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Dispute Resolution, Legal Remedies available against GAAR proceedings

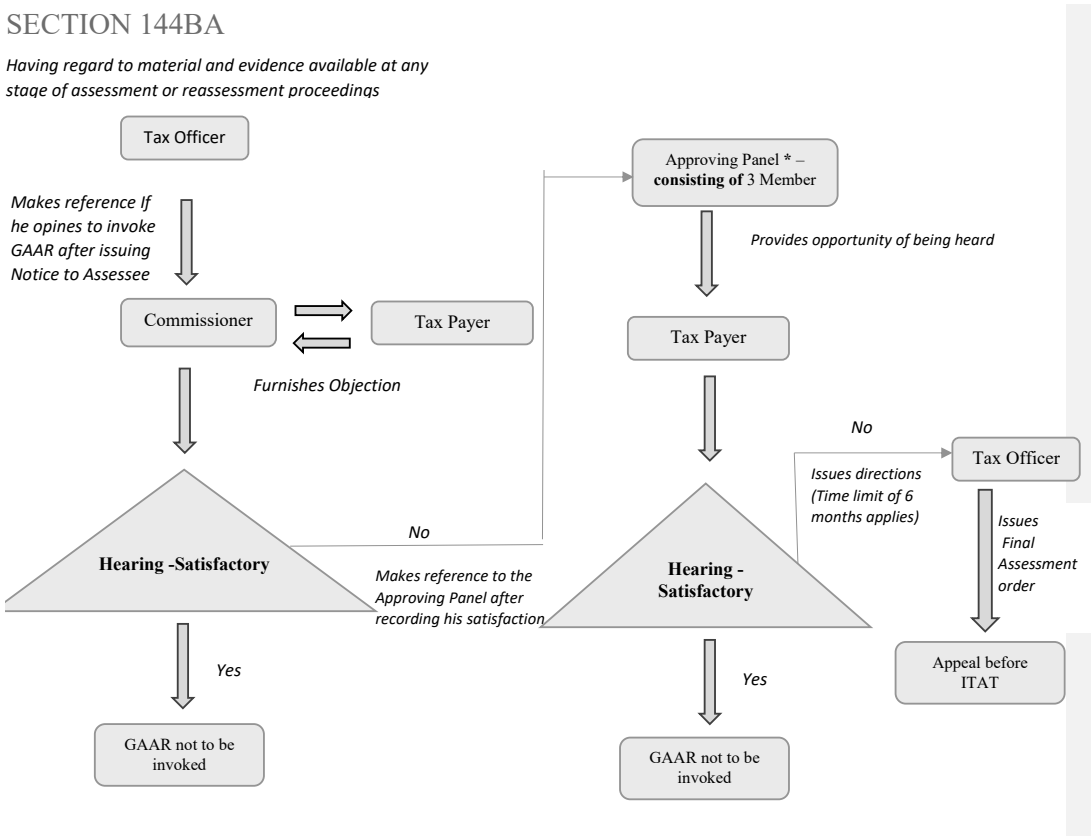
1. Introduction

General Anti Avoidance Rule ("GAAR") provisions contained in Chapter X-A of the Income tax Act, 1961 ("the Act") have come into force from April 1, 2017 i.e. AY 2018-19 onwards. Rules 10U to 10UC have been introduced in the Income-tax Rules, 1962 ("the Rules") in connection with the GAAR proceedings. Extensive deliberations have been made at various platforms / forums in connection with the applicability of the said provisions and the implications thereafter. It is an accepted fact that the said provisions give extremely wide powers and discretion to the Revenue and thus the possibility of arbitrary action being taken by the Assessing Officer cannot be ruled out, in fact the same are already being anticipated. Naturally, an assessee is likely to be aggrieved by such actions and would need to seek suitable redressals. Keeping in view the vast discretionary powers provided to the Revenue, the Legislature has provided a distinctive mechanism under the Act for the aggrieved assessee to seek redressal. However, as the remedies and safeguards provided under the Act may not be adequate at all the stages of the GAAR proceedings, the other possible legal remedies have also been discussed in this article.

2. Relevant provisions of the Act and Rules

The legal remedies available to an assessee at different stages of the GAAR proceedings are being evaluated in this article keeping in mind the provisions of section 144BA of the Act as well as the relevant Rules (i.e. Rule 10U, 10UB and 10UC).

