

May 4, 2012

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

Shri RS Gujral  
Revenue Secretary  
Ministry of Finance  
Government of India  
North Block  
New Delhi 110001  
India

Shri VG Garg  
Joint Secretary, Tax Research Unit  
Ministry of Finance  
Government of India  
North Block  
New Delhi 110001  
India

Shri S.K. Goel  
Chairman  
Central Board of Excise and Customs  
North Block  
New Delhi 110001  
India

Dear Sirs

**Finance Bill 2012**

1. Our members have asked us to write to you to express their concern over the amendments to the service tax provisions that are proposed to be introduced by the Finance Bill 2012.

2. Since 1985, the International Swaps and Derivatives Association, Inc. (“**ISDA**”) has worked to make the OTC derivatives markets safer and more efficient. Today, ISDA is one of the world’s largest global financial trade associations, with over 825 member institutions from 57 countries on six continents. These members include a broad range of OTC derivatives market participants: global, international and regional banks, asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, central counterparties

**International Swaps and Derivatives Association, Inc.**  
50 Collyer Quay  
#09-01 OUE Bayfront, Singapore 049321  
P 65 6538 3879  
[www.isda.org](http://www.isda.org)

NEW YORK WASHINGTON  
LONDON BRUSSELS  
HONG KONG SINGAPORE  
TOKYO

and other service providers. Information about ISDA and its activities is available on ISDA's website: [www.isda.org](http://www.isda.org).

3. Currently, there is a positive list of taxable services but with certain exemptions. The Finance Bill 2012 proposes to change from a positive list of taxable services to a negative list, i.e. service tax will be levied in respect of all services except the ones specified in the negative list.

4. “Service” is defined in Clause 143(C) of the Finance Bill 2012 – section 65B(44) as follows:  
“(44) “service” means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include –  
(a) an activity which constitutes merely –  
(i) a transfer of title in good or immovable property, by way of sale, gift or in any other manner;  
(ii) a transaction in money or actionable claim;  
.....”

5. Financial Sector (Banks, Non Bank Finance Companies and other Financial Institutions etc.) in the normal course of business, invest/deal in financial instruments on their own account. These transactions are not carried out for another person. Accordingly these transactions are not in the nature of ‘service’.

The above definition of service under sub clause (44) of section (65B) proposed to be inserted by the Finance Bill 2012 also specifically exclude ‘a transfer of title in goods by way of sale or in any other manner’. However the term ‘Goods’ has been defined in a restricted manner to include only certain financial instruments. This is explained below :

‘Goods’ have been defined under sub clause (26) of section (65B) proposed to be inserted by Finance Bill 2012 as follows :

*“(26) “goods” means every kind of movable property other than actionable claim and money ; and includes securities, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;”*

‘securities ’ have been defined under sub clause (43) of section (65B) proposed to be inserted by the Finance Bill 2012 , as follows :

*“(43) “securities” has the meaning assigned to it in clause (h) of section 2 of the Securities Contract ( Regulation) Act, 1956;”*

‘securities ’ has been defined in clause (h) of section 2 of the Securities Contract (Regulation) Act, 1956 as under :

“securities” include:

(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(ia) derivative;

(ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;

- (ic) security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (id) units or any other such instrument issued to the investors under any mutual fund scheme;
- (ie) any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable, including mortgage debt, as the case may be;
- (ii) Government securities;
- (iia) such other instruments as may be declared by the Central Government to be securities;  
and
- (iii) rights or interest in securities”

“Derivatives” has been defined under clause (ac) of section 2 of Securities Contract (Regulation) Act, 1956 as under :

“derivative” includes—

- (A) a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security;
- (B) a contract which derives its value from the prices, or index of prices, of underlying securities

Above definition of “Derivatives” as well as “securities” does not include financial instruments defined under Section 45U of the Reserve Bank of India Act, 1934 which is as under :

“For the purposes of this Chapter,--.

- (a) "derivative" means an instrument, to be settled at a future date, whose value is derived from change in interest rate, foreign exchange rate, credit rating or credit index, price of securities (also called "underlying"), or a combination of more than one of them and includes interest rate swaps, forward rate agreements, foreign currency swaps, foreign currency-rupee swaps, foreign currency options, foreign currencyrupee options or such other instruments as may be specified by the Bank from time to time;
- (b) "money market instruments" include call or notice money, term money, repo, reverse repo, certificate of deposit, commercial usance bill, commercial paper and such other debt instrument of original or initial maturity up to one year as the Bank may specify from time to time;
- (c) "repo" means an instrument for borrowing funds by selling securities with an agreement to repurchase the securities on a mutually agreed future date at an agreed price which includes interest for the funds borrowed;
- (d) "reverse repo" means an instrument for lending funds by purchasing securities with an agreement to resell the securities on a mutually agreed future date at an agreed price which includes interest for the funds lent;

(e) "securities" means securities of the Central Government or a State Government or such securities of a local authority as may be specified in this behalf by the Central Government and, for the purposes of "repo" or "reverse repo", include corporate bonds and debentures."

From the above definitions it would be appreciated that the definition of 'securities' and 'derivatives' under Securities Contract (Regulation) Act, 1956 is narrow .

"Securities" is thus understood differently in the broader financial markets and has a narrower meaning in the capital markets. The term "Securities" should include instruments under the (a) *the Securities Contract ( Regulation) Act, 1956* and (b) the Reserve Bank of India Act, 1934 as the intent is to exempt (from Service tax) the various instruments that are sold, purchased or otherwise dealt with, in the financial markets.

This will allow room for the markets to growth without adversely affecting revenue collection. It will also bring in ease of administration. Accordingly, there is need for an amendment on the lines suggested below, to exclude transactions in relation to securities/financial instruments.

6. We therefore request as under :

a. section 65B(44) be amended to include a new sub-clause (a)(iii) as follows:

*"(iii) a transaction in relation to securities;"*

and that "or" be moved from the end of sub-clause (a)(i) to the end of sub-clause (a)(ii), as parties to a securities transaction act as arm's length counterparties and neither provides a "service" to the other.

b. definition of "securities" be amended to read as follows:

*"(43) "securities" include:*

*(a) securities as defined in clause (h) of section 2 of the Securities Contract (Regulation) Act, 1956; or*

*(b) the instruments set out in Section 45U of the Reserve Bank of India Act, 1934."*

We look forward to your favourable response and would be most pleased to assist in any way. Please contact Jacqueline Low ([jlow@isda.org](mailto:jlow@isda.org), +65 6538 3879) or Keith Noyes ([knoyes@isda.org](mailto:knoyes@isda.org), +852 2200 5909) or our Indian counsel, H Jayesh ([h\\_jayesh@jclcx.com](mailto:h_jayesh@jclcx.com), +91 22 4057 5586) at your convenience.

Yours faithfully,

**For the International Swaps and Derivatives Association, Inc.**



Keith Noyes  
Regional Director, Asia Pacific



Jacqueline ML Low  
Senior Counsel Asia

cc Dr. D. Subbarao  
Governor  
Reserve Bank of India  
Central Office  
Mumbai 400 001  
India