

Domestic and Cross-Border Taxation

Post GAAR and BEPS

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Agenda



KEY IMPACT
AREAS:

Setting the Stage- Why GAAR & BEPS?

GAAR- Features & its Impact

BEPS- Features & its Impact

Summing up



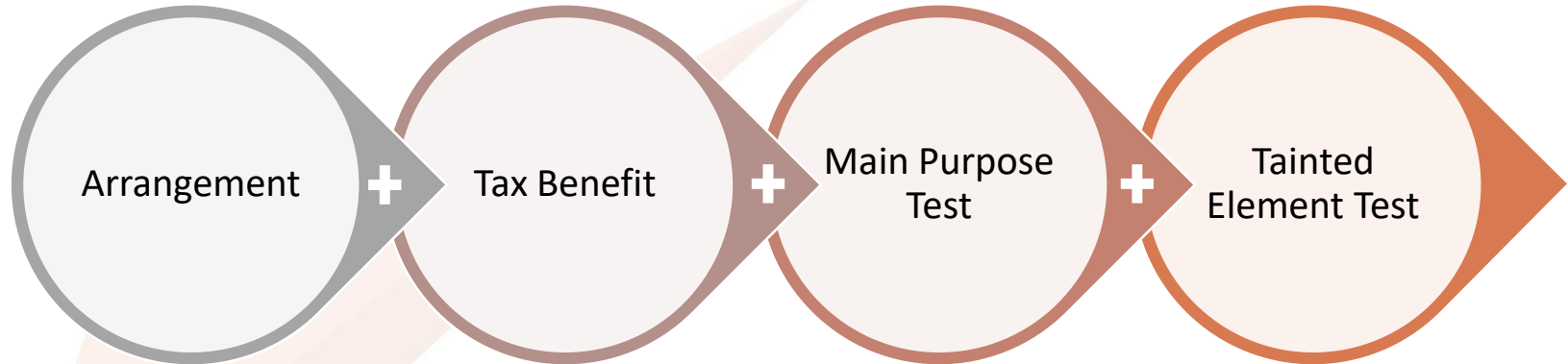
Setting the stage – GAAR and BEPS

- Increased pressure on revenue collections globally
- Austerity measures by Governments all over the world – post the 2008 financial crisis
- Inadequacy of current national and international tax regimes to effectively deal with innovative and complex structures and business models
- Increased focus on tax avoidance by media and Civil Society groups / NGOs
- Political consensus on need to tackle aggressive ‘avoidance’ techniques – both in India and globally

**Global Response:
The BEPS Project at the OECD**

**Indian Response:
Treaty re-negotiation, POEM,
thin cap, GAAR etc.**

GAAR – Features



GAAR applies when:

- The taxpayer has entered into an '**arrangement**'
- A '**tax benefit**' is obtained by the taxpayer from the arrangement
- The '**main purpose**' of the arrangement is to obtain a tax benefit
- Any one of the '**tainted element**' tests are met i.e. - (i) creates rights and obligations not at arms length (ii) results in misuse or abuse of the Act (iii) lacks commercial substance; or (iv) entered into by means that are not bona fide

GAAR – Impact

- Strict compliance with letter of the law no longer a defence to GAAR – intent and purpose become relevant
- Wide ranging powers given to the tax authorities to determine tax consequences of impermissible avoidance arrangements
- GAAR prevails over tax treaties
- GAAR applies alongside Specific Anti-Avoidance Rules (CBDT Circular No. 7 of 2017)
- Could affect many domestic and cross border structures that are ‘tax driven’
 - Also applies to tax benefits realised after 2017 from older arrangements
 - Limited grandfathering for pre-April 2017 investments provided
 - Scope of ‘arrangement’ is intentionally wide – covers virtually all actions that are intended to obtain tax benefits

BEPS – Features

- Base Erosion and Profit Sharing (BEPS) refers to:
 - Tax planning strategies
 - that exploit gaps and mismatches in tax rules to make profits 'disappear' for tax purposes, or
 - to shift profits to locations where there is little or no real activity but the taxes are low resulting in little or no overall corporate tax being paid
- OECD aims to address BEPS issues that enable MNCs to reduce their tax liabilities through erosion of tax base or through shifting of income to no or low-tax countries
- G8 and G20 governments have endorsed OECD's work on BEPS and have committed to make appropriate changes to their tax laws
- Major developing (non-OECD) countries, including India, are actively participating in BEPS project
- Multilateral instrument to modify bilateral tax treaties signed by India and over 70 other countries

GAAR Features

Coherence

Neutralising Hybrid Mismatch Arrangements (2)

Limit base erosion via Interest Deductions (4)

CFC Rules (3)

Counter Harmful Tax Practices (5)

Substance

Preventing Tax Treaty Abuse (6)

Prevent artificial avoidance of PE Status (7)

TP Aspects of Intangibles (8)

TP/Risk and Capital (9)

TP/High Risk Transactions (10)

Transparency

Establish methodologies to collect and analyse BEPS data (11)

Require taxpayers to disclose their aggressive tax planning arrangements (12)

TP Documentation (13)

Making Dispute Resolution more effective (14)

Address tax challenges of digital economy (1)

Development of multilateral instrument for amending bilateral treaties (15)

BEPS – Impact

Changes to domestic law

- Equalisation levy @ 6% introduced on certain online advertising payments (**Action 1**)
- Thin capitalization introduced by the Finance Act, 2017 (**Action 4**)
- Country by Country Reporting introduced for Transfer Pricing (**Action 13**)
- POEM addresses substantially the same ‘abuse’ that is sought to be covered by CFC (**Action 3**)

Changes to treaties through MLI

- Introduction of a Principal Purpose Test (PPT) in all treaties – treaty benefits not available if principal purpose is to obtain a tax benefit
- Simplified LOB accepted by India with set of objective criteria for qualifying for treaty benefits (in addition to PPT) – not accepted by many of India’s treaty partners
- Tie-breaker for dual-resident entities no longer based on POEM – to be determined by competent authorities
- Expanded scope of dependent agent PE definition and restricted scope of specific activity exemptions (place of storage, display etc.) may apply qua some treaties

Summing up

- Shows increased maturity of India as a tax jurisdiction
- GAAR and BEPS radically change the tax environment both for domestic and cross border structures
- Increased compliance burdens and disputes – BEPS may necessitate greater recourse to MAP to resolve cross border disputes
- Greater convergence globally on BEPS measures – foreign judgments may have greater relevance in India
- Increased challenges and complexity under the new regime – need for robust and sophisticated tax advise

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