial services industry body consisting of a number of banks, investment banks, securities firms and other diversified financial services institutions operating in Asia who are represented through their regional tax directors.

The main objects of the CMTC, according to its Constitution, are "to provide a forum for discussion by corporate tax managers responsible for the tax affairs of investment banks, securities firms, banks and other diversified financial services institutions of topical taxation issues in Asia affecting their capital and securities markets and similar activities; ... to keep members informed of up to date information on taxation matters affecting capital and securities markets, and to exchange views on the technical analysis thereof; [and] to represent the interests of its members through acting as the respected voice of investment banks, securities firms, banks and other diversified financial services institutions, and to participate in liaison or advocacy activities on tax matters either directly or indirectly through representation with other groups or societies concerned with or by fiscal matters."

CMTC shares the concerns regarding the Finance Bill 2012 tax proposals discussed in the attached letter and urges that those proposals be reconsidered.

Yours sincerely,



Jocelyn Lam
Chairperson

CBI
THE VOICE OF BUSINESS

30 March 2012

Dear Sirs

The CBI – Confederation of British Industry - is the UK's leading business organisation, speaking for some 240,000 businesses that together employ around a third of the private sector workforce. With offices across the UK as well as representation in Brussels, Washington, Beijing and Delhi, the CBI co-ordinates the voice of British business around the world.

The CBI shares the concerns regarding the Finance Bill 2012 tax proposals discussed in the attached letter and urges that those proposals be reconsidered.

Yours sincerely

John Cridland CBE
Director-General

John Cridland CBE Director-General
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Japan Foreign Trade Council, Inc.

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TEL : (03) 3435-5952 FAX : (03) 3435-5979

March 29, 2012

JFTC was founded in 1947 as a core private-sector organization in the area of international trade with nationwide membership of private companies and organizations. The membership of JFTC is composed of regular members represented by trading companies (Shoshas) and trading organizations, and supporting members consisting of manufactures, financial institutions, shipping companies, and other companies and organizations with interest in international trade. JFTC is involved in a wide range of activities with the objective of contributing to the prosperity of Japanese economy and the enhancement of international society through trade. Most importantly, JFTC functions to develop a consensus within the business community regarding various trade-related issues, and actively presents specific proposals to the government and related organizations for the solution of such problems.

JFTC shares the concerns regarding the Finance Bill 2012 tax proposals discussed in the attached letter and urges that those proposals be reconsidered.

Sincerely yours,

Shoei Utsuda
Chairman

NATIONAL FOREIGN TRADE COUNCIL, INC .

1625 K STREET, NW, WASHINGTON, DC 20006-1604

TEL: (202) 887-0278 FAX: (202) 452-8160

March 30, 2012

The NFTC, organized in 1914, is an association of some 250 U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial and service activities. The NFTC therefore seeks to foster a level playing field in the international business arena by eliminating major tax inequities in the treatment of U.S. companies operating abroad. To achieve this goal, American businesses must be able to participate fully in business activities throughout the world, through the export of goods, services, technology, and entertainment and through direct investment in facilities abroad. Foreign trade is fundamental to economic growth.

The NFTC shares the concerns regarding the Finance Bill 2012 tax proposals discussed in the attached letter and urges that those proposals be reconsidered.

Sincerely yours,

William Reinsch
President

UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

March 30, 2012

Founded in 1945, the U.S. Council for International Business (USCIB) is an international business association whose membership consists of top U.S.-based global companies and professional services firms from every sector of our economy, and with operations in every region of the world. USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. With a unique global advocacy network encompassing the International Chamber of Commerce, the International Organization of Employers and the Business and Industry Advisory Committee to the OECD, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

USCIB shares the concerns regarding the Finance Bill 2012 tax proposals discussed in the attached letter and urges that those proposals be reconsidered.

