OVERRIDING OF DTAA BY GAAR: CONSTITUTIONALITY AND LIMITATIONS

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1. Introduction

In the recent time people are very greedy they always think about our self and they also want that every single piece of money which was earned by them, never want to give a simple penny to anyone (in a free). In India people are very smart in the matter related to Tax, In India (Individual, Company, HUF, Partnership Firm) are liable to pay tax and they never want to give single money in the form of tax. In India government also provided various scheme to all the tax payer to manage their taxes and get rebate from the tax. The Apex Court acknowledged the difference between tax avoidance, evasion as well as planning in **McDowell v. CTO**. By utilizing the exemptions as well as reductions that are allowed by law for various professions tax planning assists a person in lowering their tax liability. On the other side tax evasion refers to not releasing one's tax obligations through breaking the law. **Tax avoidance** falls among different range of tax planning and **tax evasion**. Tax avoidance is the practice of minimizing tax liabilities by taking advantage of legal loopholes. Tax avoidance, while legal, defeats the intent of the legislation as well as causes a loss of revenue to the Exchequer. As a result, the legislative branch as well as the executive branch never stop trying to crack down on avoidance mechanisms. The common way of tax avoidance through Corporations and is established in low-tax Location with which India is engaged in tax treaties are a common means of tax avoidance. The most notable of these agreements is the **"treaty"** between India & Mauritius. Effectively it permits the exemption from taxation on capital gains resulting from the sale of shares in Indian companies. There is no capital gains tax in Mauritius which is a low-tax country. By virtue of a Protocol the treaty has been modified in a substantial way. The non-taxation of investment income resulting from the alienation of shares of Indian companies will end as of April 1, 2019. A concurrent and significant change has been made to **the Income Tax Act of 1961 (the "Act")** which will have a significant impact on tax avoidance through the use of strategies. **Cross-border transactions** with nations that have tax treaties are anticipated to draw careful consideration. This has caused concerns for both those who

legitimately used the benefits as well as those who abused the system to obtain them. These worries stem from the Central Board of Direct Taxes of India's dismal track record of law implementation. Even going so far as to imply that GAAR will hang over international taxpayers like a Damocles sword one commentator has expressed their opinion. The implementation of the GAAR has previously been delayed, partly because investor confidence has fallen over the arbitrary implementation of a vague rule.

2. DTAA – Double Taxation Avoidance Agreement

Understanding the need for DTAAs it is important to well-known with the structure as well as framework made available for DTAAs in the Income Tax Act of 1961 as well as the significance of DTAAs among India as well as Mauritius is necessary in need to study DTAAs as well as GAAR.

2.1. Basic concept of Double taxation

Taxes are typically imposed or levied by nations in one of two ways: either at the source and the residence. This is termed as source-based taxation as well as it is imposed on the employee or earner, if the source of earnings is located within the country's territorial jurisdiction. If a person lives inside the boundaries of a country's territorial jurisdiction so at this condition the country will tax his income and this is termed as taxation on residence - based. In some circumstances a person's income may be earned both within as well as beyond the country's borders so at this condition the government is resulting to imposes of taxes on both the country. It means where the income received and income earned. The situation described above is a clear case of double taxes, which is unfair to the person who must pay taxes twice on a single income. In order to prevent instances of double taxation, so the countries come with a common solution by signing bilateral agreements termed as "Double Taxation Avoidance Agreements".

In order to avoid instance of double taxation, India as well as about 90 nation including specific territories like Macaus, Barmuda, the British Virgin Islands as well as the Cayman Islands as well as other overseas territories, have DTAAs with India. It is not implied that a DTAA that the Indian government engages into with foreign nation will be immediately effective as well as binding in the territory of India and this the dualistic system and this system is used in India to execute the DTAA and requires that a law be passed by the Parliament to that end. By debating the agreement in parliament but then approving the DTAA's conditions so it come

with the double review on the deal. So the authority has a power to give rule on the double taxation agreement and the power given under article 253 of Indian constitution. However, the procedure of separating the law for each DTAA is rather challenging. As a result, the Income Tax Act of 1961's section 90 was amended by the parliament.

