

## ***Preface***

1. ***Author*** has felt when he ***qualified*** as Chartered Accountant (CA) in Year 1985 that ***legal provisions' interpretations*** are ***big challenge*** for legal professionals, govts' officials and public at large ***in India and outside India***.
  2. ***Author*** has ***realized*** that ***something*** should ***be developed to resolve this challenge*** in India and outside India.
  3. ***Author*** has ***started compiling*** Frequently Asked Questions (FAQs) on many subjects where his 100% ***answers are precisely based on Yes or No i.e. white or black nothing is grey***
  4. ***Author*** has ***compiled approximately 150 +(plus) research papers / books with 25 thousand + (plus) pages*** on many prevailing subjects / acts in India and outside India.
  5. ***Author's 1<sup>st</sup> paper book*** is now ***being published*** under head FAQs on Enforcement Directorate (ED) ***where 571 FAQs are replied*** based on Yes or No i.e. white or black nothing is grey
  6. This ***book*** is also ***containing***
    - (i) Foreign Exchange Management Act (***FEMA***) 1999 and rules / regulations
    - (ii) Prevention of Money Laundering Act (***PMLA***) 2002 and rules / regulations
    - (iii) Fugitive Economic Offenders Act (***FEOA***) 2018 and rules / regulations
  7. This ***book*** is ***published with Sai Kripa and dedicated*** to my father (late) ***Mr. M.R. Agarwal***, Mother ***Mrs. R.D. Agarwal***, wife ***Mrs. Snigdha Agarwal***, daughter ***Ms. Soumya Agarwal***, daughter ***Ms. Sanya Agarwal*** and dedicated team headed by ***Rajat Kumar***
- ***I trust that you will be enriched by reading this book***

*With best wishes,*  
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***He is regularly advising on several matters to Institute of Chartered Accountant of India (ICAI) and also to Ministry of Commerce (MoC) for Foreign Trade Agreements (FTAs) and World Trade Organization (WTO) for securing India's best interests.***

***He is continuously advising on Foreign Investments (FIs) in India and also on Overseas Direct Investments (ODIs) outside India.***

***He is known for his expertise in incorporating companies in most of countries across the world.***

***He has written around 150 +(plus) Research papers / books containing 25 thousand +(plus) pages available "freely" on certain portals like:***

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***Few out of abovementioned Research papers / books are as under:***

- 1. Book on Enforcement Directorate (ED) in India- (Book with 617 pages)***
- 2. Director of Revenue Intelligence (DRI) in India***
- 3. Central Bureau of Investigation (CBI) in India***
- 4. National Investigation Agency (NIA) in India***
- 5. Serious Fraud Investigation Office (SFIO) in India***
- 6. Financial Intelligence Unit (FIU-IND) in India***
- 7. Central Vigilance Commission (CVC) in India***
- 8. Narcotics Control Bureau (NCB) in India***
- 9. Research & Analysis Wing (R&AW) in India***
- 10. Economic Offence Wing (EOW) in India***
- 11. Intelligence Bureau (IB) in India***
- 12. Director General of Income Tax Criminal Investigation (DGITCI) in India***
- 13. National Company Law Tribunal (NCLT) in India***
- 14. Security Exchange Board of India (SEBI) in India***
- 15. Prevention of Corruption (PC) Act, 1988 in India***

16. *Foreign Assets Investigation Unit (FAIU) in India*
17. *Book on International Financial Services Center (IFSC) in India (Book with 290 pages)*
18. *Replacement of Indian Penal Code (IPC) Criminal Procedure (CP) & Evidence Act (EA) in India*
19. *Undisclosed Foreign Income & Asset (UFIA)-Black Money Act, 2015*
20. *Statutory provisions for General Anti Avoidance Rule (GAAR) in India*
21. *Reserve Bank of India (RBI) Act, 1934*
22. *Foreign Exchange Management Act (FEMA) 1999 in India*
23. *Benami Transactions (Prohibition) Amendment Act, 2016 in India*
24. *Advance Pricing Agreements (APAs) in India*
25. *Annual Performance Report (APR) for Investments outside India*
26. *Foreign Trade Agreements (FTAs) executed by India*
27. *Statutory Obligations for Companies Operating in India*
28. *Significant Beneficial Owners (SBO) in India*
29. *Significant Economic Presence (SEP) in India*
30. *Place of Effective Management (POEM) in India*
31. *Liberalized Remittance Scheme (LRS) for residents of India*
32. *Foreign Liability and Asset (FLA) return in India*
33. *FATCA agreement with USA*
34. *Double Taxation Avoidance Agreement (DTAA) with USA*
35. *Foreign Tax Credit (FTC) in India*
36. *Corporate Frauds (CFs) in India*
37. *Export of Goods and Services under FEMA, 1999 in India*
38. *Imports of Goods and Services under FEMA, 1999 in India*
39. *External Commercial Borrowings (ECBs) in India*
40. *Overseas Direct Investments (ODIs) under FEMA, 1999 in India*
41. *Acquisition of Immovable Properties by Non-residents under FEMA, 1999 in India*
42. *Compounding of Contraventions under FEMA, 1999 in India*
43. *Foreign Branch Office (BO) + Liaison Office (LO) + Project Office (PO) under FEMA, 1999 in India*
44. *Annual Information Statement (AIS) in India*
45. *Investments by Non-Residents (NRIs) in India*
46. *Guidance for Doing Business in United States of America (USA)*
47. *Corporate Tax (CT) Law in UAE*
48. *Acquisition & Transfer for Immovable Properties by Non-Residents (NRs) in India*
49. *Foreign Company's Registration in India*
50. *Auditor Checks and Reporting for Indian Companies in India*
51. *Companies Auditor Report Order (CARO) 2020 in India*
52. *Tax Audit Report (TAR) + Accounting Standard (ASs) in India*
53. *World Trade Organisation (WTO) & Benefits for India*
54. *Deposits by Corporate in India*
55. *Expatriates + Foreign Citizens in India*
56. *Book on Foreign Investments (FIs) by Non-Residents of India (Non-RoI) (Book with 346 pages)*