Sincerely,

Peter M. Robinson
President and CEO

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New York, NY 10036-1689
212.354.4480 tel
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Global Business Leadership as the U.S. Affiliate of:
International Chamber of Commerce (ICC)
International Organization of Employers (IOE)
Business and Industry Advisory Committee (BIAC) to the OECD
ATA Carnet System

International Chamber of Commerce
The world business organization

Policy and Business Practices

BIAC
The Voice of OECD Business

Mr Pranab Mukherjee
Hon'ble Minister of Finance
Government of India
New Delhi
India

April 3, 2012

By email and by courier

Your Excellency,

The global business community is concerned about recent developments in the tax field in India. We represent most businesses around the world and many in India.

The International Chamber of Commerce ("ICC") is the world business organization, a representative body which speaks with authority on behalf of enterprises from all sectors in every part of the world. ICC's purpose is to promote international trade, investment, and the market economy system. In the field of international taxation, ICC seeks to promote transparent and non-discriminatory treatment of foreign investment and earnings that eliminates tax obstacles to cross-border business transactions. ICC was founded in 1919. Today it groups hundreds of thousands of member companies and associations from over 130 countries.

The Business and Industry Advisory Committee to the OECD ("BIAC") founded in 1962 as an independent organisation, is the officially recognised representative of the OECD business community. BIAC's members are the major business organisations in the OECD member countries and an increasing number of OECD observer countries.

Our concern about the impact on the Indian and global business climate of a recent legislative initiative in India has caused us to approach you jointly. We refer to the proposals in the Indian government budget of 16th March 2012 that have retroactive effect, including a proposal to retroactively tax gains made on share transactions where buyer and seller do not reside in India and are not tax resident in India.

…/..

International Chamber of Commerce
38 Cours Albert 1er, 75008 Paris, France
Tel +33 (0)1 49 53 28 28 Fax +33 (0)1 49 53 28 59
E-mail icc@iccwbo.org Website www.iccwbo.org

Business does not agree with retrospective legislation as we need to know how the law operates when we enter into transactions.

Doing business around the world or even only between two countries means a potential conflict between different domestic tax systems.

Countries are sovereign and their legislators do not take into account effects outside their jurisdiction. This has been accepted practice. With the ever accelerating globalization this should be reviewed to allow continuation of global growth and welfare. India is one of the few leading countries in the world and, we are pleased to note, is recognizing the responsibility that comes with this position.

We are concerned the recent introduction of retroactivity is not only unwelcome for the future of India's investment climate, it will also send a signal to other countries that retroactivity is an acceptable route. Currently, many countries have rules that forbid such retroactivity or have through other means indicated that retroactivity is not a course that will be used by their legislator. Retroactive rules will serve to cause a downturn in global economic activities. After all, how can an investor be certain of the legislative environment when it comes to harvesting its investment over many years prior.

We understand that the Indian Government has clarified that the retroactive application of tax rules will not re-open cases beyond the time limit provided in the tax law. This limit is six years. Consequently, any transaction done during the last six years will be subject to this change. Auditors of companies around the world will not know how to interpret this rule and may demand significant provisions to be taken into the profit and loss accounts; this at a time where profit indications are already volatile. This effect on the Indian retroactive rule may first time be seen at the time global companies report their first quarter 2012 earnings. It will certainly put an emphasis on India but perhaps not in the manner desired by you and your colleague ministers.

We are happy that the Government of India has set up an advisory group on International Taxation and Transfer Pricing to have a consultation with Industry and suggest measures to reduce litigation and provide stability and certainty in the tax laws. ICC India has already sent a request to you to consider including their nominee on this important Advisory Group.

Our organizations are ready to discuss with you and your staff how best to approach the balance between the financial needs of your country, as exemplified by the unexpected retroactivity of tax rules, and the optimal position of your country in attracting new investments not only by foreign investors (FDI) but also by investors resident in your country. Stable and predictable tax laws create an environment conducive to investments and will make India a robust leader in the world.

…/..

