INTERNATIONAL JOURNAL OF RESEARCH IN COMMERCE & MANAGEMENT

IJRCM

A Monthly Double-Blind Peer Reviewed (Refereed/Juried) Open Access International e-Journal - Included in the International Serial Directories

Indexed & Listed at:

Ulrich's Periodicals Directory ©, ProQuest, U.S.A., EBSCO Publishing, U.S.A., Cabell's Directories of Publishing Opportunities, U.S.A.,

Open J-Gage, India [link of the same is duly available at Inflibnet of University Grants Commission (U.G.C.)],

Index Copernicus Publishers Panel, Polandwith IC Value of 5.09 &number of libraries all around the world.

Circulated all over the world & Google has verified that scholars of more than 2840 Cities in 164 countries/territories are visiting our journal on regular basis.

Ground Floor, Building No. 1041-C-1, Devi Bhawan Bazar, JAGADHRI – 135 003, Yamunanagar, Haryana, INDIA

http://ijrcm.org.in/

CONTENTS

CALL FOR MANUSCRIPTS

We invite unpublished novel, original, empirical and high quality research work pertaining to recent developments & practices in the areas of Computer Science & Applications; Commerce; Business; Finance; Marketing; Human Resource Management; General Management; Banking; Economics; Tourism Administration & Management; Education; Law; Library & Information Science; Defence & Strategic Studies; Electronic Science; Corporate Governance; Industrial Relations; and emerging paradigms in allied subjects like Accounting; Accounting Information Systems; Accounting Theory & Practice; Auditing; Behavioral Accounting; Behavioral Economics; Corporate Finance; Cost Accounting; Econometrics; Economic Development; Economic History; Financial Institutions & Markets; Financial Services; Fiscal Policy; Government & Non Profit Accounting; Industrial Organization; International Economics & Trade; International Finance; Macro Economics; Micro Economics; Rural Economics; Co-operation; Demography: Development Planning; Development Studies; Applied Economics; Development Economics; Business Economics; Monetary Policy; Public Policy Economics; Real Estate; Regional Economics; Political Science; Continuing Education; Labour Welfare; Philosophy; Psychology; Sociology; Tax Accounting; Advertising & Promotion Management; Management Information Systems (MIS); Business Law; Public Responsibility & Ethics; Communication; Direct Marketing; E-Commerce; Global Business; Health Care Administration; Labour Relations & Human Resource Management; Marketing Research; Marketing Theory & Applications; Non-Profit Organizations; Office Administration/Management; Operations Research/Statistics; Organizational Behavior & Theory; Organizational Development; Production/Operations; International Relations; Human Rights & Duties; Public Administration; Population Studies; Purchasing/Materials Management; Retailing; Sales/Selling; Services; Small Business Entrepreneurship; Strategic Management Policy; Technology/Innovation; Tourism & Hospitality; Transportation Distribution; Algorithms; Artificial Intelligence; Compilers & Translation; Computer Aided Design (CAD); Computer Aided Manufacturing; Computer Graphics; Computer Organization & Architecture; Database Structures & Systems; Discrete Structures; Internet; Management Information Systems; Modeling & Simulation; Neural Systems/Neural Networks; Numerical Analysis/Scientific Computing; Object Oriented Programming; Operating Systems; Programming Languages; Robotics; Symbolic & Formal Logic; Web Design and emerging paradigms in allied subjects.

Anybody can submit the **soft copy** of unpublished novel; original; empirical and high quality **research work/manuscript** ***anytime*** in ***M.S. Word format*** after preparing the same as per our **GUIDELINES FOR SUBMISSION**; at our email address i.e. infoijrcm@gmail.com or online by clicking the link **online submission** as given on our website (***FOR ONLINE SUBMISSION, CLICK HERE***).

GUIDELINES FOR SUBMISSION OF MANUSCRIPT

1. **COVERING LETTER FOR SUBMISSION:**

DATED: ____________

THE EDITOR
IJRCM

Subject: **SUBMISSION OF MANUSCRIPT IN THE AREA OF** .

(e.g. Finance/Marketing/HRM/General Management/Economics/Psychology/Law/Computer/IT/Engineering/Mathematics/other, please specify)

DEAR SIR/MADAM

Please find my submission of manuscript entitled '____' for possible publication in your journals.

I hereby affirm that the contents of this manuscript are original. Furthermore, it has neither been published elsewhere in any language fully or partly, nor is it under review for publication elsewhere.

I affirm that all the author (s) have seen and agreed to the submitted version of the manuscript and their inclusion of name (s) as co-author (s).

Also, if my/our manuscript is accepted, I/We agree to comply with the formalities as given on the website of the journal & you are free to publish our contribution in any of your journals.

