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Dear Mr. Mukherjee,

I am writing this letter to you as a citizen of the Republic of India. I enclose herewith my critique of the *Vodafone* Judgment recently delivered by our Supreme Court. I have suggested, for reasons set out therein, that the decision does not deserve to be accepted by our Government. I have suggested several remedial actions, the best of which, to protect the nation's interest, is through retro-operative law to undo its immediate, and continuing effects to the detriment not only to our revenue, but also to our Constitution and democracy.

2. I summarise in this paragraph the main points decided by the Supreme Court. I would mention in brief: in para 3, how the decision would subject the nation to corporate domination from foreign lands; in para 4, how our institutions would suffer; in para 5, how the Consolidated Fund of India would suffer; and in para 6, how our government has responded over these years.

(i) The Hon'ble Court failed to appreciate that as the economic matrix was in India, mere 'shares sale' in foreign jurisdiction cannot deprive India of a share in tax. To hold otherwise would be unfair to those who protect the matrix, and contribute to the economic events which have proximate nexus, on the territoriality principle, with sale of such shares in foreign jurisdiction; and who have enhanced by their labour the value of the underlying assets the value of which determines the value of the shares.

(ii) The Hon'ble Court's judgement would help build an opaque system which would frustrate our Right to Know, and would facilitate corruption. Our law and policy never admit of an opaque system.

(iii) The Hon'ble Court seems oblivious of the new 'states systems' evolved after the World War II, and thus has caused a miscarriage of justice by not appreciating material facts, and by not evolving new criteria for judicial- decision-making to save our country from the studied fraud managed and operated from islands most of which have only macroscopic presence in the Caribbean, or somewhere in some foggy part of the Oceania..

(iv) The Hon'ble Court's *Vodafone* decision promotes the craze for FDI by ignoring the statutory and constitutional considerations. It illustrates how the rabid neo-liberal agenda subjugate all other considerations to the creation of the conditions for the triumph of the deceptive strategy designed to loot our land. It is a clear affront to the Income-tax Act, and Article 265 of our Constitution to interpret the statutory provisions for getting more and more FDI. If such things are allowed to happen our Constitution would receive the neoliberal gloss (now called 'neo-constitutionalism'), and our Constitution that 'We, the People' had given to ourselves would stand repealed by agencies other than those competent to modify our Constitution. The neo-liberal think-tans and the mighty corporations operating from outside our territory, are out to see that

only the structure of power, created by our Constitution, should survive, and that too as their protectors and facilitators.

(v) The decision in *Vodafone* is *per incuriam* as it has overlooked the words and structure of the relevant statutory provisions of Section 9(1) (i). It is well established that an order *per incuriam* should not be allowed to stand.

(vi) The Court has, in effect, erred in deciding against Section 5 (5) of the DTC before it is even enacted. I have developed this point in my Critique enclosed. The effect of the *Vodafone* decision on the validity of the Section 5 of the DTC deserves to be examined before it is enacted.

(vii) The 5-Judges Bench decision in *McDowell's Case* has been misread, and ignored when it was binding as a rule of law on the Bench deciding *Vodafone*.

(viii) The Hon'ble Court has made a lot of observations on points not even raised before it. And thus, has created situations in which the Revenue would keep on suffering and groaning, and the crooks will have best times from dark regions on our Earth. The effect of such wide-ranging observations be got examined for appropriate actions.

3. The *Vodafone* decision is going to be a great stride towards the triumph of corporatocracy from the foggy foreign regions whose ways our government can neither know, nor control. Bad days are ahead, as the economic epicenter would shift to those areas leading to new imperialism of predatory capitalism. Through corporate structuring, realities would get shrouded. *Vodafone* helps build an opaque system which is wrongly justified, in *Vodafone*, for the genuine commercial needs. Such views go counter to our Fundamental Rights, and Directive Principles of our Constitution.

4. The strategy of the corporate structuring through tax havens that succeeds in *Vodafone* would deprive our nation state, and our government control to save us from the corporate loot. By controlling the Press, by deploying the image-makers, and by employing well-paid and powerful lobbyists, they would act the way the East India Company had acted in the past.

5. We shall have to refund Rs 11000 crores plus other incidental and essential dues. With this begins the disastrous story to losing in many other cases, already in the pipeline, and also in all those cases which would be structured on the same protocols any where on land, or cyberspace, or on the high seas to make our laws and the Constitution redundant. There is a clear risk of our Consolidated Fund becoming, in long term, a beggar's bowl. I am sure you would be aghast at my forebodings. I also wish such sinister things never happen, are never allowed to happen. The government must act.