## 41 FAQ's on Statutory Provisions for General Anti Avoidance Rule (GAAR) in India

INDEX		
S.No	Topic	Page No.
	<b>Statutory Provisions for GAAR in India</b> (Section 95 to 102 of Income Tax Act (ITA) 1961)	<b>4</b>
1.	Meaning for <b>GAAR's provisions</b> (Section 95)	4
2.	Meaning for <b>Impermissible Avoidance Arrangement (IAA)</b> (Section 96)	4 + 5
3.	Meaning for <b>Commercial Substance Over Form (CSOF)</b> (Section 97)	5 + 6
4.	Meaning for <b>consequences after invocation</b> of GAAR's provisions (Section 98)	6
5.	Meaning for <b>connected persons</b> under GAAR's provisions (Section 99)	6 + 7
6.	Meaning for <b>application of chapter X-A</b> of ITA under GAAR's provisions (Sec 100)	7
7.	Meaning for <b>guideline's framing</b> under GAAR's provisions (Section 101)	7
8.	Meaning for <b>arrangement</b> under GAAR's provisions (Section 102(1))	7
9.	Meaning for <b>asset</b> under GAAR's provisions (Section 102(2))	8
10.	Meaning for <b>Benefit</b> under GAAR's provisions (Section 102(3))	8
11.	Meaning for <b>connected person</b> under GAAR's provisions (Section 102(4))	8 + 9
12.	Meaning for <b>Fund</b> under GAAR's provisions (Section 102(5))	9
13.	Meaning for <b>party</b> under GAAR's provisions (Section 102(6))	9
14.	Meaning for <b>relative</b> under GAAR's provisions (Section 102(7))	9
15.	Meaning for <b>substantial interest</b> under GAAR's provisions (Section 102(8))	9
16.	Meaning for <b>step</b> under GAAR's provisions (Section 102(9))	10
17.	Meaning for <b>tax benefit</b> under GAAR's provisions (Section 102(10))	10
18.	Meaning for <b>tax treaty</b> under GAAR's provisions (Section 102(11))	10
19.	Meaning for <b>Applicability</b> for GAAR's provisions	10 to 12
20.	Meaning for <b>Non Applicability</b> for GAAR's provisions	12 + 13
21.	Meaning for <b>Tax Evasions (TE)</b> under GAAR's provisions	13 + 14

22.	Meaning for <b>Tax Avoidances (TA)</b> under GAAR's provisions	14 + 15
23.	Meaning for <b>Tax Mitigations (TM)</b> under GAAR's provisions	15
24.	Meaning for <b>obtaining Ruling from AAR</b> for 100% Income tax's certainty	15 + 16
25.	Meaning for <b>solution through appeal</b> before ITAT + High court + Supreme court	16
26.	Meaning for <b>solution through writ petition</b> before High court	16
27.	Meaning for <b>AO's role</b> under GAAR's provisions	16
28.	Meaning for <b>PCIT or CIT role (any)</b> under GAAR's provisions	17
29.	Meaning for <b>approved panel's role</b> under GAAR's provisions	17 + 18
30.	Meaning for <b>onus on taxpayer</b> to prove that GAAR's provisions not applicable	18
31.	Meaning for <b>Income Tax Avoidance (ITA)</b> under GAAR's provisions	18
32.	Meaning for <b>Miscellaneous circumstances</b> under GAAR's provisions	19
33.	Meaning for <b>Multilateral Instrument (MLI)</b> for BEPS under GAAR's provisions	19 + 20
34.	Meaning for <b>challenges in invoking</b> under GAAR's Provisions	20
35.	Meaning for <b>DTAA (treaty) regulations</b> under GAAR's provisions	20 + 21
36.	Meaning for <b>legal status before April 01, 2017</b> under GAAR's provisions	21 + 22
37.	Meaning for <b>legal status outside India</b> under GAAR's provisions	22
38.	Meaning for <b>professional advises to taxpayers</b> under GAAR's provisions	23
39.	Meaning for <b>FAQ's answers provided by Central Board for Direct Tax (CBDT)</b>	23 to 25
40.	Conclusion for <b>invocation</b> under GAAR's provisions	25 to 27
41.	GAAR's provisions under chapter <b>X-A</b> of ITA, 1961	28 to 35
Profile of Publisher for Article on 41 FAQ's on Statutory Provisions for GAAR in India		36



## **41 FAQ's on Statutory Provisions for General Anti Avoidance Rule (GAAR) in India** (Under Chapter X-A of Income Tax Act (ITA), 1961)

### **Statutory Provisions for GAAR in India (Section 95 to 102 of ITA 1961)**

#### **1. Meaning for GAAR's provisions (Section 95)**

- (i) Some arrangements made by assessee (taxpayer) may be declared Impermissible Avoidance Arrangement (IAA) by revenue deptt. + also taxpayer required to pay consequent (additional) Income tax + tax penalty + initiation for prosecution (imprisonment) (all) when agreement declared IAA
- (ii) IAA may be declared 100% (wholly) or not 100% (partly) therefore provisions under chapter X-A be applied accordingly.

#### **2. Meaning for Impermissible Avoidance Arrangement (IAA) (Section 96)**

- (i) GAAR's provisions empowering Income tax (revenue) deptt. to declare IAA + also to determine Income tax consequences after declaring IAA (both).
- (ii) IAA treated when main purpose for arrangement to obtain Income Tax Benefit (ITB) (only) + also arrangement lacking commercial substance over form (both).
- (iii) GAAR's provisions empowering revenue deptt. to scrutinize arrangements + to declare IAA + also to apply GAAR's provisions (all) besides same arrangements already existed in DTAA.
- (iv) DTC provisions + also amendments (both) made by govt. after recommendations received from Shome Committee that certain arrangement be treated IAAs when 2 (minimum) conditions be satisfied like:
  - (a) When purpose for arrangement to obtain ITB (only).



+ (plus)

(b) When purpose for arrangement to obtain ITB (only) + also minimum 4 (additional) conditions be satisfied like:

(ba) When 100% violation existed for computation of Arm Length Price (ALP)

+ (plus)

(bb) When result for arrangement directly or indirectly for misusing or abusing (any) DTC's provision.

+ (plus)

(bc) When commercial substance over form 100% (wholly) or not 100% (partly) not existed for arrangement.

+ (plus)

(bd) When arrangement not for bona fide business purpose + also not with good intention (both)

### 3. Meaning for **Commercial Substance Over Form (CSOF)** (Section 97)

(i) (a) When arrangement treated lacking for commercial substance over form

+ (plus)

(b) Also arrangement not majorly (significantly) effected on business's risk + also net cash flow for parties except significantly effected to obtain ITB (only).

(ii) Commercial substance over form for arrangement be 100% (wholly) or not 100% (partly) differ (significantly) from individual's step taken

(iii) When arrangement involving 1 location for asset or residence for parties without significant commercial substance over form.

(iv) When arrangement involving round-trip financing to accommodate related parties + non related parties (both)

(v) Meaning for Lacking commercial substance over form:

(a) To include Round Financing (RF)

+ (plus)

(b) To include accommodation to related parties + non related parties (both)





+ (plus)

(c) To include elimination effect for offsetting + also for cancelling each other (both)

+ (plus)

(d) To include transactions conducted through 1 or more than 1 persons + to disguises values + locations + sources + ownerships + also controls on funds (all) being subject matters for transactions

(vi) Meaning for round trip financing:

(a) To include funds transferred between parties to arrangement

+ (plus)

(b) To include transactions not having substantial commercial over form except to obtain ITB (only).