3. The GAAR proceedings emanating from the aforesaid provisions can be summarised through the following chart



** Constitution of Approving Panel 3 Members Retired/ current HC judge, IRS not below PCIT/ CCIT and academic/ scholar. To be constituted for a period of 1-3 years. To have the powers of AAR as specified under Section 245U of the Act.*

4. Legal remedies at different stages of GAAR

The various stages at which the assessee may be required to seek a legal remedy vis-à-vis the GAAR proceedings are enumerated hereunder:

4.1 Legal Remedies – At the stage when the Assessing Officer is making a reference to the Principal Commissioner/ Commissioner:

As per the provisions of Section 144BA(1), having regard to material and evidence available, the Assessing Officer may make a reference to the Principal Commissioner / Commissioner where he considers it necessary to declare an arrangement as an Impermissible Avoidance Agreement ("IAA") and to determine consequences thereof. Prior to making such a reference, the Assessing Officer as per Rule 10UB, has to issue the assessee a notice providing the assessee the basis and reason (along with details of the arrangement, list of documents relied on and the alleged tax benefit arising) as to why he considers it necessary to declare an arrangement as an IAA and seeking objections from the assessee against the reasoning mentioned therein. The assessee, being aggrieved of the action taken by the

Assessing Officer MAY be able to approach the Hon'ble Court in appropriate cases by way of a Writ Petition in the following scenarios / situation:

a. Section 144BA(1) provides that the Assessing Officer having regard to the "material and evidence available" may make a reference to the Principal Commissioner or Commissioner to declare an arrangement to be an IAA. The validity / legality of the reference would have to be judged on the basis of material and evidence in the possession of the Assessing Officer. Therefore, it implies that the Assessing Officer on the basis of mere conjectures and surmises would not be able to invoke GAAR proceedings and make a reference to the Principal. Commissioner. If he does so, in the absence of an alternative legal remedy to directly challenge the validity of the reference, it MAY be possible for the assessee to challenge the same before the Hon'ble Writ Court on the ground that the same is patently illegal or without jurisdiction

b. Rule 10UA (1) (a) to (d) provides certain factual situations in which Chapter X-A itself would not be applicable eg. in case of an FII or where the tax benefit arising to the parties to the arrangement does not exceed Rs. 3 crore etc. However, if the Assessing Officer clutches jurisdiction under Chapter X-A in any of the aforesaid situations in the absence of any alternate legal remedy at that stage, it MAY be possible for the assessee to challenge the action of the Assessing Officer in appropriate cases before the Hon'ble Writ Court on the ground that the same is patently illegal and without jurisdiction. Reference may be made to following case laws wherein the action / notice issued by the Revenue was quashed as the same was patently illegal / without jurisdiction:

- *Vodafone India Service Pvt. Ltd. vs. UOI (359 ITR 133) (Bom HC)*
- *Calcutta Discount Co. Ltd. vs. ITO (41 ITR 191) (SC)*
- *CIT vs. Foramer France (264 ITR 566) (SC)*
- *Ajanta Pharma Ltd. vs. ACIT (267 ITR 200) (Bom HC)*
- *Shubham Fabrics vs. Inspecting ACIT (174 ITR 502) (All HC)*
- *Mercury Travels Ltd. vs. DCIT (258 ITR 533) (Cal HC)*
- *Ajit Jain vs. UOI (242 ITR 302) (Del HC)*
- *Gujarat Gas Co. Ltd. vs. CIT (245 ITR 84) (Guj HC)*

c. Rule 10UB further provides that the Assessing Officer before making a reference to the Principal Commissioner / Commissioner has to issue a notice in writing seeking objections, if any to the application of Chapter XA. The Rule further provides that the said notice must contain details of the arrangement, tax benefit arising from such arrangement, the basis & reasons for considering the arrangement as an IAA and the list of documents relied upon by the Assessing Officer should also be furnished to the assessee. However, if no notice is issued and the Assessing Officer has made a reference to the Principal Commissioner /Commissioner without providing the assessee with the opportunity to file objections, it MAY be possible for the assessee to challenge the said reference before the Hon'ble Writ Court on the ground that the said reference being made in violation of the principles of Natural Justice is bad in law and liable to be quashed [see The State of Uttar Pradesh v Mohammad Nooh - 1958 045 AIR 0086 (SC), JK Synthesis v ITO (1976) 105 ITR 864 (All) and Pancharatna Cement P Ltd v UOI – (2009) 317 ITR 259 (Gau)]. Alternatively, if the notice issued does not comply with the aforesaid requirements it MAY be possible for the assessee to challenge the same before the Hon'ble Writ Court on the ground that the said notice is patently illegal due to non-satisfaction of the preconditional

requirements. [Reference may be made to the case laws in Para 4.1(b) above]

