

**PRESENTATION ON
DIRECT TAX CODE BILL, 2010 &
GENERAL ANTI- AVOIDANCE RULES**

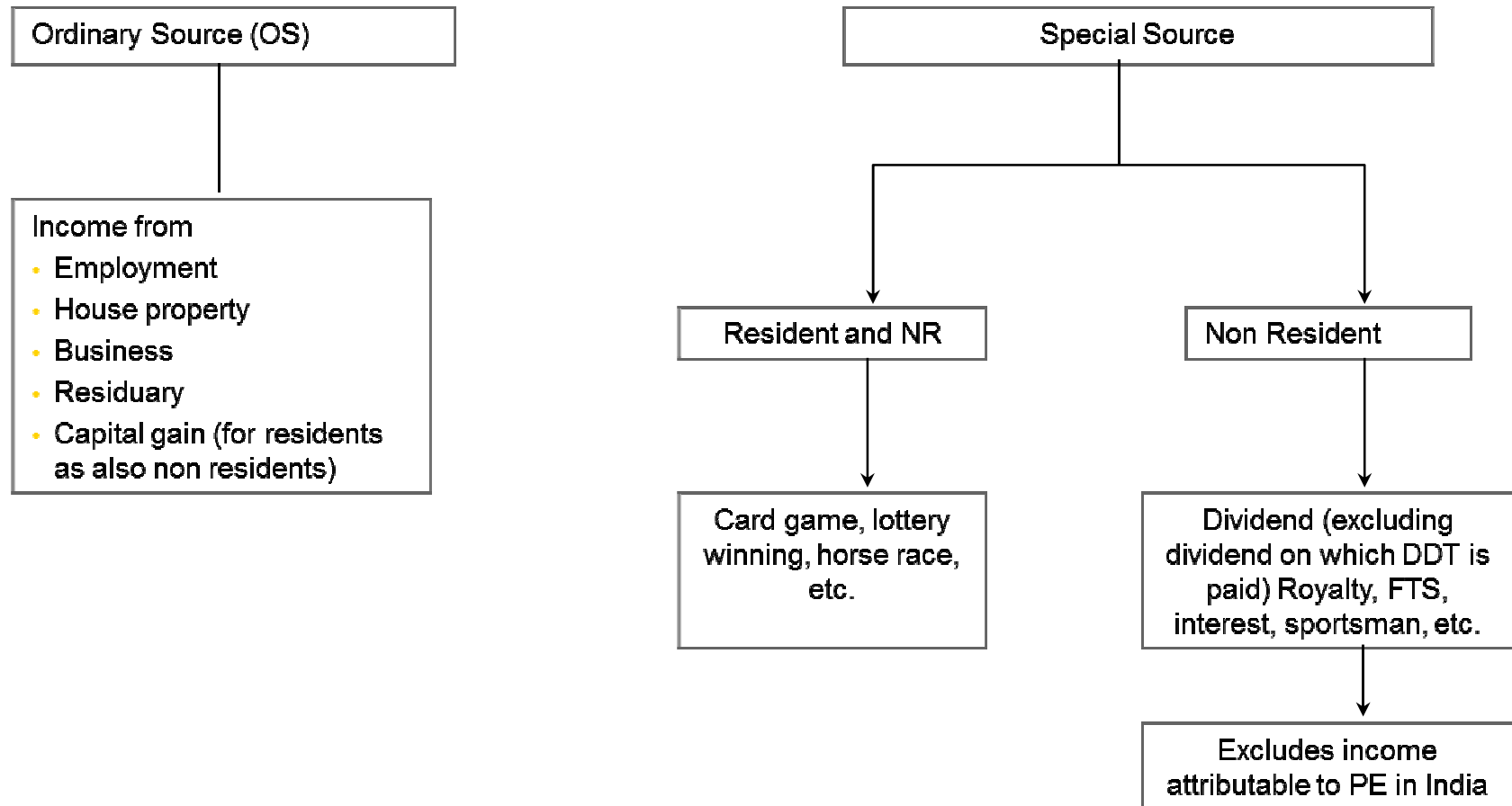
BACKGROUND TO DIRECT TAX CODE BILL, 2010

- ✓ Tax reform initiative
- ✓ Draft Bill of DTC, 2009 along with the Discussion paper was unveiled for the first time in August 2009
- ✓ The Government received over 1,600 representations on DTC, 2009
- ✓ Revised Discussion paper was released in June 2010 addressing major identified issues
- ✓ DTC placed in Lok Sabha on 30th August, 2010
- ✓ DTC 2010 to cost the Exchequer revenue loss of INR 531,720 Million on reduced rates
- ✓ Reference for examination and report to Standing Committee on Finance (SFC) on 9th September, 2010
- ✓ Report to Parliament by SFC on 9th March, 2012

DTC: An Overview

- ✓ Concept of Financial year for tax base as well as assessment
- ✓ Unified tax code for liability to income tax, wealth tax, DDT, MAT, etc
- ✓ Every accrual or receipt (whether a capital receipt or otherwise) which has the effect of enhancing net worth of a taxpayer is normally considered as chargeable income of taxpayer
- ✓ No separate rate of tax for capital gain- though, certain concession for Long term capital gains
- ✓ Introduction of 'Ordinary' & 'special source of income'
- ✓ Clarifies no double taxation in the hands of the same person for any year (S.17(i))
- ✓ Section 17(ii) provides that income includible in the hands of one person cannot be included in total income of the other
- ✓ Corollary to that, denies no deduction for expenditure allowed as a deduction in any other year [S.18(1)(c)]

COMPUTATION OF TOTAL INCOME UNDER DTC



DTC, 2010: Impact / Issues

- ✓ Slump sale to be taxed as capital gains and not business income, unlike DTC 2009
- ✓ Transfer of Security held by FIIs chargeable to Capital gains and not Income from Business
- ✓ Expenditure to be allowed in the year of payment of TDS – Two years' limitation under DTC 2009 dropped
- ✓ Weighted deduction for in-house scientific R&D facility increased to 200 percent in line with ITA
- ✓ Non-moving creditors beyond five years to be treated as taxable business income as against three years in DTC 2009

DTC, 2010: Impact / Issues

- ✓ Deduction for specified deferred revenue expenditure to be allowed on straight-line basis over 6 / 10 years as against allowance on WDV basis @ 25 percent / 15 percent as under DTC 2009
- ✓ Asset' based levy in DTC 2009 substituted with 'Book Profits' based levy as under ITA
- ✓ SEZ developers / SEZ Units no longer exempt from MAT
- ✓ MAT Credit : Similar Mechanism as under ITA
- ✓ Carry forward of MAT credit upto 15 years as against 10 years in the ITA
- ✓ MAT credit to lapse in case of conversion of a private company or an unlisted public company into a limited liability partnership