#### 4. Meaning for consequences after invocation of GAAR's provisions (Section 98)

(i) To reject or re-characterize 100% (wholly) or not 100% (partly) arrangement

(ii) To change for place of residence or site for asset or transaction (any)

(iii) To reject corporate structure

(iv) To change computation for incomes + expenses + reliefs + etc. (all)

(v) To reject DTAA (treaty) benefits

(vi) To change for equity-debt incomes + expenses + reliefs + etc. (all)

● Consequences for invoking GAAR's provisions:

Taxpayer liable for Income tax + tax penalty + initiation for prosecution (imprisonment) (all) in hands of parties (both) for arrangements specified under ITA, 1961.

#### 5. Meaning for connected persons under GAAR's provisions (Section 99)

● To include arrangement with connected person(s) + also accommodating party (both) under GAAR's provisions like:

(i) 100% arrangements between 2 connected persons be treated 1 person or 1 arrangement (only) therefore 2 arrangements be disregarded under GAAR's provisions.





- (ii) 100% arrangements with accommodating party be treated disregarded
- (iii) 100% arrangements between accommodating party and other person (both) be treated 1 person or 1 arrangement (only) therefore 2 arrangements be disregarded under GAAR's provisions.
- (v) 100% arrangements be considered or looked through disregarding corporate structure.

**6. Meaning for application of chapter X-A of ITA under GAAR's provisions (Sec 100)**

- Chapter X-A of ITA, 1961 be applicable (additionally) + also existing (non chapter X-A's provisions) (both) applicable for determining Income tax liability of taxpayer.

**7. Meaning for guideline's framing under GAAR's provisions (Section 101)**

- Provisions under chapter X-A of ITA, 1961 may be applied under new guidelines + also conditions (both) which may be prescribed (in future) by govt.

**8. Meaning for arrangement under GAAR's provisions (Section 102(1))**

- (i) To include 100% (wholly) or not 100% (partly) steps for transactions + operations + schemes + agreements + understandings (beside) enforceable + also not enforceable (all)  
+ (plus)
- (ii) Also to include 100% alienation of properties for transactions + operations + schemes + agreements + understandings (all)
- (iii) To include steps 100% (wholly) or not 100% (partly) (beside) enforceable or not enforceable (any) like:
  - (a) 100% transactions
  - (b) 100% operations
  - (c) 100% schemes
  - (d) 100% agreements
  - (e) 100% understandings
  - (f) 100% alienation of properties



**9. Meaning for *asset* under GAAR's provisions (Section 102(2))**

- To include 100% properties + also 100% rights (*both*)

**10. Meaning for *Benefit* under GAAR's provisions (Section 102(3))**

- To include 100% payments in tangible form + also non-tangible form (*both*)

**11. Meaning for *Connected person* under GAAR's provisions (Section 102(4))**

- To include 100% persons those connected directly or indirectly to other person + also includes following persons (*both*):
  - (i) To include 100% relatives of above person (*individual*)
  - (iii) To include 100% directors of company + also 100% relatives of director (*both*) of person (*company*)
  - (iii) To include 100% partners of firm + members of Association of Persons (*AOP*) + Body of Individuals (*BOI*) + 100% relatives of partner + also of members (*all*)
  - (iv) To include 100% members of Hindu Undivided Family (*HUF*) + also 100% relatives of members (*both*)
  - (v) To include 100% individuals those have substantial interest in business of person + also 100% relatives of individuals (*both*).
  - (vi) (a) To include 100% companies + firms + AOPs + BOIs (*beside*) incorporated or not incorporated + HUFs (*all*)  
+ (*plus*)  
(b) Also having substantial interest in business of person or director or partner or member (*any*) + company + firm + AOP + BOI + HUF + 100% relatives of directors + partners + members (*all*)
  - (vii) (a) To include 100% companies + firms + AOPs + BOIs (*beside*) incorporated or not incorporated + HUFs (*all*)  
+ (*plus*)  
(b) Also director or partner or member (*any*)  
+ (*plus*)



- (c) Also having substantial interest in business of persons or family or relative of director or partner or member (any)
- (viii) (a) To include 100% other persons carrying business  
+ (plus)
- (b) Also having substantial interest in business of other person

**12. Meaning for Fund under GAAR's provisions (Section 102(5))**

- (i) To include 100% cash  
+ (plus)
- (ii) To include 100% cash equivalents  
+ (plus)
- (iii) To include 100% rights + obligations like right to receive + right to pay (all) in cash or in cash equivalent (any)

**13. Meaning for party under GAAR's provisions (Section 102(6))**

- To include person (individual) or Permanent Establishment (PE) participating or taking part in arrangement (any).

**14. Meaning for relative under GAAR's provisions (Section 102(7))**

- To include meaning as assigned under explanation of 56(2) (vi) of ITA, 1961

**15. Meaning for substantial interest under GAAR's provisions (Section 102(8))**

- (i) (a) It include business which being carried by company  
But
- (b) Person (individual) holding beneficial ownership for minimum 20% equity capital or voting power (any) at any time during financial year  
Or
- (ii) It include business which being carried by non-company (other than company) + also individual holding beneficial entitlement (both) for minimum 20% profits



**16. Meaning for *step* under GAAR's provisions (Section 102(9))**

- To include measure or action or series taken in order to deal with or achieve specific (*particular*) thing or object through arrangement (*any*)

**17. Meaning for *tax benefit* under GAAR's provisions (Section 102(10))**

- (i) Reductions + avoidances + deferrals for taxes + also for other amount payable (*all*) under ITA, 1961
- (ii) Increases in Income tax refunds + also increases in other amounts receivable (*both*) under ITA, 1961
- (iii) Reductions + avoidances + deferrals for taxes + also other amounts payable (*all*) under tax treaty (*DTAA*).
- (iv) Increases in Income tax refunds + also increases in other amounts receivable (*both*) under tax treaty (*DTAA*).
- (v) Reductions in incomes in relevant previous year + also other previous years (*both*)
- (vi) Increases in losses in relevant previous year + also other previous years (*both*).

**18. Meaning for *tax treaty* under GAAR's provisions (Section 102(11))**

- To include agreement referred under section 90(1) or 90A (1) of ITA, 1961 (*any*)

**19. Meaning for *Applicability* for GAAR's provisions**

- (i) GAAR's provisions *1<sup>st</sup>* time introduced through Direct Tax Code (*DTC*) Bill, 2009.
- (ii) Revised discussion paper released on GAAR's provisions through DTC Bill, 2010.
- (iii) GAAR's provisions *1<sup>st</sup>* time inducted through finance budget 2012-13.
- (iv) GAAR's provisions inducted through finance budget 2012-13 which were widely criticized due to lack of clarity + lack of safeguards + also increases in discretionary power for selection by Income tax officials (*all*).
- (v) (a) Govt. of India (*Govt.*) set up committee under leadership of Mr. Parthasarathy Shome in 2012 to review GAAR's provisions.



+ (plus)

(b) Also committee suggested that GAAR's provisions be deferred up to 5 year (up to March 31, 2017) for creating proper administrative machinery for implementing GAAR's provisions + also training to Income tax officials (both).

