

Will GAAR Stand the Test of the Constitutional Scrutiny?

1. General Anti-avoidance Rule (GAAR) is a concept which generally empowers the Revenue Authority in a country to deny tax benefit of transactions or arrangements which do not have any commercial substance and the only purpose of such a transaction is achieving the tax benefit.

2. The GAAR will not apply to the transactions when the taxpayer has one or more bona fide ways of doing a transaction and he selects the manner he wants.

3. The provisions are based on the doctrine of “substance over form” which means the authorities will look into its actual substance. This doctrine is highly subjective and uncertain. The Bombay High Court in Provident Investment Co. Ltd. (1953 SCC OnLine Bom 35) has observed that: To look to the substance of the matter and ignore the legal position is to substitute the “uncertain and crooked cord of discretion” for the “golden and straight mete wand of the law”.

4. GAAR is a well-established law that, as stated in Section 90(2) of the Income Tax Act and upheld by the most recent landmark decision of the Supreme Court in Engg. Analysis Centre of Excellence (P) Ltd. v. CIT, the more advantageous provisions or articles of the DTAA's will prevail over the inconsistent provisions contained in the Income Tax Act.

5. To overcome Section 90(2) the legislature has inserted another sub-section (2-A) in the said section which states, “Notwithstanding anything contained in sub-section (2), the provisions of GAAR shall apply to the assessee even if such provisions are not beneficial to him.

6. Article 253 of the Constitution of India, “gives power to Parliament to make any law for the whole or any part of the territory of India for implementing any treaty, agreement, or convention with any other country or countries or any decision made at any international conference, association, or other body. DTAA have been enacted by exercising powers under Article 253.

7. GAAR is an instance of the exercise of powers under Article 246. The High Court of Andhra Pradesh, in *Sanofi Pasteur Holding SA v. Deptt. of Revenue* and held that: Once a law has been enacted under Article 253, every other law is subject to that law and a law made under Article 253 cannot be amended by a subsequent statute, which has been ordinarily made under the powers conferred under Article 246.

8. It is upon the Courts to interpret the provisions and test them on constitutional parameters but till then adequate safeguards and guidelines must be provided.