Policy and Business Practices

Dialogue is the best forum to solve differences of view. Let us work together to find a solution which raises necessary revenues while maintaining India's good climate for investments. Consequently we can all benefit: the global business community and the people in your beautiful country India.

We look forward to your response to start a dialogue.

Yours truly,

ICC – Theo Keijzer
Chairman Taxation Commission

BIAC – Chris Lenon
Chairman Taxation Committee

Contact details:
E-mail: Ms. Camilla Pagnetti, ICC Paris: camilla.pagnetti@iccwbo.org
Telephone: Mr. Ashok Ummat, Executive Director, ICC India – New Delhi: +91 11 23322472

TAX EXECUTIVES INSTITUTE, INC.

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Executive Director

ELI J. DICKER
Chief Tax Counsel

April 6, 2012

Dr. Manmohan Singh
Honourable Prime Minister of India
South Block, Raisina Hill
New Delhi 110011

Shri Pranab Mukherjee
Honourable Minister of Finance
Ministry of Finance
North Block
New Delhi 110001

Shri Salman Khurshid
Honourable Minister for Law & Justice
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Shri Anand Sharma
Honourable Minister of Commerce & Industry
Ministry of Commerce & Industry
Udyog Bhawan,
New Delhi 220022

VIA EMAIL AND FACSIMILE

RE: Finance Bill 2012

Dear Sirs:

On behalf of Tax Executives Institute, Inc., I am writing to express our concern regarding certain tax provisions proposed in Finance Bill 2012. In particular, the Institute is alarmed by the proposed retrospective effect of the legislation.

Tax Executives Institute (TEI) was founded in 1944 to serve the needs of in-house tax professionals. With 7,000 members worldwide, today the organisation has 55 chapters in Asia, Europe, and North America, collectively representing 3,000 of the largest companies around the globe. As the preeminent association of business tax professionals worldwide, TEI has a significant interest in promoting fair tax laws and policies at all levels of government.

1200 G Street, N.W., Suite 300 | Washington, D.C. 20005-3814 | P: 202.638.5601 | F: 202.638.5607 | www.tei.org

TEI has a particular interest in legislation that would upset the settled expectations of taxpayers. TEI has long opposed retroactive tax legislation as unfair to otherwise compliant taxpayers and harmful to the ability of businesses to plan and conduct their operations in reliance on the legal rules in effect when business decisions are made.[1] The uncertainty resulting from the retrospective aspects of Finance Bill 2012 could adversely affect the willingness of businesses to commence or continue operations in India.

For a tax system to be fair and perceived as being fair, taxpayers must be able to rely on the law in effect when business transactions take place, expenditures are incurred, and other taxable events occur. Therefore, except in extreme circumstances, tax legislation should be prospective.

TEI recognizes that a government is free to change its tax policies, but fairness demands that the change should be prospective where the changes will have a significant negative financial effect on taxpayers. Moreover, while there are exigent circumstances where a government can exercise its authority to change the tax laws retroactively, this power should assuredly be exercised with restraint. Regrettably, the appropriate restraint is missing from Finance Bill 2012, some provisions of which would retroactively change the tax law of India as far back as 1962.

Of particular concern to the 3,000 companies represented by TEI's members are the provisions that would retroactively overturn a series of recent rulings and judgments by the courts of India, including the Supreme Court. Most notable among the reversed decisions is the very recent Supreme Court ruling in the *Vodafone* case, which confirmed an established principle of Indian law that an off-shore transaction is not subject to Indian tax even if it indirectly results in a change of control of an Indian company. While it is not unusual for a government to seek to undo the outcome of a judicial decision on a prospective basis, doing so on a retrospective basis is much rarer and, indeed, much more troubling.