4.2 Legal Remedies – At the stage when the Principal Commissioner/Commissioner is making a reference to the Approving Panel ("AP"):

As per the provisions of Section 144BA(2), on receipt of reference from the Assessing Officer, if the Principal Commissioner / Commissioner is of the opinion that GAAR provisions are to be invoked, he shall issue a notice to the assessee setting out reasons for why he is of the opinion that Chapter X-A would be applicable and provide the assessee with an opportunity of being heard and to file objections, if any. If the Principal Commissioner / Commissioner is not satisfied after hearing the assessee's contentions / with the objections filed by the assessee, he shall, after recording satisfaction make further reference to the Approving Panel ("AP") for the purpose of determining whether the arrangement is an IAA. At this stage, in appropriate cases, it may be possible for the assessee to approach the Hon'ble Writ Court requesting it to exercise its extra ordinary jurisdiction in the following situations:

a. Section 144BA(2) provides that pursuant to the reference received from the Assessing Officer, if the Principal. Commissioner / Commissioner is of the opinion that provisions of Chapter X-A are required to be invoked, he shall issue notice to the assessee specifying the reasons and the basis of such opinion for allowing the assessee to file objections, if any and afford an opportunity of being heard. It is imperative that opportunity of being heard must be given and the opinion must be formed objectively with application of mind. However, if without issuing notice / providing opportunity of being heard to the assessee, if the Principal Commissioner / Commissioner makes a reference to the AP, it may be possible to challenge the said reference in a Writ Court on the ground that it is patently illegal / without jurisdiction and made in violation of the principle of Natural Justice. [see *The State of Uttar Pradesh vs. Mohammad Nooh - 1958 045 AIR 0086 (SC), JK Synthesis vs. ITO (1976) 105 ITR 864 (All)* and *Pancharatna Cement P. Ltd.vs. UOI – (2009) 317 ITR 259 (Gau)]*

b. If the Principal Commissioner / Commissioner is not satisfied with the objections filed by the assessee under Section 144BA(2), then he shall make a further reference to the AP under Section 144BA(4) after recording his satisfaction in accordance with the provisions of Rule 10UB(5). It is well settled law that where a satisfaction is to be recorded, it must be a cogent and objective satisfaction justifying the course of action adopted (in this case further reference to the AP). In fact, considering the wide implications / ramifications of an arrangement being declared as an IAA, recording of mere mechanical satisfaction may not tantamount to sufficient compliance of the pre-conditions of Section 144BA(4) and Rule 10UB(5) and it may be possible in appropriate cases to challenge the Reference made by the Principal Commissioner/ Commissioner to the AP. Reference may be made to the following judgments wherein writ was issued as the satisfaction of the Commissioner / Assessing Officer was mechanical and without application of mind:

- *Arjun Singh vs. Asst. DIT (2000) 246 ITR 363 (MP)*
- *Ingram Micro (India) Exports (P.) Ltd. DCIT (2017) 78 taxmann.com 140 (Bom)*
- *Amity Hotels (P.) Ltd. vs. CIT (2005) 272 ITR 75 (Del HC)*

c. Rule 10UC(1)(ii) provides that no reference can be made by the Principal Commissioner / Commissioner to the AP after expiry of two months from the end of the month in which the final submission by the assessee is received. Thus, if the Principal. Commissioner breaches the aforesaid time limit it would vitiate the entire order which

may be challenged before the Hon'ble Writ Court with a prayer to quash the same. Reference may be made to the following decisions wherein the notice issued by the Assessing Officer was quashed as it was time barred

- *CIT vs. Foramer France (2003) 264 ITR 566 (SC)*
- *Madhavlal Sindhoo vs. VR Idurkar & Anr – (1956) 30 ITR 332 (Bom)*
- *German Remedies Ltd vs. DCIT – (2006) 287 ITR 494 (Bom)*

4.3 Legal Remedies – Proceedings before the AP

Pursuant to receiving a reference from the Principal Commissioner, the AP can issue such directions as it deems fit including specifying the previous year or years for which the directions would be applicable. Section 144BA(7) provides that no directions shall be issued unless an opportunity of being heard is given to the assessee / Assessing Officer if the directions are prejudicial to their interest. Section 144BA(13) further provides that the aforesaid directions would have to be issued within a period of six months from the end of the month in which the reference was received. Section 144BA(14) provides that notwithstanding anything contained in any other provisions of the Act, no appeal shall lie against the directions of the AP. However, in the absence of a direct alternate and efficacious remedy, it MAY be possible for the assessee in appropriate cases to approach the Hon'ble Writ Court in the following scenarios / situations:

a. As provided in Section 144BA(7), the AP cannot pass any direction without providing opportunity of being heard to the requisite party whose interest would be prejudiced by issuance of such directions. Therefore, if it does so then, the aggrieved party be it Revenue or the assessee may be able to approach the Hon'ble Writ Court on the ground that the principles of natural justice have been violated and pray for quashing of such an order. [see *The State of Uttar Pradesh vs. Mohammad Nooh - 1958 045 AIR 0086 (SC), JK Synthesis vs. ITO (1976) 105 ITR 864 (All)* and *Pancharatna Cement P. Ltd. vs. UOI – (2009) 317 ITR 259 (Gau)]*

b. The mechanism provided under the Act stipulates that once the Assessing Officer incorporates the directions of the AP as well as determines the tax consequence, the Assessing Officer would be able to pass an assessment or reassessment order only after the approval of Principal Commissioner. Though the said order is an appealable order u/s 253(1)(e) of the Act directly before the Hon'ble Tribunal, there is no direct efficacious remedy available against the directions of the AP if the same are patently illegal and / or without jurisdiction eg: the AP over and above declaring an arrangement to be IAA has also calculated the consequences under chapter X-A reference to section 144BA(1). In such a situation, since the AP would have exceeded its jurisdiction, the order would be patently illegal and it may be possible for the assessee in appropriate cases (which may be rare) to approach the Hon'ble Court with a prayer to quash the directions so issued on the ground that they are patently illegal or beyond jurisdiction [Reference may be made to case laws cited in Para 4.1b].

c. Further, if the AP gives direction u/s 144BA(6) after the expiry of the period of six months from the end of the month in which reference was received, it may be possible for the assessee to challenge such direction before the Hon'ble Writ Court with a prayer to quash the said directions being time barred in nature. [See *CIT vs. Foramer France (2003) 264 ITR 566 (SC), Madhavlal Sindhoo vs. VR Idurkar & Anr – (1956) 30 ITR 332 (Bom)* and *German Remedies Ltd vs. DCIT – (2006) 287 ITR 494 (Bom)]*

4.4 Legal Remedies – Against order passed pursuant to the directions of the AP

4.4.1 High Court

As per section 253(1)(e), order of assessment or reassessment passed pursuant to sanction u/s 144BA(12) is directly appealable to the Hon'ble Tribunal. **However**, Section 144BA(12) provides that "**no order** of assessment or reassessment shall be passed by the Assessing Officer **without the prior approval of the Principal Commissioner or Commissioner**, if any tax consequences have been determined in the order under the provisions of Chapter X-A". **Thus**, it would be reasonable to conclude that the Principal Commissioner has to apply his mind to the entire order, which would include not only GAAR consequences but also other additions as well (Transfer Pricing as well as corporate tax), and then provide an approval. It is a settled law that the approval of a quasi-judicial authority cannot be mechanical in nature and the same must postulate application of mind. Thus, in appropriate cases (which may be rare) it may be possible for the assessee to challenge the approval of the Principal Commissioner itself and consequently the order passed in pursuance thereof, if the assessee is able to show that the approval was granted in a casual manner without application of mind. [See Arjun Singh vs. Asst. DIT (2000) 246 ITR 363 (MP), wherein notices issued by the Assessing Officer were quashed in the absence of the requisite approval]

4.4.2 Tribunal

As per section 253(1)(e), order of assessment or reassessment passed pursuant to sanction u/s 144BA(12) is directly appealable to the Hon'ble Tribunal. In such a situation, there would be no adjudication at all particularly on the non-GAAR issues by any of the lower authorities (e.g. CIT(A) / DRP). Therefore, in effect the approval by the Principal Commissioner under Section 144BA would substitute the adjudication by the CIT(A) / DRP. It would be interesting to observe -

i) how the approval by the Principal Commissioner under Section 144BA(12) would operate and whether the Principal Commissioner would issue directions to the Assessing Officer to reverse its proposed findings on non-GAAR issues in case there is a disagreement between the two;

ii) how the Tribunal will adjudicate particularly on non-GAAR issues on which there has been no adjudication by CIT(A) / DRP;

iii) whether the Tribunal would be comfortable to sit in judgment on directions passed by a Retired / Sitting High Court Judge who is part of the AP;

iv) whether (in light of the discussions given hereunder) the Assessing Officer would be able to apply the GAAR provisions in respect of an eligible assessee under Section 144C and if so whether the order would be appealable before the Hon'ble Tribunal.

GAAR vs. DRP?

