

## General Anti Avoidance Rule (GAAR) v. Base Erosion & Profit Shifting (BEPS) or both

With India's commitment to implement most of the recommendations of the final reports of Organization for Economic Cooperation and Development' (OECD) BEPS Action Plans, and at the same time ensure simplification as well as a non-adversial tax regime to promote ease of doing business, the focus is on the need for implementation of GAAR in India.

Considering international developments surrounding BEPS, Finance Act 2015 deferred GAAR implementation, by another two years, which were initially introduced in the Income-tax Act by Finance Act 2012.

### OECD's BEPS project and involvement of India

India has been an active participant right from the initial stages of the two-year long BEPS project of the OECD and G20 countries. The recommendations under the BEPS project were made on the basis of a consensus arrived at by 34 OECD countries, plus eight non-OECD G20 countries (including India), on an equal footing basis.

Additionally, the Committee of Fiscal Affairs of the OECD constituted "Bureau Plus", comprising 12 OECD members and four non-OECD G20 economies, to oversee the progress of the BEPS project and to participate in the decision-making process. India, being a member of Bureau Plus, was an active participant in the decision-making process on several deliverables of the BEPS project. India also continues to work on monitoring the implementation of the BEPS recommendations, development of the multilateral instrument etc., which will carry on into 2016 and 2017 and is expected to be reviewed in 2020.

Based on inputs gathered from industry representatives and a senior official from the Indian tax administration participating in "India after BEPS" roundtable meeting recently organized by Ernst & Young LLP, India, a potential direction and road map for BEPS implementation in India is evolving.

### GAAR in the light of BEPS

From the Government perspective, the ultimate aim of both BEPS and GAAR is the same. However, from the taxpayer's and business perspectives, the law, which provides certainty, consistency and is also compliance-friendly will need to be implemented.

As observed from the Finance Minister's speech at the time of introduction of GAAR, the primary objective was to prevent generation of black money and also treaty abuse.

While generation of black money is more related to tax evasion and not tax avoidance, the objective of treaty abuse is clearly achieved more comprehensively with Action Plan 6. Furthermore, various other measures such as the retrospective amendment to tax indirect transfer of shares, exception for FII's not claiming benefits under tax treaty, proposal to phase out exemptions and deductions, etc., reduces the scope of GAAR.

It is pertinent to note that some BEPS reports in certain instances recognize the need for a form of GAAR within its proposals and that the adoption of anti-abuse rules in tax treaties is not sufficient to address tax avoidance strategies that seek to circumvent provisions of domestic tax laws. For instance, under Principal Purposes Test rule provided in Action 6, if one of the principal purposes of transactions or arrangements is to obtain treaty benefits, the benefits will be denied unless it is established that granting the benefits will be in accordance with the object and purpose of the provisions of the treaty. However, the BEPS projects recommendations for domestic anti-abuse measures are generally for Specific Anti Avoidance Rules (SAAR) to address specific BEPS issues and not general.

While there can be no complaint against a law, which seeks to address tax evasion or highly aggressive tax avoidance, it needs to be ensured that the Government do not tread into the limits of over-legislation. The objective of revenue collection should be balanced against support for the business environment. Over-legislation, which impairs the ease of doing business and spurs litigation, complexity and uncertainty, may be counter-productive.

The basic criticism against GAAR in India (though it provide certain checks through procedural steps on tax authorities for implementing GAAR) is that the drafted provisions are very complex (for instance as many as twelve terms used at various places in the provisions have been defined in section 102) and the wide powers to re-characterize transactions and determine tax consequences, is likely to add to the uncertainty and costs in doing business in India. Furthermore, India's perception of being one of the most adversarial tax regimes in the world, with uncertainty in the implementations of tax laws at lower levels mostly contributing to it, will impact India's ranking as a preferred FDI destination. In other words, GAAR by its very nature may contribute to certain levels of uncertainty and litigation.

The expectations from the Budget 2016 are to implement BEPS Actions in a manner consistent with OECD's recommendations and allay taxpayers concerns on the uncertainty in the Indian law particularly with respect to taxation of cross border transactions. Since, the BEPS Actions address most of the key concerns of the India; India should review the implementation of GAAR. Taxpayers will need time to absorb the impact of BEPS. It will be a relief, if the impact of BEPS Actions is studied and then GAAR introduced in line with the best practices across the globe. To conclude, in view of the above, implementing GAAR in its current form may contribute to more harm than good.