INCOME FROM EMPLOYMENT, PERSONAL TAXATION, INCENTIVE DEDUCTIONS TO INDIVIDUALS

INCOME FROM EMPLOYMENT

- ✓ Employer' is not defined in ITA, whereas DTC defines as follows :-
 - “employer” means a person who controls an individual under an express or implied contract of employment and is obliged to compensate him by way of salary*
- ✓ Withholding obligation on an employer who makes the payment which is in the nature of salary [S. 384(187)(a)]
- ✓ Contribution to superannuation fund in excess of Rupees One lakh is disallowable in hands of employer though deductible in hands of employee
- ✓ Though concept of NOR is done away with, exemption for income accruing outside India is provided for individuals satisfying the conditions of para 29 of Schedule VI which contains provisions along the lines of section 6(6) of ITA

INCOME FROM EMPLOYMENT

- ✓ Unlike ITA, no relief from tax for capital receipts available for compensation which is not exempt
- ✓ Medical expense reimbursement limit enhanced from Rupees fifteen thousand to Rupees fifty thousand
- ✓ Sponsored foreign medical treatment limit liberalized
- ✓ Withdrawal of leave Travel concession, however, Press report suggests it will be included as part of prescribed allowance
- ✓ Relief from tax not available for VRS / retrenchment compensation even if exempt from tax

POINT OF RELEVANCE TO INDIVIDUAL

- ✓ Significant additions / clarifications to list of allowable expenses:
 - Remuneration to any working participant of unincorporated body. Limits on deductibility to be prescribed.
 - Selling expenses (including warranty charges)
 - Expenditure for protecting or safeguarding the goodwill of the person which has necessarily to be preserved for the purpose of his business.
 - Entrance fees paid to club facility used for business
 - Sales promotional expenses
 - Deduction admissible for payment made in respect of remission/ cessation of liability assessed in the past
 - Quantum of H.O. expenses of NR attributable restricted to 0.5% of total turnover or gross receipts of business in India (instead of existing limit of 5% of total income)
 - Provision for doubtful debts for bank and FIs restricted to 1% of average advances (instead of 7.5% of total income & 10% of rural advances)
 - Provisions along the lines of section 43B of ITA introduced in DTC with respect to items being land revenue, taxes, bonus/ commission, leave salary, gratuity, etc

POINT OF RELEVANCE TO INDIVIDUAL

Nature of deduction	ITA	DTC 2010
Amount paid towards: - life insurance premium - health insurance premium	100,000 15,000	Aggregate not to exceed Rs 50,000
Medical treatment and maintenance of a dependent person with disability	50,000 (disability) 75,000 (severe disability)	50,000 (disability) 100,000 (severe disability)

- ✓ *As per DTC 2010, interest on SOP is allowed as a deduction from 'total income'. Thus, in a scenario where total income is NIL or insufficient to absorb the interest amount, the benefit will lapse unlike in case of ITA where loss from house property could be carried forward*

INCOME FROM HOUSE PROPERTY

SCHEME OF TAXATION

- ✓ The chapter is applicable for house properties ready for use [section 24(5)(b)]
- ✓ The definition of term 'house property' may leave litigation prone scope for one to suggest that the chapter cannot apply when there is bare letting without facility or service
- ✓ *Basis of charge remains ownership of house property under both ITA and DTC*
- ✓ *Under ITA, lessee of a lease of more than 12 years was considered to be the owner. This fiction is absent in DTC*
- ✓ Subject to exception in respect of SEZ, hotel etc, if income is assessable as business income, the chapter is applicable notwithstanding that letting is in the nature of trade, commerce or business
- ✓ Security deposit against long term leasing of 12 years or more is considered as income under residuary head. Amount allowed as deduction in the year of repayment of deposit

POINT OF RELEVANCE TO INDIVIDUAL

Particulars	ITA	DTC 2010
Basis of taxation	Property which is let as also vacant property (excluding one SOP)	Property which is actually let
Exclusions from charge	Property which is occupied for the purpose of business	Property which is occupied for business is not a let property and hence, stands excluded from the charge in which is w.r.t actual letting.
Basis of gross rent	Notional amount can also be part of annual value or annual rent.	No scope for notional addition. Gross rent comprises of rent actually received ³
	Receipt of arrears is chargeable in the year of receipt	No change
	Unrealised rent is, in specified cases chargeable only in the year of realization.	Rent is chargeable on "receivable" basis. There is no provision to exclude unrealized rent
Standard deduction	30%	20% (exhausts all the deductions including for composite letting)
Interest on un let property	Upto Rs 1.5 lakhs for a property which is self occupied	Upto Rs 1.5 lakh under S.74 provided the property is not at all let throughout the year *

**Deduction allowed to individual and HUF as tax incentives from gross total income. Unlike in ITA which permits carry forward of loss, in DTC, taxpayer will forfeit the claim if there is no positive gross total income.*

BUSINESS INCOME

SETTING UP OF A BUSINESS

- ✓ **Business defined to include profession**

- ✓ **Date of setting up of business defined**

Successful trial run of plant in case of business of manufacture, production or processing.

Readiness to commence 'commercial operations' in any other case.

- ✓ **Distinct & Separate business**

General test : Absence of interlacing or interdependence

- ✓ Pre-set up period expenses not allowable as deduction

- ✓ For presumptive and specified business cases, scheduled items, need to allocate common overheads

- ✓ Loss from all businesses in ordinary source segment largely fungible for the purpose of set off. Loss of Specified / Scheduled business (except tonnage tax) is also freed from ring fencing

SETTING UP OF A BUSINESS

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✓ **Date of setting up of business defined**

Successful trial run of plant in case of business of manufacture, production or processing.

Readiness to commence 'commercial operations' in any other case.

