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GAAR- ISSUES

Initial burden of proof is on Assessing Officer

Sec. 96 (1) & (2)

- Whether presumption under sub section.(2) has a bearing on sub section.(1)
- If one of the tainted elements is established by assessing officer would it be inferred tax benefit as main purpose?
    - If so, high threshold laid out by rule 10UB(2) is meaningless.

Sec.96(2) :

Presumption under subsection (2) shifts the burden of proof to the assessee and makes Rule 10UA ineffective.

GAAR- ISSUES

Investment Vs Arrangement

Rule 10U(1)(d) Vs 10U(2)

- One school of thought "these are conflicting, thereby real grandfathering benefit may not be available"
- Example:

  In a case where an investment made in February 2013 is sold in October 2017 resulting into tax benefit of INR 7 crore which is exempt under a particular tax treaty.

  - In such a scenario, can it be argued by the tax-payer that the tax benefit after the cut-off date should be grandfathered since it squarely falls under the purview of clause 1(d)?
  - On the other hand, would the revenue authorities also be justified in denying this claim based on the blanket restriction under clause 2?

GAAR- ISSUES

PPT Vs GAAR

GAAR- with lot of consultative process Government has laid down lot of checks and balances such as Approving panel, "main purpose" and grandfathering etc.

PPT- it relies on one of the "principle purposes"

- too much of discretion to the assessing officer
- PPT with wider coverage has a silver lining – Carve out- treaty benefits in accordance with object & purpose of treaty allowed.
  - In such a case can GAAR apply?

- Can taxpayer opt himself to be governed by GAAR instead of PPT?

GAAR- ISSUES

Whether legitimate tax planning survives under GAAR regime?

- Whether judicial doctrines laid down by Apex court are intact?
- Should there be a line of demarcation between tax avoidance supported by legitimate tax planning and other one by abuse of provisions?

Jurisprudence– Foreign Courts

- In the case of **Canada Trustco Mortgage Co. Vs The Queen ("Canada Trustco"), 2005 SCC 54** the Canada Supreme Court established certain principles as follows
  - A finding of abuse is possible in the following situations:
    - ✓ the taxpayer uses specific provisions of tax laws in order to achieve an outcome that those specific provisions seek to prevent;
    - ✓ a transaction defeats the underlying rationale of the provisions that are relied upon; or
    - ✓ an arrangement circumvents the application of certain provisions, such as anti-avoidance rules in a manner that frustrates or defeats the 'object, spirit or purpose' of those provisions.
  - Abuse is not established if it is reasonable to conclude that an avoidance transaction was within the 'object, spirit or purpose' of the provisions that confer the tax benefit.
  - Economic substance must be considered in light of the specific provisions being examined. -***(in favour of taxpayer)***

Jurisprudence– Foreign Courts

- In the case of **Capthorne Holdings Ltd. v. Canada, 2011 SCC 63,** the Canada Supreme Court observed that the GAAR requires three questions to be decided as follows

1. was there a tax benefit;
2. was the transaction giving rise to tax benefit, an avoidance transaction; and
3. was the avoidance transaction giving rise to the tax benefit abusive.

- Abusive tax avoidance arises where the above criteria is met, which is same as in the case of Canada Trustco's case.

- These considerations are not independent of one another and may overlap -***(in favour of Revenue)***.

Jurisprudence– Foreign Courts

- In the case of **Oxford Properties Group Inc. Vs. The Queen, (2016) TCC 204,** wherein Tax court of Canada held that GAAR did not apply to a series of transactions pursuant to which real properties were packaged into limited partnerships, "bumped" and sold to tax-exempt entities.- ***(in favour of taxpayer)***
- In the case of ***British Columbia Ltd vs The Queen, 2016 TCC 288 (Reverse loss trading)*** wherein the the TCC concluded that the GAAR did not apply, on the basis that there was no benefit, and consequently the taxpayer Holdco's reassessment under section 160 of the Act could not be upheld. -***(in favour of taxpayer)***

Judicial doctrines - INDIA

- **Vodafone International Holdings BV (2012) 341 ITR 1 (SC)**

  Justice Kapadia observed

  - all the tax planning cannot be treated as illegal, impermissible or illegitimate.
  - the observations of Justice Chinnapareddy in Mc Dowell's case on the need to depart from westminister principle were only in the context of an artificial or colorable device
  - Justice Chinnapareddy had agreed that tax planning within the framework of the law was permissible
  - there is no conflict between Mc Dowell's case and Azadi bachao's case

Dr.Shome committee report
- Suggestions yet to be considered

1. where treaty itself has anti avoidance provisions GAAR should not be invoked
2. tax mitigation should be distinguished from tax avoidance. Illustrative examples and negative list for the purposes of invoking GAAR should be specified.
3. GAAR should not be invoked in intragroup transactions which may result in tax benefit to one person but overall tax revenue is not affected either by actual loss or deferral of revenue.
4. where SAAR is applicable to a particular aspect /element, then GAAR should not be invoked to look into the same.

THANK YOU