6. *Vodafone* is decided against the Revenue accepting in toto the thesis and agenda of the corporate world and the neo-liberal proponents operating through tax havens, secrecy jurisdictions mainly after the World War II. It has the effect of creating situations which subverts our democracy by creating conditions for the emergence of corporatocracy under which the instruments of darkness strive to rule. The new states systems have been evolved and the complex legal structures are built in dark areas at remote tiny islands for the Rogue Finance to work. We must save our democracy from foreign corporate domination built through complex structuring from remote areas on the earth, and must preserve our Constitution to fulfill its mission as is dear to it.

7. Subversion of our Constitution was amply evident, even a decade back, in *Azadi Bachao*. It was strange to see both the sides (our Government and the tax heaven) sailing in the same boat for the benefit of masqueraders from third countries accessing benefits under bilateral double tax avoidance treaties. In *Azadi Bachao*, we succeeded

before the Delhi High Court, but then the NDA Government worked to lose, whatever our nation had gained, by taking a suicidal position in the Supreme Court. Perhaps, it was to help a tax haven paper company which was made a co-appellant on the forceful pleading of Shri Arun Jaitley, Sr Advocate, and was argued by one who had argued before the High Court for our Government as its Solicitor-General! What I saw then led me to write a letter to Shri Jaswant Singh, the then F.M. crying for immediate corrective actions. Neither the letter was acknowledged, nor was any action taken in the matter. The Supreme Court, in *Azadi Bachao*, was persuaded to sustain the CBDT Circular, issued during the BJP regime under political pressure, directing the tax authorities go into blinkers, and not to ask anything from anyone if a certificate of residency issued in Mauritius is shown. Then began, after 2000 the locust-eaten years of the misuse of the Mauritius route, and massive phase of gross corruptions set in our country for the benefit of the looters, tax-evaders, fraudsters, money-launderers, and criminals of all hues. . It was my criticism, before the Court, of the Income-tax Department's poor handling of the international tax issues in the Indo-Mauritius Tax Treaty Case that led to the establishment, in 2001, of the Directorate of International-Taxation. It is now my misfortune to suggest that, if *Vodafone* is not challenged, the said Directorate be abolished because it would cease to have relevance.

8. **Now this Vodafone Judgement.** It not only appreciates *Azadi Bachao*, it has decided issues, and made observations which would help building corporatocracy at the wreck of democracy, and would drain out resources making us helpless to build conditions in our country to evolve in the light of our constitutional commitments. My Critique would show that on all vital issues the Judgement is erroneous. What John Kenneth Galbraith said in his *A Short History of Economics: The Past as the Present* (at p. 236) comes to mind:

‘ Here another great constant in economic life: as between grave ultimate disaster and conserving reforms that might avoid it, the former is frequently much preferred’.

9. I pray to you, our Finance Minister, to set up a committee of eminent experts, (as I have suggested in the *Critique*: see pp. 72-73 ) to study the impact of this Judgement, and to articulate proposals for immediate remedial actions. “The Constitution and the laws bind every court in India, and that though the courts are free to interpret, they are not free to overlook or disregard the Constitution and the laws”<sup>1</sup> I suggest that this committee should consist of two sitting Judges of our superior courts, two distinguished civil servants with unblemished record, two jurists, and a distinguished member of the civil society. I submit that no interested persons should be associated with work, no lobbyist should influence its deliberations, and nothing pertaining to it be ever outsourced even for getting ideas as to what is required to be done. The matter can be referred to the Law Commission ( in addition or as an alternative).

10. I have suggested certain remedial steps ( please see my *Critique* at pp. 1-2, and pp. 70-74), but **I consider the best course is to frame retro-operative law through ordinance<sup>2</sup>, and/or to move a Re-call petition before the Supreme Court as was**

<sup>1</sup> . H M Seervai, *Constitutional Law of India* 4th ed p. 2677.

<sup>2</sup> *Mahal Chand Sethia v. W.B;* *Rai Ramkrishna v. Bihar* AIR 1963 SC 1667 [SEE Seervai, Const. Law vol. 1 p. 844-845].

**done in the *Black Money Case*** (as its ambit of the Re-call procedure is wider, it is heard in the open court, and the judicial jurisdiction is wide enough to see that justice is done). But, when all is said, the Best Way is the retro-operative law invoking power under Article 245(1) and (2).

11. It is strange to see how our Supreme Court suggests to Parliament certain actions, but our Parliament seldom bothers to listen to such suggestions. Nearly a decade back, in *Azadi Bachao*, made certain suggestions<sup>3</sup> which, later, the Supreme Court forgot, or Parliament ignored. In *Vodafone* too, many suggestions/recommendations<sup>4</sup> have been made by the Supreme Court. I wish the same indifference is not shown to them. Such things do not speak well of our supreme institutions. If the Hon'ble Supreme Court found that in many cases Parliament ignored it, it should have issued mandamus to the Executive to take remedial actions. I hope both the Supreme Court and Parliament knows about *Teh Cheng Poh v. Public Prosecutor*, Malaysia, 1980 LR, 458 PC at p. 472 ; H. M. Seervai observes, “..... the importance of *Poh's* Case lies in the fact, that in the opinion of the Privy Council a *mandamus* would lie against the Cabinet to advise H.M. to revoke the Regulations.” (*Constitutional Law of India*, p. 1131).