✓ **Distinct & Separate business**

General test : Absence of interlacing or interdependence

Deemed to be distinct and separate

- Unit manufacturing, processing, producing or trading in same goods but located physically apart
- Manufacturing, processing producing in same goods, but utilizing different raw material or manufacturing process
- Maintenance of separate books of account or 'capable' of being maintained
- Presumptive basis of taxation
- Special source income
- Speculative transactions in nature of business

BUSINESS INCOME COMPUTATION

✓ Normal Scheme

Gross earnings	A
Less:	
i. Operating expenditure	(B)
ii. Permitted Finance charges.	(C)
iii. Capital allowances	(D)
Profits of business	$A - (B + C + D)$

- ✓ Normal scheme will not apply to business of : Insurance, shipping company covered by tonnage tax, Mineral Oil & Natural gas, SEZ developer, businesses eligible for Investment linked incentives and presumptive cases

DTC IMPACT ON BUSINESS INCOME

- ✓ Rental Income of SEZ developers, hospital, hotel, convention center, cold storage excluded from House Property chapter. Such rental income is business income
- ✓ Interest income is residuary source income except in case of financial institution
- ✓ Dividend income is residuary source income for all tax payers
- ✓ Sale of business undertaking/ division is part of capital gains chapter
- ✓ Reimbursements (forming part of ordinary source of income) to be taxed only on receipt basis [S.33(2)(xxi)]. Expenses may still be allowed on accrual basis

OPERATING EXPENSES

- ✓ Significant additions / clarifications to list of allowable expenses:
 - Remuneration to any working participant of unincorporated body. Limits on deductibility to be prescribed.
 - Selling expenses (including warranty charges)
 - Expenditure for protecting or safeguarding the goodwill of the person which has necessarily to be preserved for the purpose of his business.
 - Entrance fees paid to club facility used for business
 - Sales promotional expenses
 - Deduction admissible for payment made in respect of remission/ cessation of liability assessed in the past
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 - Provision for doubtful debts for bank and FIs restricted to 1% of average advances (instead of 7.5% of total income & 10% of rural advances)
 - Provisions along the lines of section 43B of ITA introduced in DTC with respect to items being land revenue, taxes, bonus/ commission, leave salary, gratuity, etc

Items not allowable as deduction

- ✓ Expenditure 'attributable' to exempt income replacing the concept of '**in relation to**' as per existing ITA
- ✓ Provision for unascertained liability
- ✓ Expenditure, including capital expenditure, in favour of an associated person to the extent it is excessive/unreasonable
- ✓ Scope of disallowance on account of TDS
 - Deduction permissible if TDS paid before return filing due date
 - Else deduction, in the year of payment of TDS
- ✓ Interest paid to financial institution allowable only in the year of payment

Amortization of expenses (Schedule XXII)

Sr No	Deferred Revenue Expenditure	Amortization Period		Year from which deduction allowable
		ITA	DTC	
1	Non compete fees	Not specified	6	Year in which such amount is actually paid
2	Premium for obtaining any asset on lease or rent	Not specified	6	Year in which such amount is actually paid
3	Amount paid to an employee on account of VRS	5	6	Year in which such amount is actually paid
4	Expenditure by an Indian company on account of business re-organization	5	6	Year in which business reorganization takes place
5	Expenditure incurred by a resident Indian on any operations relating to prospecting of mineral oil or development of mine or other natural deposit of any minerals	10	10	Year in which such amount is actually paid
6	Loss on forfeiture of any agreement entered in the course of business	Not specified	6	Year in which the loss has been incurred
7	Preliminary expense in connection with setting up, extension of business or commencement of business (available with respect to cost of the project)	10	6	Year of setting up, extension of respective distinct business or commencement

Comparison of Depreciation rates – Schedule XV

Description of Asset	ITA	DTC '10
Buildings used as –		
(1) Hospital and Convention Centre	10%	15%
(2) Buildings acquired on or after the 1st day of September, 2002 for installing machinery and plant forming part of water supply project or water treatment system and which is put to use for the purpose of business of providing infrastructure facilities under clause (i) of Section 80-IA(4)	100%	10%
Rails –		
(1) Engines, coaches and wagons	-	40%
(2) Rolling Stock	-	15%
Books – Any other book other than used in profession or in libraries	100% / 60%	25%
Scientific Research Assets	100% (U/s.35)	100%
Family Planning asset (available only to companies)	1/10 th amortisation (U/s. 36)	25%

Comparison of Depreciation rates – Schedule XV

Description of Asset	ITA	DTC 2010
Intangible Assets:		
(1) Any right by way of licence or franchise to operate a business	25%	25%
(2) Asset or project constructed, set up or erected by the assessee and the benefit arises for a period not exceeding ten years and it is not owned by the assessee	-	20%
(3) Asset or project constructed, set up or erected by the assessee and the benefit arises for a period exceeding ten years and it is not owned by the assessee	-	15%

- ✓ Know-how qualifies for depreciation as an intangible asset similar to ITA
- ✓ Restrictive definition of know-how is deleted in DTC
- ✓ Concern regarding depreciation on goodwill still remains unaddressed

Implications of Finance Lease

- ✓ A business capital asset obtained under Finance lease is considered to be owned by the lessee.
 - Impacts right to claim depreciation
 - No specific back up provisions for computation of cost and finance income
- ✓ There may also be MAT implications depending on the accounting treatment. But, evaluate the measure of actual cost in the assessment of lessee
- ✓ Lease is finance lease if the following conditions are fulfilled **cumulatively**
 - ✓ contract for lease is entered into between two parties for leasing of a specific asset;
 - ✓ such contract is for use and occupation of the asset by the lessee;
 - ✓ the lease payment is calculated so as to cover the full cost of the asset together with the interest charges; and
 - ✓ the lessee is entitled to own, or has the option to own, the asset at the end of the lease period after making the lease payment;
- ✓ Aggressive planning of a transaction may be subject to the implications of GAAR

CAPITAL GAINS : OTHER THAN LISTED SHARES, EQUITY ORIENTED FUND (EOF)
UNITS AND BUSINESS RE ORGANISATION

Capital gains : Other than listed shares / EOF units

- ✓ Taxation as capital gain restricted to transfer of 'investment asset'
- ✓ Investment asset excludes the following-
 - Business trading assets
 - Business capital assets as defined in S.284(39)
- ✓ Asset being land constitutes an investment asset even if it is connected with business since the asset is excluded from scope of business capital asset
- ✓ Land forming part of building may also constitute an investment asset
- ✓ Investment asset is defined as under:
 - Capital asset which is not a business capital asset
 - Security held by FII
 - Undertaking or division of a business
- ✓ Capital gains taxed at the same rate as is applicable to any other income of taxpayer