NAME OF CORRESPONDING AUTHOR:
Designation:
Affiliation with full address, contact numbers & Pin Code:
Residential address with Pin Code:
Mobile Number (s):
Landline Number (s):
E-mail Address:
Alternate E-mail Address:

NOTES:
a) The whole manuscript is required to be in ***ONE MS WORD FILE*** only (pdf. version is liable to be rejected without any consideration), which will start from the covering letter, inside the manuscript.
b) The sender is required to mentionthe following in the **SUBJECT COLUMN** of the mail:
New Manuscript for Review in the area of (Finance/Marketing/HRM/General Management/Economics/Psychology/Law/Computer/IT/Engineering/Mathematics/other, please specify)
c) There is no need to give any text in the body of mail, except the cases where the author wishes to give any specific message w.r.t. to the manuscript.
d) The total size of the file containing the manuscript is required to be below **500 KB**.
e) Abstract alone will not be considered for review, and the author is required to submit the complete manuscript in the first instance.
f) The journal gives acknowledgement w.r.t. the receipt of every email and in case of non-receipt of acknowledgment from the journal, w.r.t. the submission of manuscript, within two days of submission, the corresponding author is required to demand for the same by sending separate mail to the journal.

2. **MANUSCRIPT TITLE:** The title of the paper should be in a 12 point Calibri Font. It should be bold typed, centered and fully capitalised.

3. **AUTHOR NAME (S) & AFFILIATIONS**: The author (s) **full name**, **designation**, **affiliation** (s), **address**, **mobile/landline numbers**, and **email/alternate email address** should be in italic & 11-point Calibri Font. It must be centered underneath the title.

4. **ABSTRACT**: Abstract should be in fully italicized text, not exceeding 250 words. The abstract must be informative and explain the background, aims, methods, results & conclusion in a single para. Abbreviations must be mentioned in full.

5. **KEYWORDS**: Abstract must be followed by a list of keywords, subject to the maximum of five. These should be arranged in alphabetic order separated by commas and full stops at the end.

6. **MANUSCRIPT**: Manuscript must be in ***BRITISH ENGLISH*** prepared on a standard A4 size ***PORTRAIT SETTING PAPER***. It must be prepared on a single space and single column with 1" margin set for top, bottom, left and right. It should be typed in 8 point Calibri Font with page numbers at the bottom and centre of every page. It should be free from grammatical, spelling and punctuation errors and must be thoroughly edited.

7. **HEADINGS**: All the headings should be in a 10 point Calibri Font. These must be bold-faced, aligned left and fully capitalised. Leave a blank line before each heading.

8. **SUB-HEADINGS**: All the sub-headings should be in a 8 point Calibri Font. These must be bold-faced, aligned left and fully capitalised.

9. **MAIN TEXT**: The main text should follow the following sequence:

   INTRODUCTION

   REVIEW OF LITERATURE

   NEED/IMPORTANCE OF THE STUDY

   STATEMENT OF THE PROBLEM

   OBJECTIVES

   HYPOTHESES

   RESEARCH METHODOLOGY

   RESULTS & DISCUSSION

   FINDINGS

   RECOMMENDATIONS/SUGGESTIONS

   CONCLUSIONS

   SCOPE FOR FURTHER RESEARCH

   ACKNOWLEDGMENTS

   REFERENCES

   APPENDIX/ANNEXURE

   It should be in a 8 point Calibri Font, single spaced and justified. The manuscript should preferably not exceed ***5000 WORDS***.

10. **FIGURES &TABLES**: These should be simple, crystal clear, centered, separately numbered &self explained, and **titles must be above the table/figure**. **Sources of data should be mentioned below the table/figure**. It should be ensured that the tables/figures are referred to from the main text.

11. **EQUATIONS**:These should be consecutively numbered in parentheses, horizontally centered with equation number placed at the right.

12. **REFERENCES**: The list of all references should be alphabetically arranged. The author (s) should mention only the actually utilised references in the preparation of manuscript and they are supposed to follow **Harvard Style of Referencing**. The author (s) are supposed to follow the references as per the following:

- All works cited in the text (including sources for tables and figures) should be listed alphabetically.
- Use (**ed.**) for one editor, and (**ed.s)** for multiple editors.
- When listing two or more works by one author, use --- (20xx), such as after Kohl (1997), use --- (2001), etc, in chronologically ascending order.
- Indicate (opening and closing) page numbers for articles in journals and for chapters in books.
- The title of books and journals should be in italics. Double quotation marks are used for titles of journal articles, book chapters, dissertations, reports, working papers, unpublished material, etc.
- For titles in a language other than English, provide an English translation in parentheses.
- The location of endnotes within the text should be indicated by superscript numbers.

PLEASE USE THE FOLLOWING FOR STYLE AND PUNCTUATION IN REFERENCES:

BOOKS

- Bowersox, Donald J., Closs, David J., (1996), "Logistical Management." Tata McGraw, Hill, New Delhi.
- Hunker, H.L. and A.J. Wright (1963), "Factors of Industrial Location in Ohio" Ohio State University, Nigeria.

CONTRIBUTIONS TO BOOKS

- Sharma T., Kwatra, G. (2008) Effectiveness of Social Advertising: A Study of Selected Campaigns, Corporate Social Responsibility, Edited by David Crowther & Nicholas Capaldi, Ashgate Research Companion to Corporate Social Responsibility, Chapter 15, pp 287-303.

JOURNAL AND OTHER ARTICLES

- Schemenner, R.W., Huber, J.C. and Cook, R.L. (1987), "Geographic Differences and the Location of New Manufacturing Facilities," Journal of Urban Economics, Vol. 21, No. 1, pp. 83-104.

