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Rules on application of GAAR Provisions Notified by Government of India

The General Anti-Avoidance Rule ('GAAR') provisions are incorporated in the Income-tax Act, 1961 ('the Act') to be effective from April 1, 2016 (Financial Year 2015-16). In this regard, a Committee constituted by the Central Board of Direct Taxes ('CBDT') published the draft guidelines on June 28, 2012. Subsequently, the Prime Minister constituted an Expert Committee on GAAR which submitted its final report on September 30, 2012 and the Finance Minister subsequently issued a statement in January 2013 setting out the decisions taken by the Government in relation to the GAAR provisions.

Some of the decisions stated by the Finance Minister were formally incorporated in the Act by the Finance Act, 2013 and some other decisions including procedural aspects are now notified under the Rules. The GAAR Rules would be applicable

from April 1, 2016. This News Alert summarises the key points from the notified GAAR Rules.

Key Points

Monetary Threshold Exemption

The GAAR provisions would apply only where the tax benefit (to all the parties in aggregate) from an arrangement in a relevant year exceeds INR 30 million.

Exemption to Foreign Institutional Investors and P-Note holders

- SEBI-registered Foreign Institutional Investors ('FIIs') are excluded from applicability of GAAR provisions if they do not avail of benefits under a Tax Treaty entered into by India. Hence, if an FII proposes to avail the benefits of a Tax Treaty, the GAAR provisions may apply in case of an impermissible avoidance arrangement.
- Investments in FIIs made by Non-Resident Investors by way of offshore derivative instruments (such as Participatory Notes), directly or indirectly, are excluded from the ambit of the GAAR provisions.

Grandfathering Provisions

- The GAAR provisions shall not apply to any income earned by any person from transfer of investments made by such person before August 30, 2010.
- The GAAR provisions shall, however, apply to any arrangement, irrespective of the date on which it has been entered into, in respect of the tax benefit obtained from the arrangement on or after April 1, 2015.

Upon reading the grandfathering provisions, there seems to be some ambiguity in terms of whether investments made prior to August 30, 2010 are grandfathered completely or whether they would be caught in the GAAR net if the tax benefit is obtained on or after April 1, 2015.

It appears that the income arising after April 1, 2015 from transfer of investments made prior to August 30, 2010 would be grandfathered and GAAR provisions may not apply to such an arrangement. On the other hand, the GAAR provisions may apply in case of other arrangements such as involving payment of interest, royalty, etc., after April 1, 2015, even if those arrangements were made prior to August 30, 2010. This also seems to be consistent with the Finance Minister's statement issued in January 2013. A related issue also arises as to what falls within the ambit of the term "investments", including whether it should be restricted only to

investments which are capital assets. Greater clarity on these aspects would be welcome.

Scope of GAAR provisions – Applicable only to the alleged “part” of the Impermissible Avoidance Arrangement

The GAAR Rules provide that where only a part of an arrangement is declared to be an impermissible avoidance arrangement, the consequences in relation to tax shall be determined with reference to such part only (and not the entire arrangement).

Procedural Aspects

- The Act currently provides that the Commissioner shall issue a notice to the assessee setting out the reasons and basis for invocation of the GAAR provisions and shall provide an opportunity of being heard to the assessee. The GAAR Rules further provide that in addition to the above, the Assessing Officer shall also issue a notice (recording the reasons and other specified aspects) to the assessee seeking objections, before making reference to the Commissioner.
- The GAAR Rules have prescribed the necessary forms and other procedural aspects for invocation and application of the GAAR provisions by the Tax Authorities, which are summarised below.

Sr No	Form	Purpose
1	Form 3CEG	Form for making reference to the Commissioner by the Assessing Officer
2	Form 3CEH	Form for returning the reference by the Commissioner and issuing directions to the Assessing Officer
3	Form 3CEI	Form for recording the satisfaction by the Commissioner before making reference to Approving Panel

- The following time limits have been specified under the GAAR Rules for procedural aspects:

Sr No	Action / Purpose	Time Limit
1	Issue of direction to the Assessing Officer by the Commissioner, where GAAR provisions are not to be invoked - Where <i>suo moto</i> direction is given merely after considering the reference from the Assessing Officer - Where direction is given after considering the reply received from the assessee	- Within one month from the end of the month in which the reference is received by Commissioner - Within two months from the end of the month in which the final submission is received from the assessee
2	Issue of direction to the Assessing Officer by the Commissioner, where no objections are raised by the assessee against invocation of the GAAR	Within one month from the end of the month in which the date of compliance of notice is issued by the Commissioner to the assessee
3	Reference to the GAAR Approving Panel by the Commissioner	Within two months from the end of the month in which the assessee's final submission is received in response to the notice issued by the Commissioner

Some clarifications – Still awaited

Considering the recommendations of the Expert Committee and the statement of the Finance Minister, some key aspects that are not addressed as yet are stated below:

- The Finance Minister statement expressed that where GAAR and SAAR are both in force, **only one of them will apply** to a given case, and guidelines will be made regarding the applicability of one or the other. However, no specific guidance has been provided in this context.
- No specific provision has been made to the effect that where an arrangement is treated as an impermissible avoidance arrangement, it would be ensured that the **same income is not taxed twice** in the hands of the same taxpayer in the same year or in different assessment years.
- Clarity is awaited on the aspect of the tax auditor being **required to report any tax avoidance arrangement**.
- Clarification is awaited regarding the applicability of the GAAR provisions by way of certain illustrative cases, as were outlined in the draft CBDT guidelines and the Expert Committee Report.

Conclusion

These Rules are one more step towards providing certainty on some aspects relating to the application of the GAAR provisions, which had created a lot of ambiguity. Going forward, it would be helpful if the government clarifies the unresolved aspects identified above.

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