A COMPLETE ANALYSIS OF THE FINANCE ACT, 2013
PART - IV
(Chapter VIII, IX & X-A of the IT Act)

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5. CHAPTER VIII - Rebate and Reliefs

Amendment:

- *In section 87 of the Income-tax Act, with effect from the 1st day of April, 2014,—*

(i) in sub-section (1), for the word and figures "sections 88", the word, figures and letter "sections 87A, 88" shall be substituted;

(ii) in sub-section (2), for the word and figures "section 88", the words, figures and letter "section 87A or section 88" shall be substituted.

- *After section 87 of the Income-tax Act, the following section shall be inserted with effect from the1st day of April, 2014, namely:—*
  "87A. An assessee, being an individual resident in India, whose total income does not exceed five hundred thousand rupees, shall be entitled to a deduction, from the amount of income-tax (as computed before allowing the deductions under this Chapter) on his total income with which he is chargeable for any assessment year, of an amount equal to hundred per cent. of such income-tax or an amount of two thousand rupees, whichever is less."

Analysis:
The newly inserted provision of Section 87A is with respect to the allowance of rebate who satisfy the following essentials:

i. Assessee should be an individual resident in India
ii. The total income of the assesse shall not exceed Rs. 5,00,000/-

The assessee upon satisfying the above conditions is entitled to a deduction from the income tax chargeable on his total income for any assessment year. The deduction shall be of an amount equal to 100% of such income tax or Rs. 2000/- whichever is less.

Consequential to the introduction of the new provision of section 87A, the section 87 has been amended. The amended provision of section 87 now accommodates section

87A in the allowance of rebate in computing income tax. The new provision section 87A and the amendment section 87 shall be w.e.f. 01.04.2014.

[SECTIONS 21 & 22 OF THE FINANCE ACT, 2013]

6. CHAPTER IX – Double Taxation Relief

Sections 90 & 90A: Tax Residency Certificate – Mandatory

Amendment:

In section 90 of the Income-tax Act,—
(a) Sub-section (2A) shall be omitted;
(b) After sub-section (2), the following sub-section shall be inserted with effect from the 1st day of April, 2016, namely:—
"(2A) Notwithstanding anything contained in sub-section (2), the provisions of Chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him.";
(c) in sub-section (4), for the words "a certificate, containing such particulars as may be prescribed, of his being a resident", the words "a certificate of his being a resident" shall be substituted
(d) after sub-section (4) and before Explanation 1, the following subsection shall be inserted, namely:—
"(5) The assessee referred to in sub-section (4) shall also provide such other documents and information, as may be prescribed."

In section 90A of the Income-tax Act,—
***(a)** Sub-section (2A) shall be omitted;*
***(b)** After sub-section (2), the following sub-section shall be inserted with effect from the 1st day of April, 2016, namely:—*
*"**(2A)** Notwithstanding anything contained in sub-section (2), the provisions of Chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him.";*
***(c)** In sub-section (4), for the words "a certificate, containing such particulars as may be prescribed, of his being a resident", the words "a certificate of his being a resident" shall be substituted.*
***(d)** After sub-section (4) and before Explanation 1, the following subsection shall be inserted, namely:—*
"(5) The assessee referred to in sub-section (4) shall also provide such other documents and information, as may be prescribed."

Analysis:

The existing sub-section (2A) to sections 90 & 90A which was to be w.e.f. 01.04.2013 has been omitted and is substituted with the new provision which shall be w.e.f. 01.04.2016. The amendment would therefore be effective only from Assessment Years 2016-17.

The newly inserted sub-section (2A) in the sections 90 & 90A provides that the provisions of GAAR under Chapter X-A which shall be w.e.f. 01.04.2016, shall apply even if such provisions are not beneficial to the assessee.

Under the existing provisions, a non-resident person / a foreign company is required to obtain a TRC from the tax authorities in their country of residence/incorporation so as to avail the benefits of the double taxation avoidance agreements (DTAA) entered into by India with other countries referred to Section 90 and Section 90A.

The Finance Bill 2013 had proposed to amend Section 90 and 90A to provide that submission of TRC containing prescribed particulars is a necessary but not a sufficient condition for claiming the benefits of the DTAA.

This proposal has not been introduced and has been substituted by the Finance Act to read *"a certificate of his being a resident".* Rule 21AB and Form Nos. 10FA and 10FB have prescribed the requisite certificates.

The proposal in Finance Bill 2012 had created uncertainty among foreign investors, especially those routing investments through Mauritius. The Finance Minister has clarified that the status quo with regard to investment from Mauritius would continue till the double taxation avoidance agreement with that country is revised.

In the landmark judgment of **UOI V. Azadi Bachao Andolan, 2003 132 Taxman 373 (SC)],** the Hon'ble Supreme Court has held that the Tax Residency Certificate (TRC) will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the DTAA.

Further, the Authority for Advance Ruling in **E Trade Mauritius Ltd. [2010] 190 Taxman 232 (AAR – New Delhi)** and **Dynamic India Fund-I, In Re [2012] 23 taxmann.com 266 (AAR - New Delhi)** has followed the ruling in Azadi Bachao Andolan in considering Tax Residence Certificate as a sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the DTAA.

By inserting the sub-section (5) to section 90 & 90A in the Finance Bill, 2013, the legislature had gone a step ahead of the judicial rulings (as abovementioned) by making **TRC as a necessary but not a sufficient condition** for claiming benefits under DTAA. The relevant part of the section is as under:

"(5) The certificate of being a resident in a specified territory outside India referred to in sub-section (4), shall be necessary but not a sufficient condition for claiming any relief under the agreement referred to therein."