Capital gains : Other than listed shares / EOF units

- ✓ Gain on transfer of investment asset transferred after the end of financial year next following the year of acquisition is computed separately. Such gain is calculated after considering:
 - Substitution of FMV as at 1.4.2000, at the option of taxpayer as cost of acquisition
 - Indexation of costs of acquisition*
 - Roll over exemption (restricted to individual/ HUFs)
- ✓ None of the above adjustments permitted if asset is sold within one year from end of the year of acquisition. STCG hence chargeable as normal income
- ✓ Provision for reckoning holding period of previous owner for determining tenure is absent in DTA
- ✓ Capital loss is though ring fenced however , the same can be adjusted against any other capital gain income (no distinction between short term and long term) and carried forward for indefinite period
- ✓ Losses from any other source available for set off against capital gains income

Capital gains : Other than listed shares / EOF units

- ✓ Consideration for transfer of land or building is stamp duty value of the asset regardless of higher actual consideration received [See overriding impact of Section 50(2)(h) read with section 50(1)]
- ✓ CBDT to prescribe manner to determine 'fair market value' for capital gains purposes
 - For determining full value of consideration [S.50(2) r.w.s 314(93)]
 - For determining value as on 1.04.2000 [Refer, S.53(1) / (3) r.w.S.314(93)]
- ✓ No specific right to taxpayer to get value determined by valuation officer if the taxpayer is not agreeable to adoption of consideration based on value as per stamp duty law [Section 50(2)(h)]
- ✓ *For Roll over Investment under section 55(6), unlike ITA, DTC does not provide condition of 3 years lock in period for NIA nor cost substitution in case of violation*

TAXATION OF INVESTORS- SHARES

STT based sale of listed shares

Particulars	Position under ITA	DTC 2010
LTCG	➤ Exempt	➤ Exempt by way of full deduction of gain
Period of holding for LTCG	➤ More than 1 year	➤ More than 1 year
STCG rate	➤ 15%	➤ No special rate; hence, virtually, half of normal rate? ➤ 50% deduction for gains

Non-STT based sale of shares*

Particulars	Position under ITA	DTC 2010
LTCG	<ul style="list-style-type: none"> ➤ For listed shares, taxable at 10% without indexation or 20% with indexation benefit ➤ For others, taxable at 20% with indexation benefit. 	➤ Taxation at normal rates with indexation benefit
Period of holding for LTCG	➤ More than 1 year	➤ More than 1 year from end of F.Y. of acquisition.
STCG rate	➤ Normal rate	➤ Normal rate

**An area of concern for substitution of FMV as on 1.4.2000 in respect of shares (other than STT based long term shares) covered by Seventeenth Schedule in view of language of S.53(1) r.w.s. 53(2) [contrasted with S. 55(2)(aa) r.w.s. 55(2)(b)(i) / (ii) of ITA]*

SCHEME OF TAXATION

- ✓ Residuary head attracted only if income not included under any other specified heads.
Certain sources of income, however, specifically covered [E.g. interest income, except in case of permitted financial institutions is chargeable under residual head]
- ✓ Applies only to income from ordinary sources; does not apply to income from special sources, such as e.g. interest income of non resident is covered as a special source
- ✓ Dividend income is a residuary head income. S. 58(2)(a) of DTC 2010 relieves charge only in case where, in respect of dividend, DDT has been paid. Unlike DTC, ITA section 10(34) provides exclusion in respect of dividend referred to in section 115-O of ITA. Hence, if there is default of DDT payment under DTC, question may arise whether the exclusion of dividend income is effective
- ✓ On a combined reading of section 59(1)(a)(i) r.w.s 59(2) of DTC 2010, it is doubtful whether, against dividend income from foreign company or against chargeable interest income, or against any other form of chargeable dividend income, expenditure in the nature of interest will be allowable as deduction

LIFE INSURANCE POLICIES-Income Tax Perspective

Particulars	Position Under ITA	DTC 2010
Premium threshold for tax benefit qualifying policy	20% of actual capital sum assured	5% of capital sum assured
Tax benefit for investment in qualifying policy	Deduction u/s. 80C within overall cap of Rs.1 Lac for individuals / HUFs	Deduction u/s. 70 within overall cap of Rs. 0.50 L for individuals / HUFs.
Interim/ Maturity proceeds of qualifying policy.	Exempt u/s. 10(10D)	Exempt (by way of full deduction)
Interim/ Maturity proceeds of non qualifying policy	Debatable whether excess over premiums paid is Capital gains or Income from other sources	<ul style="list-style-type: none"> ▶ Receipts of Approved equity oriented policy on which distribution tax u/s.110 is paid @5% is exempt by way of full deduction ▶ Receipts of other policies taxable as Income from residuary source subject to deduction of premiums paid* . Receipts liable to withholding of 10% / 20% for residents and 30% for non residents subject to threshold of Rs.10,000/- p.a.for non corporates
Death claim proceeds	Exempt	Exempt

** Premiums paid till date of interim receipt not deductible against subsequent receipts.*

SOURCE RULES

- ✓ Resident to pay tax on overseas income regardless of taxation in overseas jurisdiction [section 3(4)]
- ✓ Income deemed to accrue or arise in India (including in case of non residents) defined to cover:
 - 'Business connection' in India
 - Any property or source of income in India
 - Income from transfer of a capital asset situated in India²
 - Royalties or fees for technical services
 - Interest in respect of any debt for purpose of earning any income sourced in India
- ✓ Income of NR from activity confined to purchase of goods for export not deemed to accrue in India. Concessions contained in Explanation 1 to Section 9(1) of ITA for news agency and certain cinematographic producing entities withdrawn
- ✓ Deeming fiction for FTS, royalty, etc. applies regardless of:
 - Payment outside India
 - Rendition of services outside India
 - Income 'otherwise' not accruing in India
 - NR does not have residence or place of business or business connection in India

FOREIGN TAX CREDIT (FTC)

- ✓ Unilateral FTC is provided in terms of Section 207 of DTC 2010
- ✓ It is available to only resident. DTC 2010 makes it comparable to ITA and restricts it to a resident
- ✓ Ordinary FTC is available in respect of income accruing outside India. The credit is available in respect of income from any overseas country or specified territory
- ✓ 207(3) seems to be a clarificatory provision. It clarifies that FTC will not exceed Indian Tax payable in respect of overseas income as also overall tax liability of the assessee
- ✓ The right to prescribe mode and manner of FTC is provided for (may have rules surrounding CFC)