12. As I have studied the Judgment in *Vodafone Case* critically, as I have greater and deeper understanding of international taxation than most others at the Bar and our Government, as I have carried on litigations in this field before the Delhi High Court and the Supreme Court right from 2000, as I have received appreciation for my work in this field not only from eminent international jurists, but also from Delhi High Court<sup>5</sup>, and as I had been a member of the Council for Higher Legal Studies of the Universities at Calcutta, Patna, and Nagpur, as I have delivered lectures on international law at various fora including National Law University, as I have written articles ([www.shivakantjha.org](http://www.shivakantjha.org)), and books {*Judicial Role in Globalised Economy*(Wadhwa) ; and *On the Loom of Time*(Taxmann)}, and as I have worked and witnessed for more than 3 decades in the Indian Revenue Service, I think I am competent to venture my comments, and feel I shall be failing in my duty to the nation if I do not put forth my

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<sup>3</sup>“We are afraid that the weighty recommendations of the Working Group on Non-Resident Taxation are again about what the law ought to be, and a pointer to the Parliament and the Executive for incorporating suitable limitations provisions in the treaty itself or by domestic legislation.” In our view, the recommendations of the Working Group of the JPC are intended for Parliament to take appropriate action.” “True that several countries like the USA, Germany, Netherlands, Switzerland and United Kingdom have taken suitable steps, either by way of incorporation of appropriate provisions in the international conventions as to double taxation avoidance, or by domestic legislation to ensure that the benefits of a treaty/convention are not available to residents of a third state.”

<sup>4</sup> To illustrate : (i) to prescribe LOB; (ii) framing law under Article 245(2) of our Constitution; (iii) . This Article gives Parliament the authority to make laws which are extra-territorial in application (para 183); (iii) Need for Legislation to stop the evil thus pointed out by the Hon'ble Court in *Vodafone* (para 52) ....

<sup>5</sup> “We would however like to make an observation that the Central Govt. will be well advised to consider the question raised by Shri Shiva Kant Jha who has done a noble job in bring into focus as to how the Govt. of India had been losing crores and crores of rupees by allowing opaque system to operate.” Delhi High Court in *Shiva Kant Jha vs. UoI* (2002) 256 itr 563

ideas, and caution our Government against the shape of things to come. I have marked how the corporate lobby has gagged critics, has circulated self-serving comments, and has tried to engineer their affairs through pressure and persuasion. But I believe in the words of Tagore that my Professor, Dr Kali Kinkar Datta often quoted: ‘যদতির ডাক শুনকে কেউ না আসে তবে একলা চলো রে’ (*Tor Daak Shune Keu Naa Aase Tobe Eklaa Chalo Re*). These words had guided my father and uncle who had fought for this country’s Independence; and have been most precious for me who too had borne the joyous brunt of our Struggle for Freedom.

13. To work for the nation’s cause in one’s seventies is difficult. Yet I have tried to put forth my ideas in the enclosed Critique. I would be happy to help our Government, surely without consideration, if I am asked on any point to help our Government. I had concluded my arguments on the 7<sup>th</sup> day of my presentation before the Delhi High Court with the words of Lord Nelson : “England expects that every man will do his duty” which I varied as “ India expects every citizen to do his duty”. I would end this letter with a few words from the *Bhagavad-Gita*:

*Uddhared atmanatmanam  
Natmanam avasadayet  
Atmaiva hy atmano bandhur  
Atmaiva ripur atmanah.*<sup>6</sup>

I seek your leave to put this letter and Critique on my website [www.shivakantjha.org](http://www.shivakantjha.org) for public information as the matter involved is of great public interest. Besides, this may help various agencies to have an access to my views, for whatever worth they may be; and it may enable our countrymen to reflect over the issues. I hope persons abler than me would find out better solutions for the weal of all in Bharat. My endeavour is wholly *pro bono publico*, totally without any interest, personal, political, professional....

With the greatest regards and best wishes,  
**Jai Hind**

(Shiva Kant Jha).

Shri Pranab Kumar Mukherjee  
Hon’ble Finance Minister of India  
New Delhi

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<sup>6</sup> “Let a man lift himself by himself ; let him not degrade himself; for the Self alone is the friend of the self, and the Self alone is the enemy of the self.” The *Bhagavadgita* VI. 5 ( Dr. S. Radhakrishnan’s Translations) *The Bhagvad Gita* VI. 5