2.2. Double Taxation agreement as per section 90 of Income tax act

According to Section 90(1) of the Income Tax Act the Union Executive has the jurisdiction as well as power to negotiate tax-related agreements with foreign specified territories or governments. The above mention clause outlines how to offer compensation for income where double taxation has already applied or accrued as well as how to prevent double taxation. The first structure or head of Section 91 permits the Central Government to grant relaxation when a person has paid any taxes on the same income in two countries as well as the second form as well as head stipulates that agreements may be made in order to prevent double taxation as per the law of India as well as the laws of all other countries. In order to prevent double taxes, the first element is to addresses tax relief. According to the applicability of the provision the assesses is exempted from double taxation on earnings as well as must first pay tax before applying for compensation through a reimbursement. In the framework of double tax avoidance as well as relief both Income tax act as well as the DTAA are applied to the assesses in these two act whichever is advantageous to the assesses shall be applicable, according to subsections (1) as well as (2) of Section 90.[1] The parliament has given the Union Executive permission to negotiate treaties with any nation abroad as well as to decide how those agreements will be carried out. When the DTAA as well as the Income Tax Act conflict, the DTAA shall take precedence over the Income Tax Act insofar as it is more advantageous.

2.3.Important points for India- Mauritius Treaty

The India-Mauritius Treaty has generated considerable international investment as well as debate. The justification for it was that the aforementioned agreement permits treaty purchasing as well as double non-taxation making it a popular choice for investors. Due to the fact that capital gains must be taxed on residency without considering the source of the income into account double non-taxation sometimes occurs. It also covers capital gains from the sale of shares. If the person is a Mauritius resident the capital gains resulting from the sale of the any stock of an Indian-based company will be subject to tax in Mauritius. The tax regime in

[1] Kanga And Palkhivala, The Law And Practice Of Income Tax, 1720-1721 (10 Ed., 2014)

Mauritius has a low tax rate as well as no tax capital gains. Under the same treaty a Mauritius resident can save the 20% tax on capital gains imposed by India. Due to the fact that neither jurisdiction taxed these transactions the aforementioned problem is known as double non-taxation. Mauritius was a tiny nation with little trade relations with India at the time the agreement was signed.[2] Investors who wanted to make investments in India settled in Mauritius to take advantage of these advantages. Shell firms or that a round of cash were used to form many enterprises. The Central Government responded by stating that the practise is permitted through announcement as well as the prerequisite for resident evidence is to obtain a Tax Residency Certificate which will be provided by the Mauritius government. The aforementioned "treaty shopping" caused controversy.

The Supreme Court affirmed the circular that the Central Government issued for the announcement in the case of **Azadi Bachao Andolan v. Union of India**[3]. The court ruled that the Mauritius TRC is legal as well as that it cannot be contested in India. The court also noted that agreement shopping was acceptable as well as that the executive should have implemented a restriction of advantage clause in circumstances when it sought to prevent it. It was additionally determined in the case of **Vodafone International Holdings BV v. Union of India**[4] that the closed systems of TRCs is still debatable even after this ruling although changes were introduced by the parliament. The modification gave the government more information to work with besides the TRCs therefore Vodafone questioned whether the TRCs were decisive in cases of tax evasion.

3. Rules related to General Anti-Avoidance Rules (GAAR)

DTAA is one of several actions that can be taken to obtain a tax benefit or lower the assesses' tax burden. In recent years there have been concerns about assessors creating fictitious structures such as channeling revenue through low-tax countries or using shell corporations to unfairly benefit from tax incentives as well as deductions. The State suffered a loss of revenue as well as the tax base was eroded. In the Income tax act there is an amendment in the year 2012 and on this year General Anti Avoidance Rules (GAAR) added as its Chapter X-A in order to stop this loss. According to Chapter X-A of the IT Act assesses are not permitted to utilize a "impermissible avoidance agreement" to evade taxes. An illegal agreement is one that

[2] Karthik Ranganathan, Knowledge Sharing Alert-International Tax-Recent Amendment To India Mauritius Tax Treaty, 69 Taxmann.Com 389 (2016)

[3] Union Of India V. Azadi Bachao Andolan, (2004) 10 Scc 1

[4] Vodafone International Holdings Bv V. Union Of India, (2012) 6 Scc 613.

is exclusively made to evade taxes.

- Does not have enough commercial content
- No fair and impartial transaction
- indirectly or directly misuse of the IT Act to arise
- not performed in a genuine manner

Simply by stating that specific actions were conducted by the assesses with the intention of gaining a tax benefit the adjudicator may infer that agreements were made in order to receive tax. The tax payer will now have to provide evidence to refute each inference. Tax benefits on the other hand have a broader definition because they include cover exemptions deductions as well as other reductions in tax obligations that may result from taxation agreements. Tax authorities have a broad range of authority to check or investigate structures for ownership model beneficial ownership voting rights, etc. It is taken into account that the examination will have an impact on a number of device in order used to evade paying taxes or to receive tax advantages. Along with the aforementioned arrangements many more legitimate business transactions or agreements that saved money on taxes will also be subject to investigation.