CONFERENCE PAPERS

- Garg, Sambhav (2011): "Business Ethics" Paper presented at the Annual International Conference for the All India Management Association, New Delhi, India, 19–22 June.

UNPUBLISHED DISSERTATIONS AND THESES

- Kumar S. (2011): "Customer Value: A Comparative Study of Rural and Urban Customers," Thesis, Kurukshetra University, Kurukshetra.

ONLINE RESOURCES

- Always indicate the date that the source was accessed, as online resources are frequently updated or removed.

WEBSITES

- Garg, Bhavet (2011): Towards a New Natural Gas Policy, Political Weekly, Viewed on January 01, 2012 http://epw.in/user/viewabstract.jsp

IMPACT OF GAAR ON INDIAN EQUITY MARKET: AN EMPIRICAL STUDY

DR. SANJIV MITTAL
PROFESSOR
UNIVERSITY SCHOOL OF MANAGEMENT STUDIES
GURU GOBIND SINGH I. P. UNIVERSITY
NEW DELHI

DR. SUNIL KUMAR
FACULTY
SCHOOL OF MANAGEMENT STUDIES
INDIRA GANDHI NATIONAL OPEN UNIVERSITY
NEW DELHI

DR. PRADEEP AGARWAL
PROFESSOR
DEPARTMENT OF MANAGEMENT STUDIES
SHARDA UNIVERSITY
GREATER NOIDA

DR. MOHINDER KUMAR
ASSOCIATE PROFESSOR
DEPARTMENT OF COMMERCE
PT. J. L. N. GOVERNMENT (P.G.) COLLEGE
FARIDABAD

ABSTRACT
In India, the proposed Direct Tax Code 2010 (DTC 2010 or Code) seeks to address the issues relating to tax avoidance and evasion by bringing in General Anti-Avoidance Rules (GAAR) in addition to various transaction-specific Special Anti-Avoidance provisions. The Discussion paper issued along with the proposed new tax code states that tax avoidance arrangements adopted by taxpayers span across several tax jurisdictions, and it is desirable to introduce GAAR that would serve as a deterrent to the use of increasingly sophisticated forms of tax avoidance by taxpayers. The paper also states that the appellate authorities and Courts have cast a heavy onus on the revenue authorities for dealing with matters of tax avoidance, especially when the relevant facts are in the exclusive knowledge of the taxpayer who chooses not to reveal them. Indian Government is trying to do some amendments to the Income Tax Act by introducing the General Anti-Avoidance Rules or GAAR. Most of the foreign investors investing in India by means of avoidance of tax rather than to do genuine business. So GAAR gives tax authorities a power to disregard such transactions and include the earning in the assesses income. The proposal of GAAR reintroduced uncertainty into Indian economic decision making, which frightened investors into believing that the economy had returned to the pre-liberalization period.

KEYWORDS
GAAR, equity market.

INTRODUCTION
The GAAR (General Anti-Avoidance Rule) was introduced in March 2012 by the then Finance Minister Pranab Mukherjee, as a measure to limit the scope of transactions that are undertaken primarily to evade taxes. The main targets of this rule were enterprises and investors who had set up shell companies in Mauritius to route investments into India. A tax-friendly treaty between India and Mauritius encouraged both Indian and multinational firms to set up subsidiaries in Mauritius, solely for the purpose of investing in India, without having any core business interest in Mauritius. According to data from the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, total FDI equity inflows from Mauritius to India between April 2000 and April 2011 amounted to USD 55 billion, or 42 percent of total FDI equity flows. In fiscal year 2010-11, FDI equity flows from Mauritius were close to USD 7 billion, or 36 percent of the total flows. There was a strong outcry against these measures by both domestic and foreign investors. Since the GAAR announcement followed closely on the heels of a proposal to review and retrospectively tax all acquisitions with a substantial transfer of Indian assets, the general economic mood took a dip downwards. Coupled with the perception of general policy drift of the current government, this measure was seen as a signal that the government was not interested in foreign investment flows. Other criticisms of the GAAR have centered on the following points:

1. It becomes a tool in the hands of the Income Tax Department to harass investors
2. Lack of training for officials to implement GAAR enhances the scope for faulty implementation
3. The 'sudden' introduction of the proposal, without prior consultations, was perceived as arrogant and unnecessary

To make it easier to understand GAAR; we can say that suppose a person or a company is setting up business in Gulf Country and its clear intention is to claim exemption from capital gains tax, in such a scenario Indian govt has the right to deny the legitimate claim for exemption provided under Double Taxation Avoidance Agreements as it falls under tax avoidance and Indian govt is trying to plug the loopholes.

PRE GAAR CONCEPT INDIA EXPERIENCE
The Hon'ble Supreme Court (SC) in A Raman's case observed that:

"...the law does not oblige a trader to make the maximum profit that he can get out of his trading transactions. Income which accrues to a trader is taxable in his hands. Income which he could have, but has not earned, is not made taxable as income accrued to him. Avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited. A taxpayer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality, but on the operation of the Income-tax Act. Legislative injunction in tax statutes may not, except on peril of penalty, be violated, but may lawfully be circumvented...."