TRANSFER PRICING PROVISIONS

- ✓ Determination of arm's length price (ALP) similar to that existing under the current rules
- ✓ Safe Harbour rules to be framed by the Board for determination of ALP
- ✓ Associated Enterprise (AE) definition widened to include [S. 124(5)] :
 - Clause (x): Provision of services (directly or indirectly) to another enterprise or person specified by it, if the amount payable and other terms relating thereto are influenced by such other enterprise
 - Presently such provision subsists only for sale of goods manufactured, processed etc by AE's
 - Clause (xiv): If any of the enterprises to the transaction are situated in any specific or distinct location which may be prescribed

TRANSFER PRICING PROVISIONS

- ✓ 'ALP' definition is modified and now reads as under [Section 124(2)]:
 - “arm’s length price” means a price which is applied, or proposed to be applied, in a transaction between persons, enterprises or undertakings, other than associated enterprises, in uncontrolled, unrelated or independent conditions”*
- ✓ Transfer Pricing assessment
 - TP Accountants Report to be filed with TPO within due date
 - Notice for assessment to be served within 2 months from end of FY
- ✓ Best judgement ALP determination if taxpayer fails to co-operate
- ✓ TP assessment to be completed within 42 months from the end of FY in which the transaction is entered into (ITA limit is 43 months)

TRANSFER PRICING PROVISIONS

✓ **Penalties rationalized/modified as under:**

Particulars	ITA	DTC
Under reporting of tax base	100% to 300% of tax base under reported	100% to 200% of tax base under reported
Failure to maintain documentation	2% of value of international transaction	INR 50,000 to 2,00,000
Failure to furnish documents	2% of value of international transaction	No specific provision
Failure to obtain or furnish accountants report	INR 1,00,000	INR 50,000 to 2,00,000

- ✓ Board empowered to enter into Advance Pricing Agreements (APA) in respect of determination of ALP
- ✓ APA can be valid for a period not exceeding five consecutive FYs. Not binding in case of change of law and change in basis
- ✓ APA is single track, binding only on applicant in India

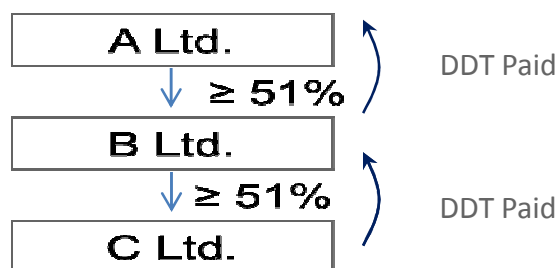
MINIMUM ALTERNATIVE TAX (Section 104 of DTC)

- ✓ MAT continues to be payable by a company on book profit . Controversy on applicability to foreign company still continues
- ✓ MAT rate is increased to 19.93% from 18%
- ✓ MAT is a likely huge burden on companies enjoying investment linked incentive (being the companies who will need to maintain their accounts under Schedule VI as per applicable accounting standards)
- ✓ There is no protection extended to SEZ developers and SEZ units who hitherto availed immunity from MAT under section 115JB(6) of ITA
- ✓ Tonnage tax companies are exempted from MAT on book profit / loss derived from core shipping activities. [Refer para (12) of the Tenth Schedule]
- ✓ MAT credit carry forward extended to 15 years from existing limit of 10 years

DDT under DTC

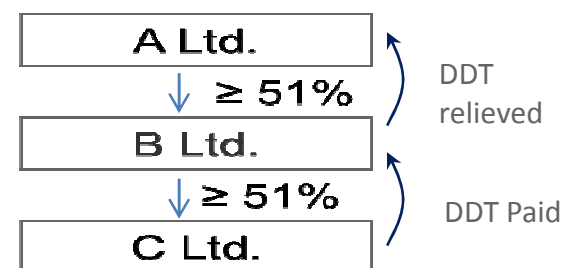
- Under ITA, SEZ Developers are excluded from DDT. The benefit is not extended under DTC
- Unlike ITA, the residual head of income excludes dividend income from purview of the head provided DDT has been paid under section 109.

ITA Scenario



- Dividend distribution by B subject to DDT. Exemption not available to B as B is subsidiary of A
- No tax payable by A on onward distribution if A is not a subsidiary

DTC Scenario



- B would not be subject to DDT despite being subsidiary of A
- A would pay tax on onward dividend distribution

Filing of Return & Regular assessment – [S.144 to 157]

- ✓ Provisions largely along the lines of ITA.
- ✓ Significant deviations in DTC are:
 - Concept of assessment year discarded. Income computation and assessment are for 'financial year'
 - Common return of tax base for Income tax, Wealth tax, DDT and BPT
 - Due date for submission of return ²
 - Non- corporate taxpayers not having business income-30th June
 - Others (including tax audit cases and all companies) – 31st August
 - Mandatory filing of return for following entities regardless of income level
 - Firm / AOP/ BOI
 - Societies (including co-operative societies)
 - Local authority
 - CBDT can notify additional classes of persons
 - Delayed filing of return will result in lapsing of losses (**including depreciation losses**) of relevant year
 - Power of A.O to call for records of earlier years in scrutiny assessment enhanced to 6 years. [3 years in ITA]
 - Time limit of 6 months introduced for Valuation Officer to submit report to A.O.

BOOKS OF ACCOUNTS, INFORMATION & DOCUMENTS

- ✓ Turnover limits of Tax Audit are revised as under:

Particulars	ITA	DTC
Profession	15L	25L
Business	60L	100L

- ✓ Books of accounts for persons in business include cash book, ledger, register of daily inventory of business trading asset
- ✓ Bills or receipts in value exceeding Rs. 200/- should carry name, address & other prescribed particulars
- ✓ Specific exemption relief from obligation to tax audit has been provided in certain cases of presumptive taxation (E.g., approved turnkey power projects, services / facilities for prospecting production, etc. of mineral oil, shipping companies, aircraft companies)
- ✓ No specific exemption to presumptive taxation cases from obligation to maintain books of account or from maintaining details of international transactions
- ✓ TP audit report to be furnished to TPO contrary to ITA which requires report to be furnished to the Assessing Officer

WEALTH TAX

Particulars	WTA	DTC 10
Taxpayers covered	<ul style="list-style-type: none"> ▶ Individual, HUF and companies @ 1% on threshold > Rs. 30 Lakhs 	<ul style="list-style-type: none"> ▶ All taxpayers except NPOs @ 1% on threshold > Rs. 1 Crore ▶ Firms,¹ AOPs, Trusts, etc will be taxed in their own capacity ▶ Local authority also covered
Deduction for related debts owed	<ul style="list-style-type: none"> ▶ Available 	<ul style="list-style-type: none"> ▶ Available
Method of valuation	<ul style="list-style-type: none"> ▶ Prescribed in Schedule III 	<ul style="list-style-type: none"> ▶ To be prescribed
Clubbing provisions for individuals	<ul style="list-style-type: none"> ▶ Assets held by spouse, minor child, revocable trust, etc and converted HUF property 	<ul style="list-style-type: none"> ▶ Continues broadly on similar lines with certain modifications

