

B S R & Co.

Navigating GAAR

6 October 2012



Background

- **GAAR in general is an attempt by the revenue to look at a wide range of transactions to see whether a transaction entered into is a impermissible arrangement!**
- **India recently introduced GAAR in the Finance Act of 2012 w.e.f 1 April 2013 and draft guidelines were issued for public comments on June 28, 2012**
- **The Chambers and Industry at large reacted to this measure and for the first time in a very cohesive manner which prompted the PMO's office to intervene and set up an independent committee headed by Dr. Parthasarthi Shome**
- **The Shome committee submitted its final report on 1 September 2012 after hearing all constituents. Here is the brief analysis of the Report**



Shome Committee Report...

- **The Committee brought at first that tax mitigation is not to be confused with tax evasion and is therefore clearly outside the ambit of GAAR**
- **Given the uncertainties involved and to give the investor community a respite the Committee recommends that GAAR be deferred for 3 years**
- **The Committee recognised that the revenue will widely invoke GAAR on the perceived notion of a tax benefit taken by the tax payer and hence need to bring in more clarity to the tax payer and not keep it ambiguous**
- **The Committee recommends a monetary threshold of Rs. 3 crores of tax benefit (without interest) to apply GAAR**
- **Since GAAR brings in the doctrine of “substance over form” the committee has recommended clear definitions in place of the phrase “lacks commercial substance”**
- **The Committee recommends that only arrangements which have the main purpose of obtaining a tax benefit should be covered under GAAR**



...Shome Committee Report...cont'd

- **The Committee recommends implementation of onus on the revenue and the Assessing Officer to give detailed reasoning along with explanations in the prescribed form why GAAR is invoked.**
- **The Committee recommends grandfathering of existing arrangements from GAAR provisions**
- **The Committee recommends that GAAR should not have Treaty override provisions unless it is a transaction which can be said to be Treaty abuse. Also recommends maintaining status quo on the CBDT circular 789 with reference to India-Mauritius Treaty**
- **The Committee recommends GAAR not to apply where anti-avoidance provisions exists in the Treaty such as a LoB clause and specific anti-avoidance rules in the Income-tax Act**
- **The Committee recommends that while determining tax consequences of an impermissible arrangement, corresponding adjustment needs to be allowed in the hands of the tax payers**