GAAR GENESIS

The General Anti Avoidance Rule (GAAR) which was first proposed in the Direct Taxes Code DTC and was soundly criticized at that time and was again sought to be reintroduced with some changes with effect from 1st April 2014 in the Finance Bill 2012, when the DTC was placed in cold storage. There was a hue and cry once more on GAAR introduction, forcing the government to appoint an expert committee to look into its aspects

The GAAR had its origins from the South African Tax law, where GAAR was to be imposed in the rarest of rare cases, by the (South African Commissioner of Taxes, a position roughly equivalent to our CBDT Chairman). However, the word 'Commissioner' from the South African legislation seems to have been mechanically "cut-paste" into Indian legislation, losing sight of the fact that in India, there are around 700 Commissioners whose rank is certainly not equivalent to the South African Tax Commissioner. These Commissioners were conferred the power to impose GAAR on unsuspecting assesses, almost at will. Further, the safeguards built in against its misuse were very cosmetic and liable to be mis-used as a tool to settle political scores.

In an attempt to placate the strong hue and cry raised by the introduction of GAAR in all its draconian force and without any safeguards in the Finance Act 2012 (albeit with a year's deferral) prompted the Government to appoint an Expert Committee to issue its recommendations.

KEY ISSUES

The key issues / implications under the proposed GAAR are:

- Tax avoidance has been widely defined with the objective to encompass a number of circumstances and instances of tax avoidance, leading to uncertainty and extensive litigation.
- GAAR can be invoked where obtaining a tax benefit is the 'main purpose', and it is not clear as to what is meant by 'main purpose'; the courts would be left to decide whether in the given facts the main purpose of the transaction/arrangement was to obtain tax benefit.
- Where an adjustment is made (invoking GAAR), it is not clear whether the full effect of the same would be given to ensure that there is no double taxation.
- The onus of proving that an arrangement has not been carried out for the main purpose of obtaining a tax benefit is with the taxpayer, while the tax authorities may not have any evidence of tax avoidance.
- There is no cut-off date for applicability of GAAR provisions to any arrangement and, therefore, where the impact of past arrangements continues in Direct Tax Code regime; the same may still be covered by GAAR irrespective of the fact that the arrangement has been approved by the tax officer or subjected to judicial review.

THE SHADOW OF BLACK MONEY

The introduction of GAAR needs to also be seen in the context of the public debate surrounding "black money" (unaccounted cash) in India. Global Financial Integrity (GFI), a US-based non-profit research organization, estimates that USD 462 billion has left India between 1948 and 2008. This amount is equivalent to 40 percent of India's GDP. Some of these funds are allegedly routed via Mauritius, back into the Indian economy, giving rise to the allegation of 'round tripping', where purported FDI inflows into India are actually India domestic funds being converted from 'black' into 'white' money.

GAAR AND THE INDIAN GOVERNMENT – A SYMBOL OF DRIFT?

The Indian economy is currently facing significant challenges, including high inflation, a rising fiscal deficit, falling industrial production and lower GDP growth. While the government took some steps last week to correct the situation, with steps such as a diesel price hike, reduction in subsidies of gas cylinders, approval of 51 percent FDI in multi-brand retail trading and 49 percent in civil aviation, these may not be enough to lift investor sentiments. The proposal of GAAR also reintroduced uncertainty into Indian economic decision making, which frightened investors into believing that the economy had returned to the pre-liberalization period before 1991, where the 'License Raj' [a licensing regime] was used by the government to harass entrepreneurs and industrialists. Given the distance that the Indian economy has traversed since then, such a step was retrograde and unnecessary. It appears to suggest that that the government has run out of ideas. There are several areas in the economy that require more government attention, including power, infrastructure, agriculture, land reforms and employment generation. While the previous finance minister and current President, Pranab Mukherjee, was seen as emblematic of an earlier era of government 'guidance' of the economy, the current Finance Minister, P Chidambaram, is expected to develop a more investor-friendly environment.

INDIA: VODAFONE TAX RULING - A LEGAL ANALYSIS OF THE TRIUMPH

Hutchison Essar is an Indian Company, the controlling interest of Hutchison Essar is held by a SPV of Cayman Island (CGP Investments Holding Ltd.). CGP is owned by Hutchison Telecommunications International Ltd (HTIL), Hongkong. In this manner the controlling interest of Hutchison Essar is held by HTIL, Hongkong through an intermediary Cayman Island company (CGP). Vodafone International Holdings, Netherland entered into an agreement with HTIL, Hongkong to buy the shares of CGP (Cayman Island). Since CGP is holding directly and indirectly 67% shares of Hutchison Essar (India), the above transaction results in transfer of shares and controlling interest of Hutchison Essar(India) from HTIL, Hongkong to Vodafone International Holding, Netherland. The consideration for transfer is stated to be USD 11.1 Billion.

The Income-tax Department issued a notice to Vodafone to show cause as to why it should not be treated as assessee in default for not withholding the Indian Capital Gain Tax on the payment made by it to HTIL for the transaction of sale of share of CGP (which in turn holds controlling interest of HTIL). Vodafone challenged the show cause notice by way of writ. The Hon'ble Bombay High Court dismissed the writ.