Reversing the outcome of decided cases on a retroactive basis exacerbates the uncertainty faced by businesses operating in India. How can taxpayers do business in India if their tax-related business decisions are subject to summary reversal by the legislature? Indeed, why would a taxpayer challenge an adverse decision of the taxing authorities in the first instance — and at considerable expense — if it cannot be assured that a successful judicial decision will

[1] *See e.g.*, Letter from Tax Executives Institute to Hon. James M. Flaherty, Minister of Finance for Canada (27 August 2010) (legislative proposal regarding retroactive non-resident trust regime fails standards for retroactive application); Brief for Tax Executives Institute, Inc. as *Amicus Curiae, Johnson Controls, Inc.. v. Jonathan Miller, Secretary, Finance and Administration Cabinet, et al.,* 296 S.W.3d 392 (Ky. 2009), *cert. denied*, 130 S. Ct. 3324 (2010) (retroactive revocation of refund mechanism amounts to a detrimental "bait and switch"); Letter from Tax Executives Institute to Hon. Colin Hansen, British Columbia Minister of Finance (30 April 2009) (legislative "clarification" contained in 2009 provincial budget constitutes a tax levy retroactive to 2002); *see also*, Letter from Tax Executives Institute to National Association of Tax Administrators (14 April 1987) (retroactive application of state court decisions impairs equality and fairness of tax system).

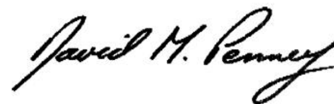
stand? And what taxpayer would invest without hesitation in a country where the legality of tax assessments is not subject to independent judicial review?[2]

In sum, the retrospective effect of proposed Finance Bill 2012 generally, and its reversal of Indian judicial precedent in particular, would have a significant detrimental effect on foreign direct investment and business operations in India, upending the necessary predicate of a stable and predictable fiscal environment for business. Enacting Finance Bill 2012 in its current form will significantly impair India's credibility and desire to become a preferred destination for foreign-direct investment.

TEI appreciates the opportunity to comment on Finance Bill 2012. If you have any questions about this letter please do not hesitate to contact Eli J. Dicker, TEI Chief Tax Counsel on 202.638.5601 or edicker@tei.org.

Respectfully submitted,

Tax Executives Institute, Inc.



David M. Penney
International President

[2] An especially troubling aspect of Finance Bill 2012 are those provisions that would render withholding agents liable for withholdings that tax administrators argue *should* have been performed, notwithstanding the fact that such parties did not know that they had such obligations because no existing law or guidance imposed them.

28 March 2012

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

Dear Finance Minister,

Re: Certain amendments proposed by the Finance Bill, 2012, (the 'Bill') to the Income-tax Act, 1961

On behalf of the membership of the Asia Securities Industry & Financial Markets Association (ASIFMA)[1] and the Securities Industry and Financial Markets Association (SIFMA)[2], we are writing to express our deep concern that certain portions of the Finance Bill 2012 ('Bill') could adversely impact investment in the Indian capital markets by the global investment community.

Specifically, the Bill's provisions relating to taxation of indirect transfers of assets as well as the General Anti-Avoidance Rule ('GAAR') are very broadly worded and could be interpreted to tax Foreign Institutional Investors ('FIIs') on their investments in the Indian listed equity markets.

FIIs are significant sources of foreign direct investment in India, with assets under custody of more than Rs. 10 lakh crores (over US$200 billion) or 17% of the capitalization of India's equity markets. They have also infused substantial sums in buying Indian Government and corporate debt and are keen to increase such investments, regulations permitting. Global investors who do not qualify as FIIs or Qualified Foreign Investors ('QFIs') rely on these institutions to invest in the Indian capital markets. FIIs fear that the new tax rules could subject this foreign investment to double or triple taxation. Such onerous taxation – or even the risk of such taxation – could threaten this important source of capital for India's businesses.