(vi) (a) GAAR's provisions actually introduced through press release issued by Central Board for Direct Taxes (CBDT) vide press release dated January 27, 2017

+ (plus)

(b) Also GAAR's provisions applicable from assessment year 2018-19 (financial year ending March 31, 2018) therefore GAAR's provisions actually commenced from April 01, 2017

+ (plus)

(c) Also GAAR's provisions inserted through chapter X-A under of ITA 1961.

+ (plus)

(d) Also procedures for invoking GAAR's provisions + also mandatory conditions to be applied (both) inserted through Income-Tax Rules (ITR) 1962.

(vii) GAAR's provisions be used by Income tax (revenue) deptt. for tax avoidance purpose + catching individuals + companies for excessive + abnormal + non bona fide + also etc. arrangements (all).

(viii) GAAR's provisions empowering revenue deptt. to deny Income Tax Benefits (ITB) against arrangements those not having any commercial substance over form + also made (both) for avoiding or reducing Income Tax Liability (ITL).

(ix) GAAR's provisions consisting set of broad rules those prepared based on general principles to check potential avoidance + also reduction in ITL (both).

(x) GAAR's provisions inserted beside already existed Specific Anti Avoidance Rules (SAARs) in ITA, 1961 like Transfer Pricing (TP) regulations + Arm Length Price (ALP) principles before introduction for GAAR's provisions (up to March 31, 2017).

(xi) (a) GAAR's provisions applicable for Individuals + also companies (both).

+ (plus)



- (b) Also GAAR's provisions not applicable for non Individuals + non companies + also etc. (all).
- (xii) (a) Revenue deptt. losing tax revenue through aggressive Income tax avoidances + abnormal planning by individuals + also companies (all).  
+ (plus)
- (b) Also GAAR's provisions introduced for avoiding tax (revenue) losses through aggressive Income tax avoidances + abnormal planning by individuals + also companies (all).

## 20. Meaning for **Non-Applicability** for GAAR's provisions

- (i) GAAR's provisions not applicable when taxpayer's action ordinarily applied or employed for bona fide purpose (only)
- (ii) GAAR's provisions not applicable when taxpayer's action having presence of non-tainted element or purpose (any)
- (iii) GAAR's provisions not applicable when taxpayer's action ordinary creating right or obligation (any)
- (iv) GAAR's provisions not applicable when taxpayer's action directly or indirectly not for misusing or abusing (any) provision specified under ITA, 1961
- (v) GAAR's provisions not applicable when taxpayer's action not lacking for commercial substance over form like 100% (wholly) or not 100% (partly) (any)
- (vi) (a) GAAR's provisions not applicable when taxpayer's action satisfying question that individual or company (any) executing arrangement where ordinary + sensible individual or company may undertake without willful intention  
+ (plus)
- (b) Also executing arrangement not for obtaining ITB (only) from revenue deptt.
- (vii) GAAR's provisions not applicable when taxpayer's action not aggressive tax avoidance planning using sophisticate structure.
- (viii) GAAR's provisions not applicable when taxpayer's action not intentional + also not illegal (both) for tax deferment from revenue deptt.



- (ix) (a) GAAR's provisions not applicable when taxpayer's action for setting unit in SEZ notified area for commercial substance over form  
+ (plus)
- (b) Also not setting unit in SEZ notified area (only) for transferring incomes from @ 30% to @ 0% (tax rate).
- (x) GAAR's provisions not applicable when taxpayer's action not for selling immovable or movable asset below Fair Market Value (FMV) under slump sale through Special Purpose Vehicle (SPV)
- (xi) GAAR's provisions not applicable when taxpayer's action not Impermissible Avoidance Arrangement (IAA)
- (xii) (a) GAAR's provisions not applicable when taxpayer's (Foreign Investors (FIs)) action not for taking tax benefits from DTAA (only)  
+ (plus)
- (b) Also executing for bona fide arrangement with commercial substance over form
- GAAR's provisions be applied (beside only) partly (not 100%) arrangement declared IAA by PCIT or CIT + also approving panel (both).

## 21. Meaning for Tax Evasions (TE) under GAAR's provisions

- (i) Tax evasion to include certain things like:
  - (a) Any (single) illegal act for evading income tax be treated TE  
+ (plus)
  - (b) Also liable for Income tax + tax penalty + also for imprisonment (all)
- (ii) Meaning for Income tax + tax penalty (both)
  - (a) Income tax @ 60% + surcharge @ 25% (equivalent to 15%) + cesses @ 4% (equivalent to 3%) = 78% specified under section 115 BBE of ITA, 1961
    - (aa) Tax Penalty @ 6% specified under section 271 AAC of ITA, 1961
    - (ab) Tax Penalty @ 24% specified under section 271 AAB of ITA, 1961





(ac) Aggregate for tax penalty @ 30% (6+24) specified under section 271AAC + 271 AAB (both) of ITA, 1961

(ad) Tax Penalty @ 30% specified under section 271 AAB (1A) of ITA, 1961

(ae) Aggregate tax penalty @ 60% (6+24+30) specified under section 271AAC + 271 AAB + 271 AAB (1A) (all)

Or

(af) Aggregate tax Penalty 66% (6+30+30) specified under section 271 AAC + 271 AAB + 271 AAB (1A) (all) when taxpayer not admitted undisclosed incomes during search + also not included undisclosed incomes for filling of Return of Incomes (ITR) after 100% completion of search.

(iii) **Meaning for Income tax imprisonment**

(a) Any (single) act for willfully suppression of facts + knowingly + intentionally be treated TE therefore liable for imprisonment + Income Tax + also tax penalty (all)

+ (plus)

(b) Also any (single) act for willfully misrepresentation (in any manner) + knowingly + intentionally be treated TE therefore liable for Income Tax + tax penalty + also imprisonment (all).

+ (plus)

(c) Also any (single) act for willfully fraud (in any manner) + knowingly + intentionally be treated TE therefore liable for Income Tax + tax penalty + also imprisonment (all)

(iv) **Conclusion for Tax Evasion (TE)**

- Abovementioned 3 (nature) for TE already prohibited under ITA, 1961 therefore liable for Income Tax + tax penalty + also imprisonment (all)

## 22. **Meaning for Tax Avoidances (TA) under GAAR's provisions**

(i) Any (single) act for tax avoidance (in any manner) be treated legal + also permitted under ITA, 1961 (both).