The High Court held that "the very purpose of entering into agreements between the two foreigners is to acquire the controlling interest which one foreign company held in the Indian Company, by other foreign company. This being the dominant purpose of the transaction, the transaction would certainly be subject to municipal law of India, including the Indian Income-tax Act". The Indian Law does not permit use of any "colourable" device by any tax payer for perpetuating tax evasion in India. The High Court remarked that "the present is a case of tax evasion and not tax avoidance".

Thereafter Vodafone approached the Supreme Court for stay of Mumbai High Court's decision. The Supreme Court on 27/09/2010 ordered that Vodafone has to deposit a part of the amount in dispute before its case is heard by the Court. Finally, the Supreme Court gave its verdict on 20.01.2012 and has decided the issue in favour of Vodafone. The Hon'ble Apex Court has held as under:

"Applying the look at test in order to ascertain the true nature and character of the transaction, we hold, that the Offshore Transaction herein is a bonafide structured FDI investment into India which fell outside India's territorial tax jurisdiction, hence not taxable. The said Offshore Transaction evidences participative investment and not a sham or tax avoidant preordained transaction. The said Offshore Transaction was between HTIL (a Cayman Islands company) and VIH (a company incorporated in Netherlands). The subject matter of the Transaction was the transfer of the CGP (a company incorporated in Cayman Islands). Consequently, the Indian Tax Authority had no territorial tax jurisdiction to tax the said Offshore Transaction."

A careful legal analysis of the aforesaid judgment will show that the following important issues were considered by the Hon'ble Apex Court in deciding the case in favour of Vodafone.

Whether the situs of shares of a foreign company holding controlling interest in Indian company can be said to be in India?

In the instant case of Vodafone, the Cayman Island company, CGP, was owning controlling interest in the Indian HEL. Therefore, it was revenue's contention that the situs of shares of CGP shall be deemed to be in India and accordingly the transaction of sale of CGP shares will be liable for tax in India. In this regard, the Hon'ble Supreme Court at para 82 and para 127 has held that situs of shares situates at the place where the company is incorporated and / or the place where the shares can be dealt with by way of transfers. In the instant case, the transfer took place in respect of shares of CGP. CGP is a company incorporated in Cayman Island and the transfer also took place outside India. Therefore, the situs of shares of CGP is not in India.

What principles should be applied to treat a transaction as sham and bogus?

The Hon'ble Apex Court has dealt with this issue in detail and has held that every foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. In this regard, the following factors should be kept in mind on the facts of the instant case:

- the concept of participation in investment
- the duration of time during which the Holding Structure exists
- the period of business operations in India
- the generation of taxable revenues in India
- the timing of the exit
- the continuity of business on such exit.

The Hon'ble Court examined the above facts. After a detailed analysis, the Hon'ble Court found that the aforesaid factors are in favour of Vodafone and therefore, held the entire transaction as not a sham and bogus transaction." Whether even an indirect transfer of property located in India will be covered under section 9(1)(i) of the Income-tax Act so as to render the same as liable for tax?

In the instant case, CGP held shares of an India company. It was the contention of the revenue that the transfer of shares of CGP outside India resulted into indirect transfer of shares of Indian company. Therefore, the transfer is liable for tax in India.

The Hon'ble Apex Court has dealt with this issue at para 71 and 165 of the order. It has been held that Section 9 covers only income arising from a transfer of a capital asset situated in India; it does not purport to cover income arising from the indirect transfer of capital asset in India. If the word indirect is read into Section 9(1)(i), it would render the express statutory requirement of the 4th sub-clause in Section 9(1)(i) nugatory. Therefore, Vodafone's transaction cannot be covered under section 9(1)(i) of the Income-tax Act. Whether section 195 which casts obligation to deduct tax at source is applicable to non-residents also?

The Hon'ble Apex Court has dealt with this issue at para 178 to 187 of its order. It has been held that section 195 would apply only for payments made from a resident to a non-resident, and not between two non-residents situated outside India.

In the instant case, the Hon'ble Court observed that the transaction was between two non-resident entities through a contract executed outside India. Consideration also passed outside India. The transaction has no nexus with the underlying assets in India. In order to establish a nexus, the legal nature of the transaction has to be examined and not the indirect transfer of rights and entitlements in India. Therefore, the provisions of section 195 relating to deduction of tax at source will not apply. Whether the McDowell case [154 ITR 148] in relation to permissible and impermissible tax planning is watered down by Azadi Bachao Andolan [263 ITR 706] case?

The Hon'ble Apex Court held that the observations made in the case of Mcdowell are clearly in the context of artificial and colourable devices. In cases of treaty shopping and / or tax avoidance, there is no conflict between the Mcdowell (supra) and Azadi Bachao (supra). Further, it has been held that revenue's stand that the ratio laid down in Mcdowell is contrary to what has been laid down in Azadi Bachao Andolan (supra) is unsustainable and therefore, calls for no reconsideration by a larger bench.

THE IMPACT OF GENERAL ANTI-AVOIDANCE RULES OR GAAR IN INDIAN EQUITY MARKET

There has been a lot of Uncertainty over General Anti-Avoidance Rules or GAAR from last few months after it was proposed by Finance Minister in Union Budget on 16th March 2012.With this post I am trying to address how GAAR will impact the FII (Foreign Institutional Investors) inflows in Indian Equity market.