Since the budget announcement on March 16, an enormous amount of attention has been paid to these taxation issues within the investor community. FIIs are carefully evaluating these new tax risks. Some institutions have told their clients that they will not take on any new India positions. Others are hopeful that once the Indian government understands the gravity of the situation the tax rules will be clarified. However, if these tax uncertainties are not resolved quickly we fear that FIIs will decide that the tax risks are unacceptable. These investors may then proceed to liquidate their India investments and such a

[1] The Asia Securities Industry & Financial Markets Association (ASIFMA) is an independent association that promotes the development of liquid, efficient and transparent capital markets in Asia and facilitates their orderly integration into the global financial system. ASIFMA priorities are driven by over 40 member companies involved in Asian capital markets, including global and regional banks, securities dealers, brokers, asset managers, credit rating agencies, law firms, trading and analytic platforms, and clearance and settlement providers. ASIFMA is located in Hong Kong and works closely with global alliance partners: the Global Financial Markets Association (GFMA), the Securities Industry and Financial Markets Association (SIFMA) and the Association for Financial Markets in Europe (AFME). More information about ASIFMA can be found at: www.asifma.org.

[2] The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org

disorderly dissolution of large positions held by these overseas investors could seriously disrupt the Indian capital markets.

We believe these tax results are *unintended* consequences of the Bill and that the solutions are straightforward. The Standing Committee on Finance ('Standing Committee') has given detailed recommendations with respect to the indirect transfer and the GAAR provisions. Their recommendations would avoid market disruptions.

- ***Explanation 4 to Section 9((1)(i) and Explanation to Section 2(14):*** The Bill should incorporate the Standing Committee's recommendations that the indirect transfer rules should not apply to indirect ownership of "small shareholdings" of Indian companies. We understand that this recommendation was intended to ensure that the indirect transfer rule would not affect portfolio investments in listed securities.
- ***GAAR:*** The Bill should reflect the Standing Committee's recommendations that "there should be certainty on the GAAR provisions so that foreign investors do not become wary of investing in India." For this purpose, we believe that the GAAR should not apply to "small" investments in listed securities or derivatives that reference these securities or debts held by FIIs.

For both purposes, a "small" investment could be defined as an interest of 10% or less of an Indian listed company (in keeping with the 10% investment limit for each FII). For debts held by FIIs, such as government bonds and listed corporate bonds, these would be within the prescribed limits set by the Securities Exchange Board of India (SEBI). If the Bill were to incorporate these two simple suggestions, then we believe that the Indian capital markets would not be disrupted and the tax authorities would retain the right to tax transactions as intended in the Bill.

As an industry, we are committed to the Indian economy and recognize the potential of India as an investment jurisdiction. We are not averse to paying the appropriate level of Indian taxes, as long as the rules are clear so that investors can plan their affairs with a degree of certainty. Clarifying the above issues will go a long way in further making India an attractive investment jurisdiction.

We are happy to nominate people from among our memberships to work with your team to deliberate on the above issues. Please contact Will Sage, ASIFMA Managing Director at: office - +852 2537 3895; mobile - +852 9813 1519 or email – wsage@asifma.org.

Yours sincerely,

Nicholas de Boursac
CEO
Asia Securities Industry and Financial Markets Association

Kenneth E. Bentsen, Jr.
EVP, Public Policy and Advocacy
Securities Industry and Financial Markets Association
1101 New York Ave., N.W. 8th Floor
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CC:

Shri R S GUJRAL
Finance Secretary
Ministry of Finance
Department of Revenue
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Shri U K SINHA
Chairman
Securities and Exchange Board of India
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By Electronic Delivery

April 3, 2012

The Honorable Pranab Mukherjee
Union Minister
Ministry of Finance
North Block
New Delhi 110001
India

RE: *Finance Bill Provisions That Could Impact Foreign Investors Negatively*

Dear Minister Mukherjee:

The Investment Company Institute ("ICI")[1] and ICI Global[2] urge that the impact on foreign investment funds of (1) the indirect transfer provision and (2) the General Anti-Avoidance Rule ("GAAR") in the proposed Finance Bill be clarified promptly. We urge further than any changes that are enacted apply only to new investments.