*But*

(ii) *TA not desirable under ITA, 1961*

*+ (plus)*

(iii) (a) *Any (single) act for availing ITB (only) without any commercial substance over form be treated not legal + also not permitted (both) under ITA, 1961*

*+ (plus)*

(b) *Also any (single) act for availing ITB (only) without any commercial substance over form therefore liable for invoking GAAR's provisions*

*+ (plus)*

(c) *Also consequently liable for Income tax + tax penalty + imprisonment (all)*

### **23. Meaning for *Tax Mitigations (TM)* under GAAR's provisions**

(i) (a) *Any act for TM be treated legal + also permitted (both) under ITA, 1961 when taxpayer availed advantage for allowable (permissible) tax incentives*

*+ (plus)*

(b) *Also taxpayer required to comply 100% prescribed terms + conditions (both) for availing tax incentives.*

(ii) *In view of above taxpayer not liable for Income Tax + tax penalty + also imprisonment (all).*

### **24. Meaning for *obtaining Ruling from AAR for 100% Income tax's certainty***

(i) *Govt. already allowed taxpayer to apply for ruling from Authority for Advance Ruling (AAR) for determining whether GAAR's provisions applicable or not applicable for future's arrangement (to be undertaken) to achieve 100% tax certainty for proposed (future) arrangement.*

(ii) *Resident + non-resident (both) taxpayers permitted for applying for ruling from AAR for determining whether GAAR's provisions applicable or not applicable for future's arrangement (to be undertaken) to achieve 100% tax certainty for proposed (future) arrangement.*



- (iii) Govt. further clarified that GAAR's provisions not to be invoked when taxpayer already obtained favorable ruling from AAR.
- (iv) Application for Advance Ruling be submitted in prescribed form + also with prescribed (*applicable*) fee.
- (v) Ruling from AAR be delivered within 6 month from date of application submitted by taxpayer

## **25. Meaning for *solution through appeal* before ITAT + High court + Supreme court**

- (i) Taxpayer permitted to file appeal before ITAT against order passed by Assessing Officer (AO) based on directions issued by approve panel  
+ (*plus*)
- (ii) Also taxpayer subsequently permitted to file appeal before high court + also Supreme Court (*both*)

## **26. Meaning for *solution through writ petition* before High court**

- Taxpayer permitted to file writ petition before high court against directions issued by approving panel when directions violating principles for natural justice + also misapplication of law (*both*)

## **27. Meaning for *AO's role* under GAAR's provisions**

- (i) AO permitted to examine for finding IAA.
- (ii) AO permitted to refer eligible arrangement to PCIT or CIT (*any*) to declare IAA when AO confident that IAA likely existed.
- (iii) AO required to prepare + to send written order to taxpayer when IAA declared by approving panel after proper examination + also rectification by PCIT or CIT (*any*) where rectification required based on instructions issued by approving panel.
- (iv) AO permitted to initiate enquiry during assessment's proceedings for current's tax year + for previous tax year + also for future's tax year (*all*).



## 28. Meaning for **PCIT or CIT role (any)** under GAAR's provisions

- (i) PCIT or CIT (any) required to issue show cause notice to taxpayer when satisfied that IAA likely existed.
  - (ii) Taxpayer required to furnish relevant documents + also explanations (both) with PCIT or CIT (any) within 60 day.
  - (iii) PCIT or CIT (any) required to refer to approving panel for approval when satisfied that IAA likely existed (beside) documents + also explanations (both) received from taxpayer
- Or
- (iv) PCIT or CIT (any) required to issue written order in favor of taxpayer when satisfied that IAA not existed after documents + also explanations (both) received from taxpayer.

## 29. Meaning for **approved panel's role** under GAAR's provisions

- Approving panel consisting judges from high courts:
  - (i) Approving Panel required to provide opportunity for being heard to taxpayer.
  - (ii) (a) Approving Panel not required to provide opportunity to taxpayer for being heard when approving panel (himself) satisfied with documents  
+ (plus)  
(b) Also satisfied with explanations received from taxpayer that invoking for GAAR's provisions not required.
  - (iii) Approving Panel required to issue directions to PCIT or CIT (any) + AO (both) when invoking for GAAR's provisions required
  - (iv) Approving Panel required to issue directions to PCIT or CIT (any) within 6 month from date of receipt of reference
    - (a) Directions from approving panel be binding on PCIT or CIT (any) + taxpayer (both)  
+ (plus)



(b) Also taxpayer not permitted to file appeal against directions issued from approving panel.

- PCIT or CIT (any) + approving panel (both) not permitted for invoking GAAR's provisions in 2<sup>nd</sup> year when arrangement already permitted without invoking GAAR's provisions in 1<sup>st</sup> year

But

- Facts + circumstances in 2<sup>nd</sup> year be same in 1<sup>st</sup> year.

### 30. Meaning for **onus on taxpayer** to prove that GAAR's provisions not applicable

(i) Taxpayer (in India) liable to prove (establish) that arrangement not liable for invoking GAAR's provisions

+ (plus)

(ii) (a) Taxpayer required to establish that arrangement not undertaken to obtain ITB (only)

+ (plus)

(b) Also arrangement 100% backed by commercial substance over form

+ (plus)

- Invoking GAAR's provisions (in India) playing significant role for domestic companies + foreign companies + resident of India + also non-resident of India (all).

### 31. Meaning for **Income Tax Avoidance (ITA)** under GAAR's provisions

(i) Income tax avoidance to include deliberate measures to avoid or reduce Income tax liability (any).

(ii) ITA not properly defined under ITA, 1961.

(iii) (a) ITA not treated illegal

But

(b) Using aggressive tool + also illegal planning (both) not permitted under ITA, 1961



### 32. **Meaning for *Miscellaneous circumstances* under GAAR's provisions**

- (i) When time period already expired for arrangement
- (ii) When tax payment made for arrangement directly or indirectly (*any*)
- (iii) When exit route already available in arrangement
- Circumstances in each case be carefully evaluated for determining existence or not existence (*absence*) for IAA

### 33. **Meaning for *Multilateral Instrument (MLI)* for BEPS under GAAR's provisions**

- (i) MLI introduced by OECD being part for BEPS's action plan.
- (ii) MLI co-existence with DTAA (*treaty*) to address effect for erosion of tax base.
- (iii) India already signed MLI in Paris on June *07, 2017*.
- (iv) (a) MLI expect from 100% signatories countries that be maintained treaty-related minimum standard for countering treaty's abuses.
- (b) Principal Purpose Test (*PPT*) be satisfied otherwise tax treaty benefits be denied when PPT for arrangement to obtain directly or indirectly ITB (*only*).
- (v) (a) PPT override GAAR's provisions.
- (c) Tax Treaty benefits be denied when PPT failed  
+ (*plus*)
- (c) Also ITB be denied when PPT + Tainted Element Test (*TET both*) failed.
- (d) Tax treaty benefits be denied when *1* PPT failed  
+ (*plus*)
- (e) Also ITB be denied when PPT + TET (*both*) failed.
- (vi) Revenue deptt. permitted to deny tax treaty benefits through invoking GAAR's provisions when taxpayer failed in PPT



- (vii) PPT can be avoided when certain clauses already existed in treaty like objectives + also purposes (both) for treaty commonly known carve-out for PPT's application.
- (viii) AO permitted to deny tax treaty benefits through invoking GAAR's provisions when PPT failed therefore AO will increase litigations (in India).
- (ix) Co-existence for MLI + GAAR's provisions (both) will increase anxiety to taxpayer.