Under the Double Taxation Avoidance Agreement between India and Mauritius FIIs coming from Mauritius are required to pay tax only in Mauritius, But there is no capital gains tax in Switzerland they don't pay tax anywhere. Investors worry that they had not taken this tax liability into consideration while invested through Mauritius because it is uncertain that the rule will be applied to those who have invested before 1st April 2012 also. There is lots of volatility noticed in Indian market after the announcement of GAAR by Finance Minister on Union budge 2012.FIIs making a cautious approach for new investment in Indian Equity Market. Initial three months of the year 2012 was very positive for Indian market as there were lots of buying interest seen by FII, but after post union budget 2012, there was continuously selling pressure seen in the Indian market by FIIs.

Here is the statistics of FII Activity for the Year 2012 so far:

MONTH	GROSS PURCHASE (CR)	GROSS SALE (CR)	NET INVESTMENT (CR)	CUMULATIVE INVESTMENT ($MN)
January 2012	50,467.40	40,109.90	10,357.70	2,037.22
February 2012	79,898.60	54,686.60	25,212.10	5,127.67
March 2012	63,795.10	55,413.80	8,381.10	1,684.82
April 2012	41,091.90	42,200.50	-1,109.10	-205.53
May 2012	6,716.50	5,840.40	876.10	166.21

Statistics Source: http://www.indiainfoline.com

FIIs hold the majority stake in Indian companies in stock market which directs the market moment. From last couple of month these companies are suffering from the selling pressure by the news of introducing GAAR .The market will remain volatile till the finance minister clarify about the GAAR provision which is suppose to present as finance bill on 7th may 2012. So this is my first post towards the Indian equity market and will keep you updating with the latest and some more important aspect of share market topics soon. Let me know with your valuable feedback how this post is helpful.

GAAR IMPLICATIONS IN INDIA

- Indian Government is trying to give powers to income tax authorities as implementation of GAAR provides tremendous powers to deny tax benefit to an entity if a transaction has been carried with the sole intention of tax avoidance. Due to powers in the hand of taxmen, now innocents may be harassed by them.
- FII & FDI money coming to India through Mauritius route will now become taxable.
- Increased litigations.
- GAAR aimed at boosting investor confidence said Parthasarthi Shome

Marketing of tax avoidance products and schemes may have been constrained in recent years, but avoidance activity is by its nature opportunistic and ad hoc. Simply raising the price of avoidance (through successful containment, increased regulation and constrained supply) will not choke off demand. Indeed, no single response or approach – whether administrative, legislative or judicial – can adequately or effectively contain avoidance activity. Such containment only begins to occur where strategies drawn from all three spheres complement each other by operating in combination. As Sir Ivor Richardson astutely pointed out some years ago, current requirements for a comprehensive and integrated approach go beyond a more traditional analysis where "the legislature … exerts control of tax avoidance through special and general anti-avoidance provisions; the revenue administration contributes in administering those provisions and exercising discretions; and the judiciary is expected to strike the right balance between acceptable and unacceptable tax planning through its interpretation and application of tax legislation.

Ultimately, however, corporate and personal taxpayers themselves have to take responsibility for the level of avoidance and the degree of acceptance of such behaviour that exists at any time in any society. The revenue authority, the legislature and the judiciary can play a role in shaping the demand for, and supply of, tax avoidance activity, but such issues belong, in the final analysis, in the realms of moral and ethical behaviour of the taxpayers themselves. Corporate and personal social responsibility – and the reputational damage that excessive and egregious avoidance activity can attract – remains the ultimate deterrent, notwithstanding the impressive arsenal that can be available to those who seek to counter avoidance.

Beyond that we should also perhaps be mindful that two of the traditional goals of public finance simplicity and equity – have critical roles to play in determining social responses to avoidance activity.

In recent years, these two goals may have been less prominent in tax reform than the efficiency goal that lends itself to easier economic measurement and evaluation.

It is paradoxical that the more complex that the tax regime becomes (often in attempts to contain avoidance activity), the more likely it will be that opportunities for avoidance will arise. Avoidance activity thrives in complexity and uncertainty. And where that complexity exacerbates the natural interaction (sometimes mediated by intermediaries) between the taxpayer and the revenue authority such that it becomes frictional rather than cooperative, there will almost inevitably be a higher probability of avoidance activity. It may be relevant for taxpayers to examine the transactions/arrangements entered into, so that the same do not fall within the boundary of being considered as impermissible avoidable transactions entered into with the object of obtaining a tax benefit.

The GAAR provisions are like a double-edged sword and would need to be judicially invoked by the revenue authorities. As discussed earlier, the Courts in India have examined the issue of tax avoidance and laid down the principles as to what constitutes tax avoidance. In light of the various judicial precedents, the tax authorities in India tend to raise the issue of tax avoidance and deny relief to the taxpayer. Given the uncertainties involved in such application, it is imperative for the proposed GAAR to be successful; it should not impact genuine business transactions or promote uncertainty. One of the key objectives for introducing the Direct Tax Code is to simplify the language to enable better comprehension and remove ambiguity to foster voluntary compliance, thus reducing litigation. However, the scope of GAAR provisions in the present draft could cause massive uncertainty and lead to extensive litigation as potential legitimate tax planning could also become the target of GAAR. In this connection, it would be imperative that the guidance note to be formulated should be sensitive to the issue of addressing avoidance from the prospect of upholding the rule of law, the object and purpose of the legislation, rather than be construed as law in itself and giving a free rein to administrative or judicial discretion. Some suggestions on reframing/modeling the provisions on the basis of international experience may be adopted:

LEGISLATION

- Our model could be based on the Canada model - the principles laid down by Canada Supreme Court to be adhered.
- The tax benefit on the transaction should not be the only criterion. If the transaction is done where tax benefit and commercial benefit are present, the transaction should not be covered by GAAR.
- The provisions could be made applicable in respect of transaction where entering into the transaction and the cause and effect of the transaction occur after the date of implementation.
- Detailed guidelines to be provided on the lines of the Canadian law with relevant examples illustrating the reasons and analogy in applying GAAR provisions.
- GAAR should not be judged on the basis of a single transaction, but on a series of transactions. Further, where no 'tax benefit' arises under the whole series of transactions, the same should not be subject to GAAR evaluation, even though a part of the series may result in 'tax benefit'.
- Corresponding adjustments to be provided in the hands of the parties to the transaction.

CASE 1

- A corporation transfers property used in its business to a related corporation to permit the deduction of non-capital losses of the related corporation. All of the shares of the two corporations have been owned by the same taxpayer during the period in which the losses were incurred.
- Where the transaction could be considered as consistent with the scheme of the Act, it may be argued that the GAAR provisions would not be infringed. However, if a transfer of a property or other transaction is undertaken to avoid a specific rule, such as a rule designed to preclude the deduction of losses after the acquisition of control of a corporation by an arm's length person, such a transfer would be a misuse of the provisions of the Act and be subject to provisions of the Act.
- Thus, genuine corporate reorganization should not be affected.

CASE 2

- A company has property with an unrealized capital gain that it wishes to sell to a third party. A related corporation, a wholly owned subsidiary has a net capital loss. Instead of selling the property directly to the third party and realizing a capital gain, the person transfers the property to the related corporation. The related corporation sells the property to the third party and reduces the resulting taxable capital gain by the amount of its net capital loss.
- Where the provisions of the Act provide that the sale to a related corporation should be at arm's length, it could be argued that the transaction may not infringe the provisions as in determining the cost in the hands of the related corporation, the cost to the company would be considered.
- Thus, the transfer of property by holding company to subsidiary company or vice versa under Indian regulations should not be impacted.

CASE 3

- An individual provides services to a corporation with which he or she does not deal at arm's length. The company does not pay salary to the individual because payment of salary would increase the amount of loss that the company will incur in the year.
- There may be a provision in the Act requiring salary to be paid in these or any circumstances; the failure to pay salary is, therefore, not contrary to the scheme of the Act read as a whole.
- In the circumstances, in the Indian context, the taxpayer may choose to determine the terms of transactions which are not expressly prohibited under the terms of the Act.

CASE 4

- A taxable company has agreed to purchase all of the shares of an operating company, which is also a taxable Indian company The purchaser incorporates a holding company which borrows the purchase price and pays the vendor for the shares. The holding company and the operating corporation amalgamate so that the interest payable on the monies borrowed to acquire the shares can be deducted in computing the income from the business of the amalgamated corporation.
- Generally, leverage of debt by Indian companies and subsequent amalgamation should not be considered as abusive under GAAR. However, the implication of provisions of Section 14A could be considered to bring the same under a 'tax benefit' and hence under GAAR provisions.

CASE 5

- A taxable Indian company merges with another taxable Indian company that is a shell company. Upon merger, the shareholders who controlled the predecessor receive common shares of the merged company and the minority shareholders of the predecessor receive redeemable preferred shares that are immediately redeemed. The sole reason that the minority shareholders receive shares instead of cash is to cause the merger to comply with the requirements of the Act.
- Structuring of company reorganization through redeemable preference shares should not be covered by GAAR.

CASE 6

- A taxable Indian company has a subsidiary that is sustaining losses and needs capital to carry on its business. The subsidiary would not be able to obtain any tax savings in the year. The holding company borrows the money from a bank and subscribes to the shares of the subsidiary and claims a deduction for the interest.
- Generally, based on judicial precedents, the interest would be deductible for the holding company. However, the implication of provisions of Section 14A could be considered to bring the same under a 'tax benefit' and hence under GAAR provisions.

CASE 7

- A non-resident company has an Indian subsidiary. The subsidiary has substantial reserves and the non-resident company desires to cash out by selling to an unrelated party. The gains on sale would be substantial and subject to higher rate of tax. The subsidiary distributes the reserves as dividend, which reduces the valuation of the company. The non-resident then sells the subsidiary.
- The payment of the dividend and the consequent DDT on such dividend should not be construed as covered under GAAR.

CRITICISM AGAINST GAAR

a. It is feared that once GAAR is introduced, FIIs who invest through countries like Mauritius to exploit bilateral tax treaties will have to pay capital gains tax for their investments in Indian equities.
b. The onus of proof for proving no tax avoidance will be on the tax payer and not the tax department.
c. GAAR provides wide discretion to the tax authorities which at times can be misused.