These two provisions apparently were drafted in response to very specific and narrow concerns. The proposed legislative language, however, is sufficiently ambiguous that the provisions may call into question the tax treatment, widely viewed as settled, of common transactions engaged in by highly-regulated, publicly-available investment funds. Moreover, these ambiguities reinforce a lingering concern that Indian tax policy, particularly when applied to existing investments, can be less consistent than the policies of other capital-seeking locations.

The specific suggestions made below are intended to strengthen investor confidence and enhance the stability of the Indian capital markets. Our prior experiences with Indian tax matters

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[1] The Investment Company Institute 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 $13.3 trillion and serve over 90 million shareholders.

[2] ICI Global is the global association of regulated funds publicly offered to investors in leading jurisdictions worldwide. ICIG seeks to advance the common interests and promote public understanding of global investment funds, their managers, and investors. Members of ICIG manage total assets in excess of US $1 trillion.

suggests that the provisions' effects, which we describe below, are unintended. Prompt clarification, through public statements and amended legislative language, will benefit investors and the markets.

The Indirect Transfer Provision

The first provision, apparently designed to reverse retroactively the decision of the Indian Supreme Court in the *Vodafone* case, could have extremely broad and negative effects. One industry concern is that the provision would permit Indian authorities, subject to the statute of limitations, to assert tax against any non-Indian investor who sold shares of a non-Indian fund investing in India. The industry's concern would be even greater if tax were asserted against a non-Indian investor who held only a small interest in a publicly-available fund, even one investing exclusively in India, that held only small, non-controlling interests (*e.g.,* less than 10 percent) in individual Indian companies.

Although the indirect transfer provision apparently is intended to address situations in which a non-Indian investor sells a controlling interest in a non-Indian holding company that owns a controlling interest in an Indian company, the provision is not so limited. The simplest way to address this concern would be to state precisely those transactions that the provision is intended to cover. We recommend this approach.

Alternatively, a list of excepted transactions could be provided. One such alternative, a *de minimis* exception applicable to the fund itself, could be crafted based upon the 10-percent investment limit that applies to foreign institutional investors. Another alternative approach would be to except from the provision's application transfers of shares of publicly-available investment funds.

The General Anti-Avoidance Rule

The second provision, to enact the GAAR, also could have extremely broad and negative effects. We understand that one potential use of the GAAR would be to permit Indian authorities to assert capital gains tax against investors resident in countries with which India, by treaty, provides a tax exemption. The GAAR, which we understand would place the burden of proof on the investor, could be used for innumerable other purposes as well.

Cross-border investors place great emphasis on legal certainty; such certainty includes the well-established practice of countries overriding treaties in only the absolutely rarest of circumstances. Investor confidence is diminished if a country's tax laws, including the treatment provided by carefully-negotiated and mutually-ratified treaties, is uncertain.

To the extent that certain types of investors, or the residency requirements of any specific country with which India has an income tax treaty, are viewed as problematic, a narrowly-crafted solution should be advanced. If a GAAR (despite its broad scope and its potentially negative impact on

investment and capital formation) is to be enacted, the provision should allow for treaty overrides only prospectively, after a transition period, for new investments.

The Investment Fund Industry's Need for Certainty

The investment fund industry is unique in that (1) the typical fund values its assets daily and (2) the typical fund's interests (*e.g.,* shares) generally are purchased and sold each day based upon the fund's net asset value. Uncertainty regarding the tax treatment of a fund's investments creates uncertainty regarding fund asset values and the price at which the fund's interests should trade.

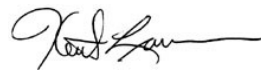
The investment fund industry's need for tax certainty illustrates quite clearly the very negative impact on investor confidence of legislation that applies, whether retroactively or prospectively, to existing investments. Funds must evaluate constantly the valuations of their portfolio securities and the benefits of continuing to hold them. The possibility of incurring unexpected tax can affect valuation considerations and reduce investor demand for Indian securities. Reduced demand, in turn, could reduce securities prices and harm Indian companies and their investors.

