

Chapter 51

GENERAL ANTI-AVOIDANCE RULES

| Sr. No | Particulars | Pg No |
|--------|--|-------|
| 1 | Basic | 51.2 |
| 2 | Sec 95 Applicability of GAAR | 51.2 |
| 3 | Sec 96 Impermissible Avoidance Arrangement | 51.2 |
| 4 | Rule 10U Non- Applicabilty of GAAR | 51.2 |
| 5 | Sec 97 Arrangement to lack commercial substance | 51.3 |
| 6 | Sec 98 Consequences of Impermissible Avoidance agreement | 51.3 |
| 7 | Sec 99 Treatment of connected person and accommodating party | 51.4 |
| 8 | Sec 100 Application of this Chapter | 51.4 |
| 9 | Rule 10UB Notice forms for reference u/s144BA | 51.4 |
| 10 | Rule 10UC Time limits | 51.4 |

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**SILENT
MOVES.
LOUD
RESULTS**
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Basic

The question of substance over form has consistently arisen in the implementation of taxation laws. Most countries have codified the “substance over form” doctrine in the form of General Anti Avoidance Rule (GAAR).

The General Anti-Avoidance Rules (GAAR) provisions aim at combating 'impermissible tax avoidance'.

General Anti-Avoidance Rules is incorporated for dealing with aggressive tax planning.

Sec 95 Applicability of GAAR

1. This section provides that 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.
- > **‘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. If there is a conflict with provisions in other sections, then this section shall prevail over other conflicting provisions.

Rule 10U Non-Applicability of GAAR

1. **The provisions of GAAR shall not apply to:**
 - a. An arrangement where the tax benefit in the RAY arising, in aggregate, to all the parties to the arrangement does not exceed a sum of ₹ 3 crore;
 - b. **Foreign Institutional Investor:**
 - i. who is an assessee under the Act;
 - ii. who has not taken benefit of DTAA &
 - iii. who has invested in listed securities, or unlisted securities, with the prior permission of the competent authority.
 - c. A NR, in relation to investment made by him by way of offshore derivative instruments or otherwise, directly or indirectly, in FII.

- d. Any income accruing or arising to, or deemed to accrue or arise to, or received or deemed to be received by, any person from transfer of investments made before 01-4-2017 by such person.
2. The provisions shall 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 01-04-2017.
- > **‘Tax benefit’** means:
- a. Reduction/ avoidance/ deferral of tax under this law/ DTAA.
 - b. Increase in refund under this law/ DTAA.
 - c. Reduction in total income/ increase in loss.

Sec 96 Impermissible Avoidance Arrangement

1. 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 ALP.
 - 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 u/s 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.
3. MEANING: “Tax treaty” means DTAA.

Sec 97 Arrangement to lack Commercial Substance

An arrangement shall be deemed to lack commercial substance, if—

1. 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
2. **It involves or includes—**
 - a. Round trip financing;
 - b. An accommodating party;
 - c. Elements that have effect of offsetting or cancelling each other; or
 - d. 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
3. It involves the location of an asset/transaction/place of residence of any party which is without any substantial commercial purpose other than obtaining a tax benefit for a party; or
4. It does not have a significant effect upon the business risks or net cash flows of any party to the arrangement but only attributes tax benefits.
5. **Transaction involves:**
 - a. Round trip financing includes any arrangement in which, through a series of transactions—
 - i. Funds are transferred among the parties
 - ii. Such transactions do not have any substantial commercial purpose other than obtaining the tax benefit :
It is irrelevant that:
 - > The funds involved in the round trip financing can be traced to any funds transferred to, or received.
 - > The time, or sequence, in which the funds are transferred or received;
 - > The manner or mode in which funds are transferred or received.
 - b. An accommodating party i.e the party whose main reason for participation is to obtain directly or indirectly a tax benefit for the assessee whether or not the party is a connected person in relation to any party to the arrangement.

- c. Elements have the effect of offsetting or cancelling each other
- d. A transaction conducted through one or more persons and disguise the value/ location/ source/ ownership/ control of funds.

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 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.

Sec 98 Consequences of Impermissible Avoidance Arrangement

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:
 - a. Disregarding, combining or recharacterising 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,

2. At a place other than the place of residence, location of the asset or location of the transaction as provided under the arrangement; or considering or looking through any arrangement by disregarding any corporate structure.

Sec 99 Treatment of Connected Person and Accommodating Party

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.

Sec 100 Application of this Chapter

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

Rule 10UB Notice forms for reference u/s 144BA

1. For the purposes of sec. 144BA(1), AO shall, before making a reference to the Commissioner, issue a notice in writing to the assessee seeking objections, if any, to the applicability GAAR.
2. **The notice shall contain the following:**
 - a. Details of the arrangement to which the provisions of GAAR are proposed to be applied;
 - b. The tax benefit arising under the arrangement;
 - c. The basis and reason for considering that the main purpose of the identified arrangement is to obtain tax benefit;
 - d. The basis and the reasons why the arrangement satisfies the condition provided in sec. 96; and

- e. The list of documents and evidence relied upon in respect of (c) and (d) above.
3. The reference by the Assessing Officer to the Commissioner u/s 144BA(1) shall be in Form No. 3CEG.
4. Where the Commissioner is satisfied that the provisions of Chapter X-A are not required to be invoked with reference to an arrangement after considering:
 - i. The reference received from the Assessing Officer u/s 144BA(1); or
 - ii. The reply of the assessee in response to the notice issued u/s 144BA(2), he shall issue directions to the AO in Form No. 3CEH.
5. Before a reference is made by the Commissioner to the Approving Panel u/s 144BA(4), he shall record his satisfaction regarding the applicability of the provisions of Chapter X-A in Form No. 3CEI and enclose the same with the reference.

Rule 10UC Time Limits

For the purposes of sec. 144BA:

- i. No directions u/s 144BA(3) shall be issued by the Commissioner after the expiry of 1 month from the end of the month in which the date of compliance of the notice issued u/s 144BA(2) falls;
- ii. No reference shall be made by the Commissioner to the Approving Panel u/s 144BA(4) after the expiry of 2 months from the end of the month in which the final submission of the assessee in response to the notice issued u/s 144BA(2) is received;
- iii. The Commissioner shall issue directions to the Assessing Officer in Form No. 3CEH:
 - a. In the case referred to in rule 10UB(4)(i), within a period of 1 month from the end of month in which the reference is received by him; and
 - b. in the case referred to in rule 10UB(4)(ii), within a period of 2 months from the end of month in which the final submission of the assessee in response to the notice issued u/s 144BA(2) is received by him.