CONCLUSION

The final report of the Shome Committee is due towards the end of September and will provide more clarity on the government's final thoughts on GAAR. It is expected to continue allowing investments via Mauritius and not trouble foreign investors. While this may be attractive to FII inflows, there is little that the government appears to be doing to attract FDI inflows, which will have a longer-term, structural impact on the economy. It will not be like 'hot money', which is more closely associated with FII inflows. It remains to be seen if the UPA 2 government, which is lurching from one crisis to the other, is able to assemble a set of cogent policies for implementation in the weeks and months ahead.

REFERENCES

CASES REFERRED

1. Australia in Commissioner of Taxation v. Lamesa Holdings, (1997) 785 FCA
2. Bank of Chettinad Ltd v. CIT, (1940) 8 ITR 522 PC
3. Barber-Greene Americas, Inc. v. Commissioner of Internal Revenue (1960) 35 T.C. 365
4. CIT v. A. Raman & Co., (1968) 67 ITR 11
5. Commissioner of Wealth Tax, Gujarat-II, Ahmedabad v. Arvind Narottam, AIR 1988
6. Copthorne Holdings Ltd. v. Canada, 2011 SCC 63
7. Ensign Tankers (Leasing) Ltd. v. Stokes (1992) 1 AC 655
8. Helvering v. Gregory, 69 F.2d. 809 (2d Cir. 1934).
9. McDowell and Ors v .Commercial Tax Officer, AIR 1986 SC 649
10. Ramanathan Chettiar v. CIT, Madras, 1973 88 ITR 169 (SC)
11. Union of India v. Azadi Bachao Andolan, (2004) 1 CompLJ 50 SC
12. Vodafone International Holdings B.V. v. Union of India, (2012) 341 ITR 1 (SC)
13. W T Ramsay v. Inland Revenue Commissioners, (1982) AC 300

ARTICLES REFERRED

14. 'Canada GAAR: trap set for unwary', 10 Int'l Tax Rev. 41 1999.
15. 'Consultative document of General Anti-Avoidance rule for Direct Taxes', 51 Tax Executive 79 1999.
16. Elinore Richardson & Hillel Frankel, 'Canada's GAAR: the emperor has new clothes',
17. Graeme S. Cooper, 'International experience with General Anti-Avoidance Rules', 54
18. Int'l Tax Rev. 35 1989-1990.
19. Irving Aw, 'Revisiting the General Anti-Avoidance rule in Singapore', 2009 Sing. J. Legal Stud. 545 2009.
20. Mathews P. George & Pankhuri Agarwal, 'The Vodafone Case and Direct Taxes Code',
21. NUJS L. Rev. 201 2010.
22. S.M.U. L. Rev. 83 2001.
23. 'Supreme Court re-enters anti-avoidance arena', 21 Int'l Tax Rev. 10 2010-201.
24. T.P Ostwal and Vikram Vijayaraghavan, 'Anti-Avoidance Measures', 22 Nat'l L. Sch. India Rev. 59 2010.

WEBSITES REFERRED

25. "Discussion paper on DTC, 2009" http://india.gov.in/allimpfrms/alldocs/12780.pdf last visited on 19thAugust, 2012
26. "GAAR: Parthasarathi Shome panel to make final recommendations on FDI, overseas deals by September-end", http://articles.economictimes.indiatimes.com/2012-09-03/news/33563373_1_capital-gains-tax-parthasarathi-shome-indirect-transfers last visited on 8th September, 2012
27. "General Anti Avoidance Rules: Indian and International Prospective", www.deolitte.in, last visited on 18th August, 2012
28. "Introduction to GAAR" http://www.taxmann.com/taxmannflashes/whatsnew.aspx?stype=1&sid=9682, last visited on 7th September, 2012
29. "Meaning of round tripping", http://www.investopedia.com/terms/r/round-triptrades.asp#axzz25nvYA65e, Last visited on, 25th August, 2012
30. "Shome Committee on GAAR", http://www.nishithdesai.com, last visited on 7th September, 2012

REQUEST FOR FEEDBACK

Dear Readers

At the very outset, International Journal of Research in Commerce and Management (IJRCM) acknowledges & appreciates your efforts in showing interest in our present issue under your kind perusal.

I would like to request you tosupply your critical comments and suggestions about the material published in this issue as well as on the journal as a whole, on our E-mail i.e. **infoijrcm@gmail.com** for further improvements in the interest of research.

If youhave any queries please feel free to contact us on our E-mail infoijrcm@gmail.com.

I am sure that your feedback and deliberations would make future issues better – a result of our joint effort.

Looking forward an appropriate consideration.

With sincere regards

Thanking you profoundly

Academically yours

Sd/-

Co-ordinator

ABOUT THE JOURNAL

In this age of Commerce, Economics, Computer, I.T. & Management and cut throat competition, a group of intellectuals felt the need to have some platform, where young and budding managers and academicians could express their views and discuss the problems among their peers. This journal was conceived with this noble intention in view. This journal has been introduced to give an opportunity for expressing refined and innovative ideas in this field. It is our humble endeavour to provide a springboard to the upcoming specialists and give a chance to know about the latest in the sphere of research and knowledge. We have taken a small step and we hope that with the active co-operation of like-minded scholars, we shall be able to serve the society with our humble efforts.

Our Other Journals