* * *

A strong signal is needed that the indirect transfer provision and the GAAR will not impact the settled expectations of investment funds holding Indian securities. If existing law, including the application of ratified treaties, is to be changed, the changes should be targeted narrowly to the specific concerns sought to be addressed. Moreover, any such changes should apply only to new investments.

We appreciate greatly your attention to this serious matter. If there is any additional information that we can provide, please contact me (at lawson@ici.org or 001-202-326-5832).

Sincerely,



Keith Lawson
Senior Counsel – Tax Law

cc: R.S. Gujral, Finance Secretary/Revenue Secretary, Ministry of Finance
Ashutosh Dikshit, Joint Secretary (TPL–I), CBDT
Sunil Gupta, Joint Secretary (TPL–II), CBDT
U.K. Sinha, Chairman, Securities and Exchange Board of India
Banashri Bose Harrison, Minister-Commerce, Embassy of India, Washington D.C.

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April 10, 2012

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Dr. Manmohan Singh
Honourable Prime Minister of India
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New Delhi 110011

Dear Sir,

Finance Bill 2012 Software Tax Proposals

We represent the Software Coalition, which is the leading software industry group with a focus on international tax issues of importance to the industry. The companies which comprise the Coalition are software companies based both inside and outside the United States, all of which engage in international trade.

We are writing to address the software tax proposals in India's Finance Bill 2012, which change with retroactive effect to 1976 the rules which govern the tax treatment of completed software transactions. In so doing, these proposals depart from international norms with respect to the taxation of software and would wipe away years of thoughtful Indian judicial and administrative precedents that were consistent with such norms. Moreover, to impose new rules with retroactive effect to 1976 under the guise that they are clarifications violates fundamental notions of fairness. Finally, it is especially unfortunate that these proposals are coming forward now, as the Indian Supreme Court is expected to address in the near future the exact issue the proposals address – *i.e.*, how to characterize cross-border software revenues.

Specifically, the Finance Bill 2012 proposes to amend section 9 of the Income Tax Act to provide that a payment for the transfer of any right to use computer software products constitutes a royalty, with retroactive effect to 1 June 1976. This proposed change to the characterization of payments for software products is contrary to the result that the majority of Indian courts and tribunals have reached. The proposal is also contrary to international norms. The United States, the United Kingdom, Japan, Hong Kong, Singapore, Australia, New Zealand, and many other countries have long observed a distinction between payments for the right to use copyright rights, which constitute royalties, and payments for the right to use copyrighted articles, which do not.[1] The Finance Bill 2012 proposes to treat payments for the use of both copyright rights and copyrighted articles as royalties. This unilateral shift would create very significant conflicts in the legal treatment of cross-border software transactions between India and its trading partners.

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[1] See, e.g., United States Treasury Regulation § 1.861-18.

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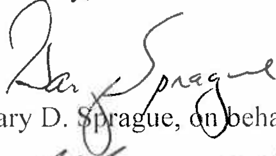
The proposed retroactive effect threatens unprecedented exposures for companies which have already reported to their shareholders on their Indian tax liabilities for prior years in reliance on the law actually in effect for those years.

Furthermore, the Finance Bill 2012 proposes to treat payments "in respect of" information as royalties, with retroactive effect to 1 June 1976, regardless of whether the payor possesses or controls the information or even uses the information directly. The scope of this proposal is highly ambiguous. As a result, we are concerned that this proposal could be construed to apply to online software transactions, including transactions in which software is provided as a service, and we believe that this proposal should be reconsidered.

We believe that the software tax proposals in the Finance Bill 2012 will cause software companies to reevaluate the level of investment they are willing to make in India. In addition, we are concerned that the software tax proposals will make software more costly for Indian consumers. Accordingly, we respectfully urge you to reconsider the software tax proposals in the Finance Bill 2012.

Sincerely,



Gary D. Sprague, on behalf of the Software Coalition

Ethan S. Kroll, on behalf of the Software Coalition

cc: Shri Pranab Mukherjee
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