Section 144C(14A) states that the provisions of Section 144C (applicable to DRP proceedings) shall not apply to any assessment or reassessment order passed by the Assessing Officer with the prior approval of the Principal Commissioner or Commissioner under Section 144BA(12) (applicable to GAAR proceedings). However, as per Section 144C of the Act, it is mandatory for the Assessing Officer to issue a draft assessment order where the assessee is an eligible assessee u/s 144C(15)(b) (i.e. a foreign company or an assessee in whose case a variation in the returned income arises in consequence of the order passed by the Transfer Pricing Officer). Therefore, the issue which arises is whether both proceedings i.e. DRP and GAAR can co-exist in the case of an eligible assessee.

GAAR + DRP ⟶ Tribunal?

Alternatively, if one was to read the provisions of Section 144C harmoniously, by ignoring the provisions of Sub-section (14A), taking into consideration the provisions of Section 144C (1) which provides "The Assessing Officer shall, notwithstanding anything contrary contained in the Act…", a possible view may be that both proceedings could co-exist and culminate into one final assessment order incorporating directions of both the AP and DRP, which may be directly

appealable before the Tribunal. However, though sub-sections (d) and (e) of Section 253 respectfully provide that (i) an order passed in pursuance of the directions of the DRP and (ii) an order passed in pursuance of the directions of the AP are appealable before the Hon'ble Tribunal, Section 253 does not explicitly provide for filing of appeals against a final assessment order (passed in pursuance of both the directions viz. directions of i) the DRP as well as the ii) the AP.

4.5 Legal remedies – before GAAR proceedings are invoked – Seeking an Advance Ruling

Section 245N of the Act, defining the term "advance ruling" has been amended with effect from 1 4 2015 vide insertion of sub-clause (iv) to clause (a), to include a determination or decision by the Authority on whether an arrangement which is proposed to be undertaken by a resident or non-resident is an IAA as referred to in Chapter X-A of the Act. Therefore, assessees are now also provided with the option of obtaining an advance ruling vis-à-vis applicability of Chapter X-A to its transaction.

Prior to the introduction of sub-clause (iv) to clause (a) to Section 245N, applications containing questions relating to a transaction or issue designed prima facie for the avoidance of tax were not maintainable before the AAR by virtue of the bar laid down in the Proviso to Section 245R(2) of the Act. However, by way of an amendment in clause (iii) of said Proviso, the bar will not apply to applicants falling under Section 245N(b)(iiia) i.e. applicants who have filed applications under Section 245N(a)(iv). However, since Section 245N(b) has been amended by Finance Act, 2017 replacing sub-clause (iiia) with item (V) of sub-clause(A), the Legislature would be required to insert a corresponding amendment in the Proviso to Section 245R(2). [To appreciate this para, simultaneously please refer to the aforesaid provision in the Act].

Obtaining an AAR on the implications of GAAR on a transaction would lend certainty to the applicant as the same would be binding on the Department. This has been clarified by the CBDT in Circular No. 7 of 2017 dated January 27, 2017 which provides that if an AAR holds that an arrangement is permissible, the ruling would be binding on the Principal Commissioner / Commissioner and sub-ordinate income-tax authorities. However, practically, the feasibility of approaching the AAR is still to be evaluated considering the delay experienced in obtaining rulings from the AAR notwithstanding the time limit of 6 months provided in Section 245R(6) for pronouncement of ruling.

5. Conclusion

Writ remedy, being a discretionary power, would be exercised only in exceptional cases and further, the Courts may opine that the Approving Panel itself constitutes an efficacious remedy for the various grievances of the assessee and thereby decline to entertain the Petition. Nevertheless, the assessee in deserving cases would have no option but to approach the Hon'ble Court by way of Writ Petition.

Keeping in mind, the far reaching consequences of the GAAR provisions, it would be imperative for the Principal Commissioner / Commissioner (i) to record his satisfaction (before making further reference to AP) & (ii) to grant approval (to Assessing Officer for passing of the order) with proper application of mind and not merely in a mechanical manner.

Further, as evident from Para 4.4 and 4.5 above there are still some facets of the redressal mechanism which require further clarifications / amendments. Though, the CDBT in its Circular No. 7 / 2017 dated January 27, 2017 has clarified that GAAR provisions will be invoked in a uniform, fair and rational manner and that adequate procedural safeguards have been put in place, but the implementation of the aforesaid clarification would have to be tested in times to come. However, one only hopes and prays that we would not have to sing the famous song from the old Hindi film *Hum Kisi se Kam Nahin – "Kya Hua Tera Vaada"*.