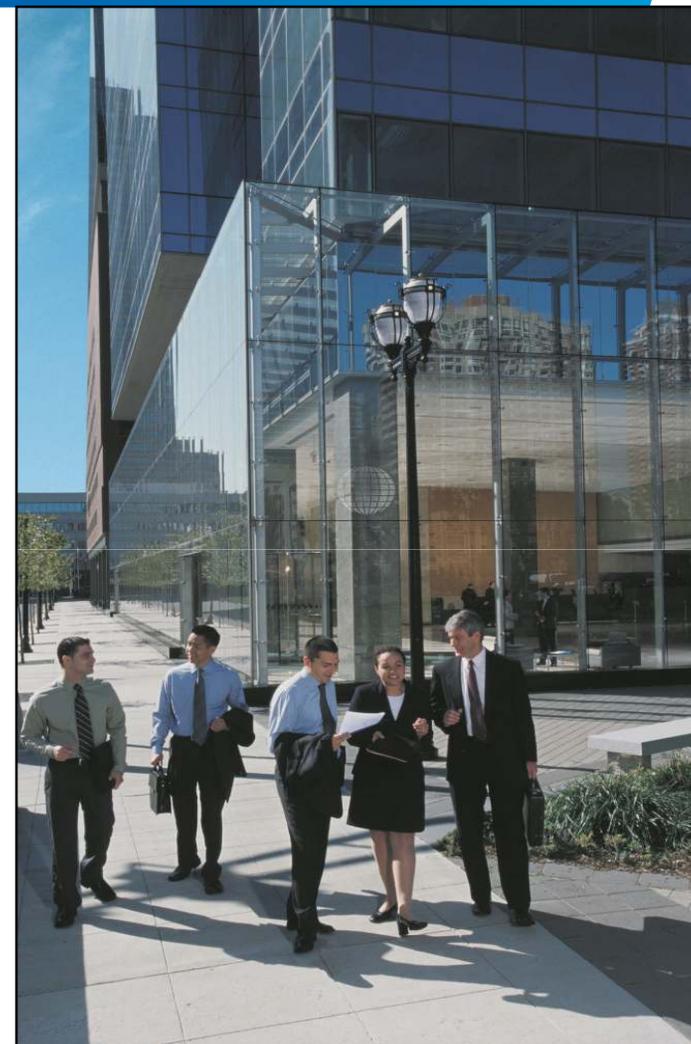
...Shome Committee Report...cont'd

- **The Committee recommends that the GAAR proceedings can be invoked in applicable cases only prospectively and only during the course of a pending assessment**

- **The Committee recommends that GAAR cannot be invoked while adjudicating on an application u/s 195 (2) / 197 of the Act**

- **The Committee recommends a clear independent panel of 5 members to approve the invocation of GAAR:**
 - Chairman to be a retired judge of a High Court
 - 2 members being person of eminence in the field of economics, accounting, taxation
 - 2 members from revenue one being a CCIT and the other a CIT

- **The Committee recommends clear time limits for invoking GAAR against the tax payer, the outer limit being 6 months from the date the reference was made to the Panel**

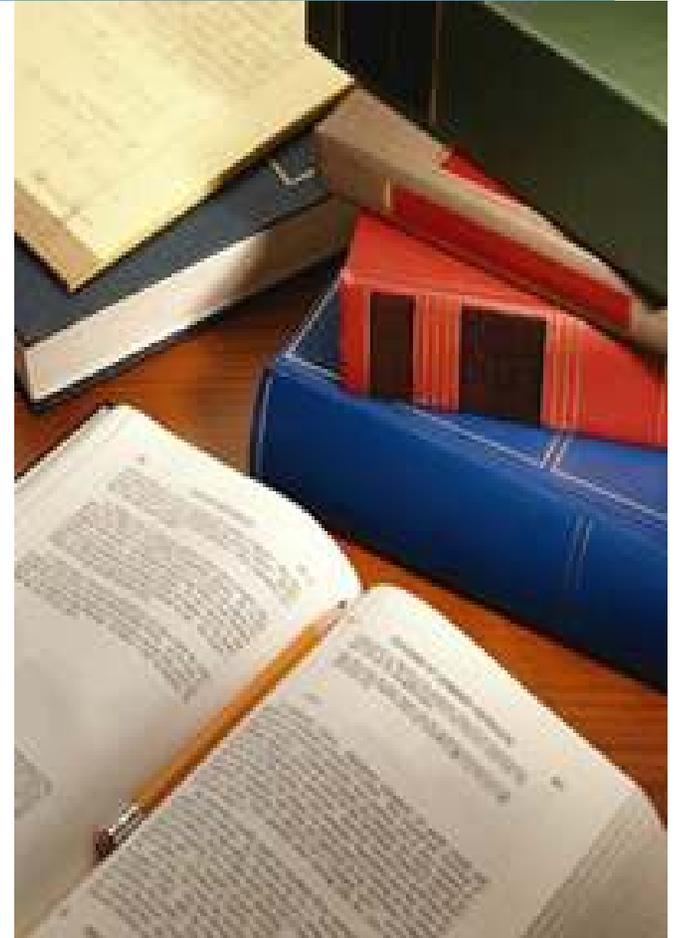


...Shome Committee Report

- The Committee recommends that administration to be strengthened in the GAAR regime and need to impart necessary training to the revenue officials
- The Committee recommends a clear time schedule to dispose off AAR applications within the 6 months period and need to strengthen the administration of AAR
- The Committee recommends clear prescription of forms for internal reference so as to ensure principles of natural justice, consistency and transparency in the process

CONCLUSION

The Committees recommendations is indeed a welcome move and well thought out. We need to see how it will be implemented and if this is accepted in total this should dispel the dark clouds surrounding GAAR!



Thank you

Presentation by

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