### 34. Meaning for challenges in invoking under GAAR's provisions

- (i) GAAR's provisions treated unconventional Income tax legislations for bringing Income tax avoidance through excessive scrutiny by Income tax officials (in India).
- (ii) GAAR's provisions hard implement + also make difference between different Incomes tax avoidance planning tool used by taxpayer (both)
- (iii) Difference between permissible and not permissible tax planning is very small
- (iv) Difficult to filtrate permissible arrangement from IAA
- (v) Difficult to target for arrangement when main purpose to obtain ITB (only)
- (vi) Difficult to apply through invoking lengthy procedures + also routing through several Income tax administrations like AO + PCIT or CIT (any) + approving panel (all).

### 35. Meaning for DTAA (treaty) regulations under GAAR's provisions

- (i) (a) DTAA + GAAR (both) 2 different sets for regulations used by Income tax administration (in India)  
+ (plus)
- (b) Also DTAA's regulations used for handling Income tax liability in India + also outside India (both)  
+ (plus)
- (c) Also GAAR's provisions used for avoiding anti-tax planning.
- (ii) GAAR's provisions restricted to tax jurisdiction (in India) when DTAA extended to tax jurisdiction in India + also outside India (both).





- (iii) DTAA's regulations to override GAAR's provisions when conflict existed between GAAR's provisions and DTAA's regulations.
- (iv) GAAR's provisions to override DTAA's regulations when IAA existed in DTAA
- (v) (a) CBDT already clarified vide circular no. 07 dated January 27, 2017 that GAAR's provisions to override DTAA's regulations when IAA existed in DTAA.
- (b) GAAR's provisions be applied when Anti-Avoidance regulations existed in DTAA  
+ (plus)
- (c) Also not sufficient to address 100% Income tax avoidance's planning.
- (vi) (a) GAAR's provisions not to be applied when Limitation of Benefits (LoB) provisions already existed in DTAA  
+ (plus)
- (b) Also LoB provisions already 100% sufficient to address Income tax avoidance's planning.

### 36. Meaning for legal status before April 01, 2017 under GAAR's provisions

- (i) Courts (in India) were handling (dealing) Income tax avoidance's cases before GAAR's provisions applicable from April 01, 2017 through inferences taken from decisions pronounced by English Courts like Duke of Westminster where court affirmed that bona fide arrangement be segregated with underlying commercial substance over form (if existed).
- (ii) In view of above principle supreme court (in India) passed judgments in popular ruling for Azadi Bachao Andolan + Vodafone + also etc. (all).
- (iii) Courts (in India) concluded that colorable or dubious arrangement (any) be disregarded through applying doctrine + also piercing for corporate veil (both).
- (iv) Introduction for GAAR's provisions to codify law to address 100% issues for Income tax avoidance or Income tax mitigation (any).
- (v) (a) TP's regulations introduced under SAAR (in India) in 2001  
+ (plus)



(b) Also TP's regulation introduced under SAAR (outside India) starting from year 1981.

+ (plus)

(c) Litigations (in India) substantially increased due to introduction for TP's regulations.

+ (plus)

(d) Litigations (in India) already became No. 1 across world due to introduction for TP's regulations.

(vi) (a) Revenue deptt. were treating sham or subterfuge (any) arrangement before introduction for TP's regulations (in India) from 2001.

+ (plus)

(b) Also disregarding for Income tax purposes.

### 37. Meaning for legal status outside India under GAAR's provisions

● GAAR's provisions already enacted in 16 countries (outside India) like:

(i) Australia

(ii) Belgium

(iii) Canada

(iv) China

(v) France

(vi) Germany

(vii) Italy

(viii) Ireland

(ix) Kenya

(x) Netherlands

(xi) New Zealand

(xii) Poland

(xiii) Singapore

(xiv) South Africa

(xv) United Kingdom (UK)

(xvi) United States of America (USA)



### 38. Meaning for **professional advises to taxpayers** under GAAR's provisions

- GAAR's provisions applicable from April 01, 2017 therefore taxpayers required to get review their arrangements from professional for invoking or not invoking like:
  - (i) For reviewing in bound structures when holding company having Intellectual Property (IP) rights located in 0% or low-tax's jurisdiction like Cyprus + Singapore + etc. (all).
  - (ii) For reviewing restructure for certain arrangements like mergers + de-mergers + acquisitions + slump sales + selective buy-backs + gift of shares + conversion from Limited Liability Partnership (LLP) + etc. (all).
  - (iii) For reviewing trust's structure + also succession planning (both)
  - (iv) For reviewing cash repatriation's structure + inter-group arrangements involving royalty + service fee + also etc. (all).
  - (v) For reviewing transfer for land used by partnership firm
  - (vi) For reviewing employee's benefit plan + also thin capitalizations planning (both)
  - (vii) For reviewing GAAR provision's applicability for existing (present) arrangements
  - (viii) For guiding GAAR provision's applicability for propose (future) arrangements
  - (ix) For guiding for preparation of defense documents for existing + also for propose arrangements (both) therefore not to be liable for invoking GAAR's provisions
  - (x) For representing before AO + PCIT or CIT (any) + approving panel + AAR + ITAT + High courts + Supreme Court (all).

### 39. Meaning for **FAQ's answers provided by Central Board for Direct Tax (CBDT)**

- Notified vide circular no. 07 dated January 27, 2017
  - (i) Whether SAAR + GAAR (both) simultaneously applicable for 1 arrangement made ?  
Yes
    - (a) SAAR + GAAR (both) simultaneously applicable for 1 arrangement made under Specific Anti Avoidance Rule (SAAR) like TP regulations + ALP  
+ (plus)



- (b) Also General Anti Avoidance Rule (GAAR) like IAA simultaneously (both) co-existed
- (ii) Whether GAAR's provisions applicable when LOB test for treaty already passed ?  
No
- (a) GAAR's provisions not applicable when LOB test for treaty already passed  
+ (plus)
- (b) Also LOB 100% sufficiently addressed for tax avoidance plannings
- (iii) Whether GAAR's provisions interplaying with right for taxpayer to select or to choose 1 method for implementing arrangement ?  
No
- GAAR's provisions not interplaying with right for taxpayer to select or to choose 1 method for implementing arrangement.
- (iv) Whether benefit for grand fathering available against investments made before April 01, 2017 ?  
Yes
- Taxpayer permitted for grand fathering benefit against investments made before April 01, 2017
- (v) Whether GAAR's provisions applicable for arrangement permissible by AAR ?  
No
- GAAR's provisions not applicable for arrangement permissible by Authority for Advance Ruling (AAR)
- (vi) Whether GAAR provisions applicable for arrangement approved by court + NCLT ?  
No
- GAAR's provisions not applicable for arrangement already approved by court + NCLT when explicitly + adequately (all) properly considered for ITB while approving transaction as non IAA
- (vii) Whether invoking GAAR's provisions not mandatory for genuine cases ?  
Yes
- GAAR's provisions not required to invoke for genuine cases after proper examination by PCIT or CIT (any) + approving panel (both).