¹ Partner/Member should not be taxed again on same wealth

WEALTH TAX

Particulars	WTA	DTC 10
Specified assets	<ul style="list-style-type: none"> ▶ Urban land, building (including farm house located within 25 kms of any municipality or Cantonment Board), ▶ motor cars, ▶ jewellery & bullion, yachts, boats, aircrafts and ▶ cash in hand 	<ul style="list-style-type: none"> ▶ All existing specified assets² plus following additional assets - <ul style="list-style-type: none"> ▶ Helicopter ▶ Archaeological collections, drawings, paintings sculptures, or any other work of art ▶ Watch having value in excess of Rs. 50,000/- ▶ Deposits located in bank located outside India in case of individuals and HUFs (even if recorded in books of account) ▶ Deposits located in bank located outside India in case of other persons only if not recorded in books of account. [Does not however include units of overseas mutual fund / debentures of F Co. and shares of F Co. which is not CFC]. ▶ Any interest in a foreign trust or any other body located outside India (whether incorporated or not) other than a foreign company¹ ▶ Any equity or preference share held by a resident in a controlled foreign company (as referred to in the Twentieth Schedule)

* Cash in hand in excess of Rs. 50,000 in hands of individuals / HUFs and unrecorded cash in hands of others

**Threshold for cash in hand for individuals/HUFs enhanced to Rs. 2 lakhs and not chargeable in hands of others

EXEMPTED ASSETS – IMMOVABLE PROPERTY

WTA	DTC 2010
<ul style="list-style-type: none">▶ Urban land on which construction is not permissible or on which building is constructed with approval of appropriate authority▶ Unused land held for industrial purposes upto two years▶ Urban land held as stock in trade upto ten years	<ul style="list-style-type: none">▶ Exemption not available
<ul style="list-style-type: none">▶ Assets⁵ acquired from moneys brought from outside India by returning Indians and PIOs	<ul style="list-style-type: none">▶ Exemption not available

EXEMPTED ASSETS – MOVABLE PROPERTY

WTA	DTC 2010
<ul style="list-style-type: none"> ▶ Motor cars used in business of running them on hire or as stock in trade ▶ Jewellery, bullion, etc used as stock in trade ▶ Heirloom jewellery of Ruler 	<ul style="list-style-type: none"> ▶ All these assets continue to be exempt
<ul style="list-style-type: none"> ▶ Yachts, boats and aircrafts used for commercial purposes 	<ul style="list-style-type: none"> ▶ Exempt (including helicopters) if used in business of running them on hire or as stock in trade
<ul style="list-style-type: none"> ▶ Assets located outside India for foreign citizens and non-resident/not ordinarily resident individuals and HJFs 	<ul style="list-style-type: none"> ▶ Assets located outside India exempt for non-residents
<ul style="list-style-type: none"> ▶ Assets⁶ brought from outside India or acquired from moneys brought from outside India by returning Indians and PIOs 	<ul style="list-style-type: none"> ▶ Exemption not available

GAAR PROVISIONS

RATIONALE OF GAAR

- ✓ Relevant extract from Revised Discussion Paper

In the past, the response to tax avoidance has been the introduction of legislative amendments to deal with specific instances of tax avoidance. Since the liberalization of the Indian economy, increasingly sophisticated forms of tax avoidance are being adopted by the taxpayers and their advisers. The problem has been further compounded by tax avoidance arrangements spanning across several tax jurisdictions. This has led to severe erosion of the tax base. Further, appellate authorities and courts have been placing a heavy onus on the Revenue when dealing with matters of tax avoidance even though the relevant facts are in the exclusive knowledge of the taxpayer and he chooses not to reveal them. In view of the above, it is necessary and desirable to introduce a general anti avoidance rule which will serve as a deterrent against such practices. This is also consistent with the international trend

GAAR: INTRODUCTION

✓ Concept of Tax Evasion, Tax Avoidance & Tax Planning

- **Tax Evasion** as defined by OECD means *“illegal arrangements where liability to tax is hidden or ignored, i.e. the taxpayer pays less tax than he is legally obligated to pay by hiding income or information from the tax authorities”*

Example: Non booking of cash revenue or excess booking of vague expenses

- **Tax Avoidance** as defined by OECD means *“an arrangement of a taxpayer’s affairs that is intended to reduce his liability and that although the arrangement could be strictly legal is usually in contradiction with the intent of the law it purports to follow”*

Example: locating assets in offshore jurisdictions, spreading of income to other taxpayers with a lower marginal tax rate

- **Tax Planning** as defined by OECD means *“an arrangement of a person’s business and/or private affairs in order to minimize tax liability”*

Example: Legitimate tax planning would involve taxpayer’s decision to operate a new business as a company or LLP or a partnership. Similarly, choosing between operating a branch or a wholly owned subsidiary also entails tax planning

GAAR: IMPERMISSIBLE TAX AVOIDANCE SCHEMES

Characteristics

- ✓ Lack of Economic Substance
- ✓ Use of Tax-Indifferent Accommodating Parties or Special Purpose Entities
- ✓ Unnecessary Steps and Complexity
- ✓ Tax haven arrangements

PRO's and CON's

- ✓ Short-Term Revenue Loss
- ✓ Disrespect for the Tax System and the Law
- ✓ Increasing Complexity
- ✓ Costs to the Economy
- ✓ Unfair Shifting of the Tax Burden
- ✓ Impairment of the ability of government to implement its various beneficiary schemes

TAX AVOIDANCE: RESPONSES BY GOVERNMENT

✓ Legislative solutions

- SAAR – Specific anti-avoidance rules targeted at specific tax avoidance arrangements
- TAAR – Targeted anti-avoidance rules such as provisions of newly enacted section 94A of the Income Tax Act, 1961
- GAAR – General anti-avoidance rules which are as the name suggests a catch-call system for tax avoidance enacted in section 95 to section 102 of the Income Tax Act, 1961

✓ Bilateral measures are also pursued through the Treaties or Double Taxation Agreements (DTAA's)