This clause in the Bill gave rights to speculation as to the requirement by the Tax Officer for proving the residential status. However, the Finance Act has watered it down and the requirement now is for *"a certificate of his being a resident"*. However, it is still not clear as to what the officer would require to substantiate the residential status.

The Finance Minister later said that changes have been made to make it clear that Tax Residency Certificate (TRC) issued by a foreign government will be accepted as a certificate of residence. "Additional information can also be asked by the government but the TRC issued by a foreign government will be accepted as a certificate of residence," he said.

Cases referred:

1. **UOI V. Azadi Bachao Andolan, 2003 132 Taxman 373 (SC)**

   Whenever a certificate of residence is issued by the Mauritius authorities, such certificate will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the DTAC accordingly.

2. **E Trade Mauritius Ltd. [2010] 190 Taxman 232 (AAR – New Delhi)**

   By virtue of the circular no. 789 issued by CBDT (which has been upheld by the Supreme Court), the tax residency certificate issued by the Mauritius authorities is at least a presumptive evidence of the beneficial ownership of the shares and the gains arising therefrom, even if it does not give rise to a conclusive presumption.

3. **Dynamic India Fund-I, In Re [2012] 23 taxmann.com 266 (AAR - New Delhi)**

   The applicant being a tax resident of Mauritius in the light of the tax residency certificate produced by it, going by the decision in Union of India vs. Azadi Bachao Andolan, it has to be held that the gain that may arise to the applicant is not chargeable to tax in India.

[SECTIONS 23 & 24 OF THE FINANCE ACT, 2013]

7. CHAPTER X-A – GAAR Provisions & Procedure

Section 95 to 102: New GAAR Provisions

Amendment:

Chapter X-A of the Income-tax Act (as inserted by section 41 of the Finance Act, 2012) relating to General Anti-Avoidance Rule shall be omitted with effect from the 1st day of April, 2014.

After Chapter X of the Income-tax Act, the following Chapter shall be inserted with effect from the 1st day of April, 2016, namely:—

'CHAPTER X-A: GENERAL ANTI-AVOIDANCE RULE

95. 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 therefrom 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. (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. (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;

(B) the time, or sequence, in 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 of 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. (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 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, 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. 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. The provisions of this Chapter shall apply in addition to, or in lieu of, any other basis for determination of tax liability.

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

102. 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.'.

Analysis:

The existing Chapter X-A which was to be w.e.f. 01.04.2014, is omitted by the Finance Act, 2013 and the new chapter provides that GAAR shall be implemented from 01.04.2016.

The government has postponed the implementation of GAAR provisions by two years, considering the circumstances and other factors as pointed out by the Expert Committee on GAAR (Shome Committee).

The Shome Committee made the following recommendations with respect to GAAR:

a) Deferring GAAR provisions by three years on administrative grounds as it requires intensive training of tax officers.
b) Abolition of tax on short term capital gains arising from transfer of securities which are equity shares or units of equity oriented mutual funds, as it may provide a big boost to capital markets, and, in turn, help attracting investments. Until such abolition, the CBDT Circular No. 789 dated 13.04.2000 which

precluded the tax administration to enquire into the genuineness of tax residency certificate (TRC) issued by the Mauritius authorities should be retained.

c) The Act should be amended to provide that only arrangements which have the main purpose (and not one of the main purposes) of obtaining tax benefit should be covered under GAAR.
d) Amendment of section 97 to include the definition of 'commercial substance' and also to amend that the factors to prove commercial substance shall be relevant and not be regarded as sufficient factors.
e) The definition of 'connected person' may be restricted to 'associated person' under section 102 and 'associated enterprise' under section 92A.
f) The sub-section (2A) of sections 90 & 90A provides that the GAAR provisions apply even if such provisions are not beneficial to the assessee. Therefore, there is likelihood of conflict between the treaty provisions (SAAR) and the application I-T Act, 1961 or the DTAA whichever is more beneficial to the assessee. Hence, the committee has recommended that, the GAAR provisions shall not override the SAAR by enforcing sub-section (2A) of sections 90 & 90A section.
g) Further, the committee also made various recommendations in respect of the tax administration, amending the Income Tax Rules and also the need for clarifications by CBDT through circulars and notifications.

The Finance Act, 2013, adopted the major recommendations and ably incorporated in GAAR provisions (Chapter X-A) with certain recommendations and modifications which are as follows:

a) Deferring GAAR by two years against the three years recommendation made by the committee:
   "After Chapter X of the Income-tax Act, the following Chapter shall be inserted with effect from the 1st day of April, 2016, namely:-CHAPTER X-A"
b) The recommendations made on the amending section 96 to provide that only arrangements which have the main purpose and not one of the main purposes of obtaining tax benefit should be covered under GAAR has been rightly adopted in the Finance Act, 2013 by the following words:
   "Section 96(1): An impermissible avoidance arrangement means an arrangement, the main purpose of which is to obtain a tax benefit and it"
c) The Finance Act, 2013 did not adopt the generic definition of the term 'commercial substance' as recommended by the Shome Committee. However, the recommendation that the factors listed in section 97(4) of the Act shall be relevant and not sufficient to prove the commercial substance test has been amended as follows:

"Section 97 (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:-"

d) The Finance Act, 2013 has also adopted other recommendations made with regard to procedural aspects which has been dealt with u/s. 144BA

Although the major recommendations of the Shome Committee have been accommodated in the Finance Act, 2013, there are a lot of gaps in the procedural fronts of implementation of GAAR.

Another cause of concern is that, though the Shome Committee had pointed that as to which would be applied if both GAAR and SAAR are in force. The Finance Ministry has not made any guidelines with respect to this issue, thereby necessitating clarity as to whether or not, in the GAAR regime, the treaty protection will be available to the investor, when the GAAR is implemented.

[SECTIONS 25 & 26 OF THE FINANCE ACT, 2013]