UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

Ram Mohan Singh
IRS Additional Director of Income Tax (International Taxation)
Range-1, 4th Floor, Room No. 402
Drum Shape Building, I.P Estate, New Delhi-110001

July 19, 2012

Dear Mr Singh:

United States Council for International Business is pleased to have the opportunity to provide comments on the recently proposed draft guidelines regarding the implementation of General Anti-Avoidance Rules (GAAR). Our comment letter provides broad principles that we believe should be taken into account in designing India's GAAR, rather than detailed comments on the proposal.

USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and regulatory coherence. Its members include U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

USCIB understands the need of governments to protect their revenue base and recognizes that in order to promote that goal many governments have adopted anti-avoidance rules. Businesses need to be able to reliably predict their tax costs when making investments in a jurisdiction so we believe it is important for any GAAR regime to balance the needs of government to protect their revenue base with the needs of business for certainty. Recent press reports state that an Indian government official said that one way of achieving this balance between avoiding government losses and protecting investors is for the Panel to compare India's GAAR with similar anti-tax avoidance policies implemented by other governments. USCIB believes this is an appropriate step to take and that careful analysis of other countries' policies will reveal that the India's proposed GAAR guidelines are extraordinarily broad.

USCIB believes that the proposed guidelines are too vague to provide certainty to business investors. For example, an important part of certainty is respecting the obligations imposed by

double taxation agreements between treaty partners. Treaty obligations should generally not be overridden by GAAR provisions. If India chooses to override a treaty obligation pursuant to Indian law, we believe that the scope of the override should be both narrow and clear. Use of the GAAR provisions to deny treaty benefits in a broad, discretionary manner would be fundamentally inconsistent with the specific limitation on benefits and beneficial ownership provisions of Articles 10 (Dividends), 11 (Interest), 12 (Royalties), and 24 (Limitation on Benefits) of India's Treaty with the United States and other countries. We believe that the application of the GAAR rules in this manner would constitute an impermissible unilateral amendment of the United States-Indian Treaty.

Under the proposed guidelines it is unclear how the GAAR provisions interact with treaties. There are a number of examples in Annexure-E that raise the misuse of treaties as a potential basis for the application of the GAAR provisions. We believe these examples do not provide adequate guidance because the relevant treaty language is generally not addressed. The examples do not discuss whether the relevant treaty has any rules concerning limitation on benefits, whether the entities in the examples satisfy those conditions, or the basis for determining that the benefit claimed under the tax treaty is not a benefit that was intended to be granted by the treaty negotiators. Therefore, we believe it is impossible to determine from the proposed guidelines how these principles would interact with particular treaty language. If a double taxation agreement between India and another country can be simply ignored, as some of the examples suggest because the language of the treaty is not consulted, then these guidelines are impermissibly broad.

USCIB also supports the comments submitted on July 3, 2012 by the Asia Securities Industry & Financial Markets Association and the Capital Markets Tax Committee of Asia concerning the application of the GAAR rules to the financial markets. Capital markets need a safe harbor that does not require them to disavow treaty benefits to which they may be entitled.

We appreciate that the guidelines are intended to provide clarity to taxpayers. However, the current guidance in the examples leaves significant uncertainty. To illustrate the problems with this approach, we highlight a few examples that are not sufficient to provide clear guidance. This list is not intended to be comprehensive:

- Example 2 is not clear regarding whether this arrangement is subject to GAAR because production was diverted from another location or whether it is because the product is not really manufactured in the new location and manufacturing is a requirement of the incentive. If the product were manufactured at the new location would the GAAR rules apply? Presumably, if the company satisfied all the requirements for the incentive regime, it would be entitled to the incentive even though the manufacturing changed

location. The GAAR rules should not add a requirement that the manufacturing not be relocated, if that requirement did not exist in the incentive legislation.

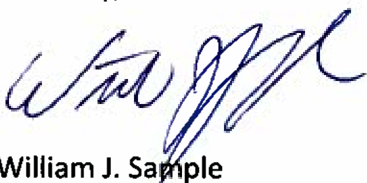
- Example 3 refers to "adequate" manpower, capital and infrastructure without providing guidance to determine "adequacy".
- In Example 12 the level of connection between the connected companies is not provided. We expect the conclusion should be very different if companies B, C, and D are 100 percent owned subsidiaries of a common parent than if the connection is significantly lower.

The facts in the examples are very general and simple; it is thus difficult to determine how the rules illustrated by the examples would apply in more complex cases. Real cases will of course be more complex and therefore this lack of clarity will create the opportunity for subjective interpretations by the tax authorities that may result in numerous disputes.

The guidelines do not sufficiently clarify the role of the three member panel. It seems that the approval of the three member panel is necessary for the tax administration to proceed with a GAAR case. That the taxpayer would still have access to competent authority procedures and Indian courts should be made clear. In addition, it would seem unlikely that the all of the potential applications of the GAAR could be reviewed by a single three member panel, particularly given the fact that senior officials are required to participate on the panel and the short time frames associated with the process. We applaud the recognition that these issues need to be resolved quickly, but are concerned that this will lead to "rubber stamp" approvals of the tax administration's position. This may be the case even if multiple panels are set up, as the guidelines permit. Thus the role and structure of the three member panel should be more clearly defined.

Thank you for this opportunity to provide input into the important work of drafting GAAR guidelines.

Sincerely,



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