✓ Judicial solutions

- These may alternatively be known as 'Court-based GAAR i.e. CAAR' or 'Judicial anti-avoidance rules (JAAR)'

✓ Administrative solutions

- Administrative measures are mainly to ensure compliance and/or to detect tax avoidance

GAAR BACKGROUND: IN INDIAN CONTEXT

- ✓ Position of law in India currently (Court-based GAAR)
 - CIT vs A Raman and Co. ([1968] 67 ITR 11)
 - McDowell & Co. Ltd vs Commercial Tax Officer ([1985] 154 ITR 148)
 - CWT vs Arvind Narottam (173 ITR 479)
 - Union Bank of India vs Playworld Electronics Pvt Ltd (184 ITR 308)
 - Union of India vs Azadi Bachao Andolan ([2003] 263 ITR 706)
 - Vodafone International Holdings B.V. vs Union of India ([2010]329 ITR 126)

- ✓ Form over substance still prevails in India

- ✓ Legal character of the transaction should not be disregarded in pursuit of substance unless tax is sought to be avoided by adopting colorable devices wherein lifting of corporate veil would nonetheless be permitted by authorities in such circumstances

AN INSIGHT INTO GAAR PROVISIONS

- ✓ GAAR provisions may be invoked once a transaction is declared as ‘impermissible avoidance arrangement’. A thorough review of the various definitions contained in various sub-sections of section 102 of ITA is imperative, satisfaction of which could ultimately lead the Commissioner to declare a transaction as an ‘impermissible avoidance arrangement’

- ✓ Term ‘impermissible avoidance arrangement’ has been defined in Section section 96 of ITA
 - ***The main purpose of an arrangement, whether looked in part or whole or in any step of such arrangement therein, is to obtain tax benefit;***
 - Term “**arrangement**” as defined in Section 102 of the ITA is wide enough to cover any type of transaction, operation, scheme, agreement or understanding, irrespective of whether they are enforceable or not and also extends to include all steps therein or parts thereof;

AN INSIGHT INTO GAAR PROVISIONS

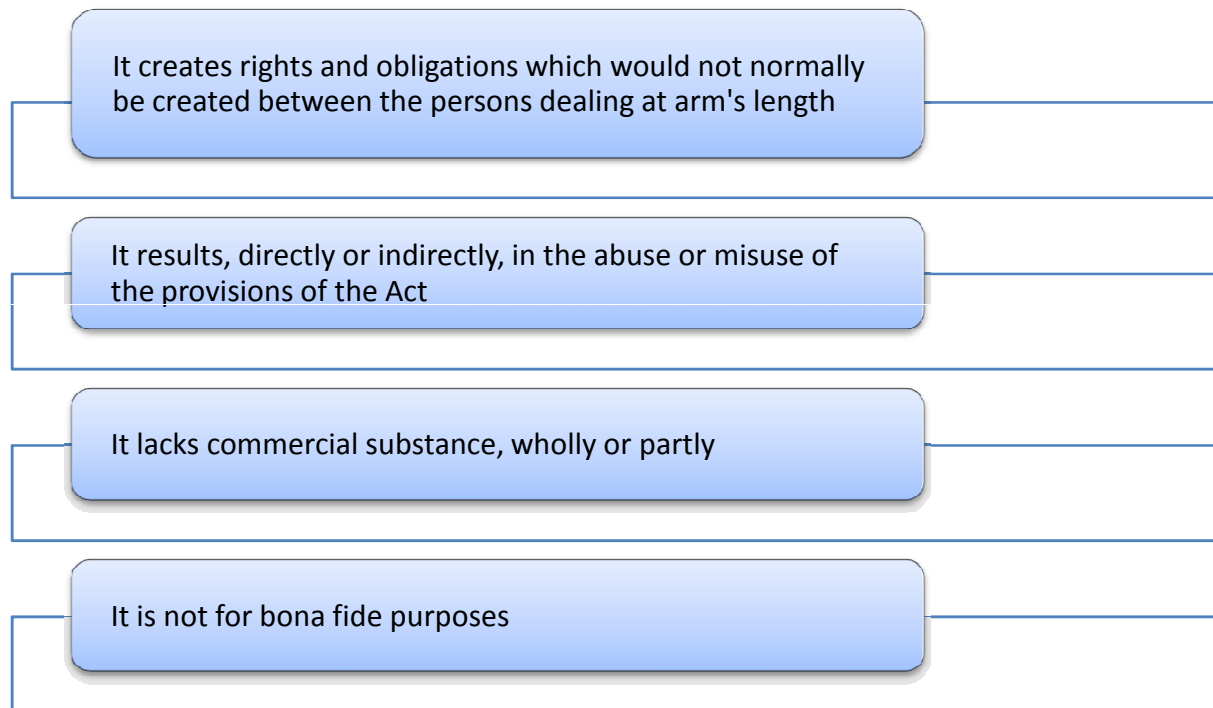
- Term “Tax Benefit” –Scope/Situations



- Another fundamental question which arises is what can trigger the GAAR provisions, at the time when actual tax benefit arises or when tax benefit accrues to the parties or even at the stage much earlier than it is accrued or arisen i.e. at the planning stage??

AN INSIGHT INTO GAAR PROVISIONS

- ✓ To establish an arrangement as an impermissible avoidance arrangement, tax benefit is to be looked at in conjunction with any of the given four conditions [section 96]:



AN INSIGHT INTO GAAR PROVISIONS

- a) First criteria laid down in the above condition aims to test the motive of the parties getting into an arrangement

Example: A Ltd a Limited liability company has a subsidiary in India i.e. B Pvt. Ltd. A had setup B with a minimum capital contribution of Rupees 100,000. For additional funding, A has given unsecured loan at the interest rate of % p.a. (Presumption that there is no thin capitalization regulation in India)

- b) Second criteria emphasize the use of the provisions of the statute to effectively reduce the tax liability

misuse analysis looks to specific provisions in isolation from the broader scheme of the ITA, while the abuse analysis looks to the purpose, scheme or policy reflected in the provisions of the ITA as a whole

AN INSIGHT INTO GAAR PROVISIONS

- c) Third criteria as envisaged in section 97 of ITA states that an arrangement, either in part or whole, shall be treated as an impermissible, if it lacks commercial substance
- A step in, or a part or whole of an arrangement shall be deemed to be lacking commercial substance if it falls under any of the following-
 - (i) 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
 - (ii) the legal substance, or effect, of the arrangement as a whole is inconsistent with, or differs significantly from, the legal form of its individual steps
 - (iii) involves the location of an asset or of a transaction or the place of residence of any party which is without any substantial commercial substance other than obtaining the tax benefit