(viii) Whether GAAR's provisions applicable on notional incomes + also disallowances against actual expenditures (both) ?

No

(a) GAAR's provisions not applicable on notional incomes + also disallowances against actual expenditures (both)

But

(b) IAA be disregarded + consequently Income tax + tax penalty be levied + also prosecution (for imprisonment) be initiated accordingly (all)

(ix) Whether limit for ITB INR 3 crore applicable for single (1) arrangement made ?

Yes

- GAAR's provisions applicable when ITB exceeding INR 3 crore for single arrangement + single assessment year + also single taxpayer (all).

(x) Whether GAAR's provisions applicable in 2<sup>nd</sup> year when in 1<sup>st</sup> year not applicable ?

No

- GAAR's provisions not applicable in 2<sup>nd</sup> year when in 1<sup>st</sup> year not applicable where facts + also circumstances in 2<sup>nd</sup> year same in 1<sup>st</sup> year.

(xi) Whether Income tax penalty not to be initiated up to 5 year when addition already made under GAAR's provisions ?

Yes

(a) Income tax penalty not to be initiated up to 5 year when addition already made under GAAR's provisions.

+ (plus)

(b) Also taxpayer permitted to avail benefits specified under section 273A of ITA, 1961 when prescribed terms + conditions (both) satisfied.

#### 40. Conclusion for invocation under GAAR's provisions

(i) (a) Govt. realized challenge for implementing GAAR's provisions (in India) therefore 1<sup>st</sup> implementation hold for 5 year (up to March 31<sup>st</sup> 2017).

(b) Govt. set up standing committee to provide input on draft laws + to introduce



Safe Harbour Rules (SHR) + also to decide different levels for approval (all) before invoking GAAR's provisions.

- (ii) (a) GAAR's provisions having diversity for situations (beside) abovementioned measures  
+ (plus)  
(b) Also GAAR's provisions to be applied or not to be applied (remained) unresolved which may create uncertainty (anxiety) in taxpayers therefore it may deterrent for business's growth + also foreign investment in India (both).  
(c) Taxpayer required (onus to prove) to demonstrate (establish) commercial substance over form for each arrangement which may lead to increase emphasis for documentations rather than executing (doing) new businesses.
- (iii) GAAR's provision introduced to evolve India's tax policy + simplification in legislation therefore to codify principles for commercial substance over form + also to bring principles which concluded in several landmark court's judgments in India + outside India (both).
- (iv) (a) GAAR's provisions empowering revenue deptt. to deal effectively + also to guard against several schemes used by taxpayers for reducing income tax liability (govt. revenue).  
(b) GAAR's provisions strengthening arms for revenue deptt. through sweeping powers to disregard or to re-characterize arrangement (any) consequent raising Income tax liability when arrangement designed to obtain ITB (only) + also not having commercial substance over form (both).
- (v) (a) Developed countries (outside India) properly implemented GAAR's provisions.  
+ (plus)  
(b) Also GAAR's provisions (outside India) already incorporated in their Income Tax Act.  
+ (plus)  
(c) Also suggested that GAAR's provisions (in India) be incorporated in ITA, 1961.



- (vi) (a) Revenue deptt. was dealing with IAA through court's decisions (*in India*) + SAAR like TP's regulations + also ALP (*all*) before introduction for GAAR's provisions (*from April 01, 2017*) against taxpayers those already designed several arrangements for avoiding + also reducing Income tax liabilities (*both*).
- + (*plus*)
- (b) Also Courts (*in India*) consistently affirming cardinal principle for genuine arrangements therefore not disregarding against (*existing*) bona fide arrangements.
- (vii) Courts (*in India*) disregarded arrangements when found colorable or dubious arrangement (*any*) therefore applied doctrines + also piercing for corporate veil (*both*).
- (viii) Govt. required to re-evaluate GAAR's provisions with help from judicial's precedents therefore essential to understand fine line difference between acceptable Income tax mitigations and actual Income tax avoidances which needed to clarity for potential Income tax-related risk.
- (ix) This Article prepared to decode GAAR's provisions to enable basic understanding for conditions to be satisfied for invoking GAAR's provisions + for approval + also for latest mechanism (*all*) to be used by revenue deptt.





#### **41. GAAR's provisions under chapter X-A of ITA, 1961**

- *After Chapter X of Income-tax Act, following Chapter shall be inserted with effect from April 01, 2016 like:*

#### **'CHAPTER X-A GENERAL ANTI-AVOIDANCE RULE**

#### **95. Applicability of General Anti-Avoidance Rule (Section 95 of ITA, 1961)**

*Notwithstanding anything contained in the Act, an arrangement entered into by an assessee may be declared to be an impermissible avoidance arrangement and the consequence in relation to tax arising there from may be determined subject to the provisions of this Chapter.*

*Explanation.—For the removal of doubts, it is hereby declared that the provisions of this Chapter may be applied to any step in, or a part of, the arrangement as they are applicable to the arrangement.*

#### **96. Impermissible avoidance arrangement (IAA) (Section 96 of ITA, 1961)**

- (1) *An impermissible avoidance arrangement means an arrangement, the main purpose of which is to obtain a tax benefit, and it—*
- (a) *creates rights, or obligations, which are not ordinarily created between persons dealing at arm's length;*
  - (b) *results, directly or indirectly, in the misuse, or abuse, of the provisions of this Act;*
  - (c) *lacks commercial substance or is deemed to lack commercial substance under section 97, in whole or in part; or*
  - (d) *is entered into, or carried out, by means, or in a manner, which are not ordinarily employed for bona fide purposes.*



- (2) *An arrangement shall be presumed, unless it is proved to the contrary by the assessee, to have been entered into, or carried out, for the main purpose of obtaining a tax benefit, if the main purpose of a step in, or a part of, the arrangement is to obtain a tax benefit, notwithstanding the fact that the main purpose of the whole arrangement is not to obtain a tax benefit.*

**97. Arrangement to lack commercial substance (Section 97 of ITA, 1961)**

- (1) *An arrangement shall be deemed to lack commercial substance, if—*
- (a) *the substance or effect of the arrangement as a whole, is inconsistent with, or differs significantly from, the form of its individual steps or a part; or*
  - (b) *it involves or includes—*
    - (i) *round trip financing;*
    - (ii) *an accommodating party;*
    - (iii) *elements that have effect of offsetting or cancelling each other; or*
    - (iv) *a transaction which is conducted through one or more persons and disguises the value, location, source, ownership or control of funds which is the subject matter of such transaction; or*
  - (c) *it involves the location of an asset or of a transaction or of the place of residence of any party which is without any substantial commercial purpose other than obtaining a tax benefit (but for the provisions of this Chapter) for a party; or*
  - (d) *it does not have a significant effect upon the business risks or net cash flows of any party to the arrangement apart from any effect attributable to the tax benefit that would be obtained (but for the provisions of this Chapter).*
- (2) *For the purposes of sub-section (1), round trip financing includes any arrangement in which, through a series of transactions—*
- (a) *funds are transferred among the parties to the arrangement; and*