AN INSIGHT INTO GAAR PROVISIONS

(iv) If it includes, or involves any of the following:

- i. round trip financing* without regard to whether or not the round tripped amounts can be traced to funds transferred to, or received by, any party in connection with the arrangement; or the time, or sequence, in which round tripped amounts are transferred or received; or the means by, or manner in, which round tripped amounts are transferred or received;
- ii. an **accommodating or tax indifferent party** (for example, use of conduit entity/person)
- iii. any element that have the effect of offsetting or cancelling each other;
- iv. a transaction which is conducted through one or more persons and disguises the nature, location, source, ownership, or control of the fund; (for example, use of colorable devices or use of sham entities or hiding behind the corporate veil)

AN INSIGHT INTO GAAR PROVISIONS

- ✓ The definition of Round Trip Financing is an inclusive definition which includes
 - Financing in which funds are transferred among the parties to the arrangement; and
 - Transfer of the funds that would result, directly or indirectly, in a tax benefit but for the provisions of this chapter or significantly reduce, offset or eliminate any business risk incurred by any party to the arrangement

- ✓ Example to understand the basis of the round trip financing
X Ltd., an Indian company, invests US\$ 10 Million in newly setup Singapore wholly owned subsidiary which in turn invests back in India either directly into X Ltd. or indirectly through investment in another Indian company which invests in X Ltd

AN INSIGHT INTO GAAR PROVISIONS

- ✓ Term 'accommodating party' as defined in section 97(3) of ITA means a party to an arrangement who, as a direct or indirect result of his participation, derives any amount in connection with the arrangement, which shall
 - (a) be included in his total income which would have otherwise been included in the total income of another party;
 - (b) not be included in his total income which would have otherwise been included in the total income of another party;
 - (c) be treated as a deductible expenditure, or allowable loss, by the party which would have otherwise constituted a non-deductible expenditure, or non allowable loss, in the hands of another party; or
 - (d) result in pre-payment by any other party;
- ✓ *Section 97(4) provides 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.*

AN INSIGHT INTO GAAR PROVISIONS

✓ Example

- X Pvt. Ltd. is an Indian company having surplus funds generated out of operations
- X Pvt. Ltd. enters into arrangement with Y Ltd. and A Ltd. where under, X Pvt Ltd will invest in the Y Ltd. by subscribing the shares of Y Ltd
- Y Ltd will in-turn give loan to A Ltd., a listed company
- A Ltd. will re-lend this amount to X Pvt. Ltd
- As per the pre-decided arrangement, X Pvt. Ltd. will be able get its own funds back into India and additionally will also be able to claim the interest payable on loan from A Ltd. as a deductible expenditure
- A Ltd. may be treated as the 'accommodating party' wherein the income which would have accrued to X Ltd. is reduced by way of claiming interest paid/payable to A Ltd. as a deductible expenditure



AN INSIGHT INTO GAAR PROVISIONS

- ✓ Consequences of an arrangement being declared as impermissible avoidance arrangement on the premise of various self explanatory parameters as discussed below [section 98 of ITA]:
 - *disregarding, combining or re characterising any step in, or a part or whole of, the impermissible avoidance arrangement;*
 - *treating the impermissible avoidance arrangement as if it had not been entered into or carried out;*
 - *disregarding any accommodating party or treating any accommodating party and any other party as one and the same person;*
 - *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;*

AN INSIGHT INTO GAAR PROVISIONS

- *reallocating amongst the parties to the arrangement*
 - *any accrual, or receipt, of a capital nature or revenue nature; or*
 - *any expenditure, deduction, relief or rebate*
- *treating*
 - *the place of residence of any party to the arrangement; or*
 - *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
- *considering or looking through any arrangement by disregarding any corporate structure.*
- *For the purposes of the above*
 - (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.*

Procedures in applying GAAR

✓ Section 144BA r.w.rule 10 UB

- Assessing Officer to issue notice [in terms of rule 10UB(2)] seeking objections of the assessee before making a reference to the commissioner
- Issue of notice [in terms of rule 10UB(2)] shall contain the following-
 - Details of the arrangement
 - Tax benefit arising thereof
 - Basis and reason for considering main purpose of identified arrangement is to obtain tax benefit
 - Basis and reason for satisfaction of the conditions as envisaged in section 96
- Reference in Form 3CEG by AO to the Commissioner under section 144BA(1)
- Commissioner to serve notice on the taxpayer providing an opportunity for a period not exceeding 60 days
- Commissioner shall pass an order as he deems fits , declaring whether the arrangement is an impermissible avoidance arrangement or not

Procedures in applying GAAR

- Commissioner to record his satisfaction in Form 3CEI before making a reference to the Approving panel
 - Directions issued by Approving panel within specified time period shall be binding on the assessee and the commissioner and other officers subordinate to him
 - Appeal shall rest to second appellate authority against the order passed u/s 153C r.w.s 144BA(12)
-
- ✓ **Burden of proof:** The burden of proof vests with the taxpayer to establish that the tax benefit was not the main purpose of the arrangement

 - ✓ Powers conferred on the Commissioner could lead to grave consequences for the taxpayer, shall he not be able to satisfy the Commissioner

APPLICABILITY OF GAAR PROVISIONS

- ✓ Chapter X-A consisting of provisions of section 95 to 102 as inserted by Finance Act 2013 shall be effective with effect from 01/04/2016
- ✓ GAAR will not apply to such FIIs that choose not to take any benefit under an agreement under section 90 or section 90A of the Income-tax Act, 1961
- ✓ GAAR will also not apply to non-resident investors in FIIs
- ✓ In order to attract the provisions of GAAR in terms of Rule 10U, tax benefit arising out of identified arrangement in a relevant assessment year should exceed a monetary threshold of Rupees 3 crores in aggregate to all parties to arrangement

APPLICABILITY OF GAAR PROVISIONS

- ✓ Provisions of Chapter X-A shall apply to any arrangement in respect of which tax benefit has been obtained on or after 1st Day of April, 2015 irrespective of the date on which agreement has been entered into
- ✓ Where a part of the arrangement is an impermissible avoidance arrangement, GAAR shall be restricted to the tax consequence of that part which is impermissible and not to the whole arrangement
- ✓ Time limits for action by the various authorities under the GAAR provisions shall be as provided in terms of section 144BA(1) read with rule 10UC