- (b) *such transactions do not have any substantial commercial purpose other than obtaining the tax benefit (but for the provisions of this Chapter), without having any regard to—*
- (A) *whether or not the funds involved in the round trip financing can be traced to any funds transferred to, or received by, any party in connection with the arrangement; which the funds involved in the round trip financing are transferred or received; or*
- (C) *the means by, or manner in, or mode through, which funds involved in the round trip financing are transferred or received.*
- (3) *For the purposes of this Chapter, a party to an arrangement shall be an accommodating party, if the main purpose of the direct or indirect participation of that party in the arrangement, in whole or in part, is to obtain, directly or indirectly, a tax benefit (but for the provisions of this Chapter) for the assessee whether or not the party is a connected person in relation to any party to the arrangement.*
- (4) *For the removal of doubts, it is hereby clarified that the following may be relevant but shall not be sufficient for determining whether an arrangement lacks commercial substance or not, namely:—*
- (i) *the period or time for which the arrangement (including operations therein) exists;*
- (ii) *the fact of payment of taxes, directly or indirectly, under the arrangement;*
- (iii) *the fact that an exit route (including transfer of any activity or business or operations) is provided by the arrangement.*

**98. Consequences of impermissible avoidance arrangement (Section 98 of ITA, 1961)**

- (1) *If an arrangement is declared to be an impermissible avoidance arrangement, then, the consequences, in relation to tax, of the arrangement, including*



*denial of tax benefit or a benefit under a tax treaty, shall be determined, in such manner as is deemed appropriate, in the circumstances of the case, including by way of but not limited to the following, namely:—*

- (a) disregarding, combining or re-characterizing any step in, or a part or whole of, the impermissible avoidance arrangement;*
- (b) treating the impermissible avoidance arrangement as if it had not been entered into or carried out;*
- (c) disregarding any accommodating party or treating any accommodating party and any other party as one and the same person;*
- (d) deeming persons who are connected persons in relation to each other to be one and the same person for the purposes of determining tax treatment of any amount;*
- (e) reallocating amongst the parties to the arrangement—*
  - (i) any accrual, or receipt, of a capital nature or revenue nature; or*
  - (ii) any expenditure, deduction, relief or rebate;*
- (f) treating*
  - (i) the place of residence of any party to the arrangement; or*
  - (ii) the situs of an asset or of a transaction, at a place other than the place of residence, location of the asset or location of the transaction as provided under the arrangement; or*
- (g) considering or looking through any arrangement by disregarding any corporate structure. (2) For the purposes of sub-section (1),—*
  - (i) any equity may be treated as debt or vice versa;*
  - (ii) any accrual, or receipt, of a capital nature may be treated as of revenue nature or vice versa; or*
  - (iii) any expenditure, deduction, relief or rebate may be recharacterised.*



**99. Treatment of connected person and accommodating party (Section 99 of ITA, 1961)**

*For the purposes of this Chapter, in determining whether a tax benefit exists,—*

- (i) the parties who are connected persons in relation to each other may be treated as one and the same person;*
- (ii) any accommodating party may be disregarded;*
- (iii) the accommodating party and any other party may be treated as one and the same person;*
- (iv) the arrangement may be considered or looked through by disregarding any corporate structure.*

**100. Application of this Chapter (Section 100 of ITA, 1961)**

*The provisions of this Chapter shall apply in addition to, or in lieu of, any other basis for determination of tax liability.*

**101. Framing of guidelines (Section 101 of ITA, 1961)**

*The provisions of this Chapter shall be applied in accordance with such guidelines and subject to such conditions, as may be prescribed.*

**102. Definitions (Section 102 of ITA, 1961)**

*In this Chapter, unless the context otherwise requires,—*

- (1) "arrangement" means any step in, or a part or whole of, any transaction, operation, scheme, agreement or understanding, whether enforceable or not, and includes the alienation of any property in such transaction, operation, scheme, agreement or understanding;*
- (2) "asset" includes property, or right, of any kind;*
- (3) "benefit" includes a payment of any kind whether in tangible or intangible form;*
- (4) "connected person" means any person who is connected directly or indirectly to another person and includes,—*



- (a) *any relative of the person, if such person is an individual;*
- (b) *any director of the company or any relative of such director, if the person is a company;*
- (c) *any partner or member of a firm or association of persons or body of individuals or any relative of such partner or member, if the person is a firm or association of persons or body of individuals;*
- (d) *any member of the Hindu undivided family or any relative of such member, if the person is a Hindu undivided family;*
- (e) *any individual who has a substantial interest in the business of the person or any relative of such individual;*
- (f) *a company, firm or an association of persons or a body of individuals, whether incorporated or not, or a Hindu undivided family having a substantial interest in the business of the person or any director, partner, or member of the company, firm or association of persons or body of individuals or family, or any relative of such director, partner or member;*
- (g) *a company, firm or association of persons or body of individuals, whether incorporated or not, or a Hindu undivided family, whose director, partner, or member has a substantial interest in the business of the person, or family or any relative of such director, partner or member;*
- (h) *any other person who carries on a business, if—*
  - (i) *the person being an individual, or any relative of such person, has a substantial interest in the business of that other person; or*
  - (ii) *the person being a company, firm, association of persons, body of individuals, whether incorporated or not, or a Hindu undivided family, or any director,*



*partner or member of such company, firm or association of persons or body of individuals or family, or any relative of such director, partner or member, has a substantial interest in the business of that other person;*

*(5) "fund" includes—*

- (a) any cash;*
- (b) cash equivalents; and*
- (c) any right, or obligation, to receive or pay, the cash or cash equivalent;*

*(6) "party" includes a person or a permanent establishment which participates or takes part in an arrangement;*

*(7) "relative" shall have the meaning assigned to it in the Explanation to clause (vi) of sub-section (2) of section 56;*

*(8) a person shall be deemed to have a substantial interest in the business, if,—*

- (a) in a case where the business is carried on by a company, such person is, at any time during the financial year, the beneficial owner of equity shares carrying twenty per cent or more, of the voting power; or*
- (b) in any other case, such person is, at any time during the financial year, beneficially entitled to twenty per cent or more, of the profits of such business;*

*(9) "step" includes a measure or an action, particularly one of a series taken in order to deal with or achieve a particular thing or object in the arrangement;*

*(10) "tax benefit" includes,—*

- (a) a reduction or avoidance or deferral of tax or other amount payable under this Act; or*
- (b) an increase in a refund of tax or other amount under this Act; or*





- (c) *a reduction or avoidance or deferral of tax or other amount that would be payable under this Act, as a result of a tax treaty; or*
  - (d) *an increase in a refund of tax or other amount under this Act as a result of a tax treaty; or*
  - (e) *a reduction in total income; or*
  - (f) *an increase in loss, in the relevant previous year or any other previous year;*
- (11) *"tax treaty" means an agreement referred to in sub-section (1) of section 90 or sub-section (1) of section 90A.'*



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