4. Concept of Validity to Override Treaty

The provisions related to the validity to override treaty describe under the of Chapter X-A shall be applicable to the assesses though they take advantageous subject to sub-section (2) of Section 90(2A) of the Income Tax Act, 1961. Therefore, Section 90 (2A) specifies that GAAR should be applied instead of DTAA regulations when GAAR is accessible to the assesses. In the event of a conflict between Chapter X-A as well as the DTAA the Income Tax Act will take precedence over the treaty under the ordinary over special rule. which will cause in the assesses losing DTAA advantages. The question that can be regarded seems to be whether such an overrule is acceptable or not.

4.1. Concept of Overriding: Treaty as well as Domestic Laws

The focus of the study as well as discussion in this section of the article will be first on the laws that are applicable to the relevant issue as well as any ambiguity that the act may permit. This topic has been interpreted as well as discussed in a few different High Courts but in each case the background has been slightly different therefore the Court has not made any definitive observations even expressed a view on the matter. The second is judicial rulings on the

question as well as the third is the present state of the law in the relevant field. According to the author the fundamental design of the agreement permits the statutory overriding over it.

i- Problem of Double -Taxation and the Constitution Scheme

The legislature (Parliament as well as State) has the authority to enact laws as well as divide the geographical scope of their application under Article 245 of the Constitution. The Indian Constitution's Articles govern the laws that are created by. The same word has been construed to include Part of Constitutional provisions parliamentary topic delegation between Parliament as well as State as well as other Constitutional provisions that may place restrictions (Article 3). Additional constraints are outlined in Article 246 of the Constitution as well as take the form of publication of legislative topics when seen in conjunction with the Seventh Schedule. According to this Sub-section (1) Parliament has the only authority to enact laws pertaining to the items on the Union list. The Union List Gives Parliament the authority to enact legislation governing foreign policy the signing of treaties as well as other agreements their implementation, as well as other topics.

More specifically Article 253 of the Constitution states that The Parliament has power to establish laws for any portion or entire jurisdiction of India in order to carry out any treaty as well as agreement with another nation and any decision taken in International conference, etc. When authority granted by Article 253. Accordant to Article 246. A law passed as per Article 246 therefore takes precedence over a measure passed under Article 253. The question of Article 253 application as well as legality still has to be resolved.

4.2. Judgement of High Court on Double Taxation

The High Court of Madras concluded that treaty overriding is constitutionally permissible while the High Court of Delhi ruled that it is unlawful. The High Court of various States has differing opinions about the legality of agreement to overrule through statutes. While the High Court of Karnataka have proposed a third option that is legal in some instances but illegal in others. The Central Government may notify a nation that is not cooperating in the exchange of information under a bilateral agreement under Section 94A (1). After notification the terms of the DTAA will no longer apply to transactions between the two countries unless a number of circumstances were met in which case the Income Tax Act of 1961's rules would take effect. The Court stated that Article 253 solely had the effect of removing the petitions placed on the legislative competition of the House of Representatives by Articles 246, 249 as well as 250.

That purpose was served by the non-obstructive clause. Nothing in Article 253 suggested that a legislation passed in accordance with that Article would be placed on a higher pedestal than a law passed in accordance with Article 246 (1). In fact, the Tribunal even suggested that such a dilemma was never considered by the Constitution. The controversy centered on the validity of a new change by the Financial Act of 2012 to the concept of royalty as per Section 9(1)(vi) of the Income Tax act of 1961. According to the High Court of Delhi this change was made. The amendment was created with a critical eye. For the purposes of a DTAA domestic law is static. Even though the Parliament may be supreme, it was held that it lacked the power to alter a treaty's terms through domestic legislation.

5. Treaty of India as well as Mauritius on the concept of GAAR

This section will look at the identifier of different changes done in the India-Mauritius DTAA. The other section will look at transactions involving a restriction of benefit clause and the application of GAAR. A few old rule transactions were kept over time despite the availability of new rules, while LBC has been introduced for others.

5.1. Modifications to the India-Mauritius Agreement

The India-Mauritius treaty was amended in 2016 by a Protocol to prevent base erosion caused by double non-taxation. Capital gains arising from the transfer of shares in an Indian company would be treated as income in India in a phased manner, as specified in the Protocol. Any investment made before March 31, 2017 is grandfathered and will be exempt from capital gains tax regardless of when it is sold. The Protocol provides for a transition period from 1 April 2017 to 31 March 2019, during which the tax rate cannot exceed 50% of a current tax rate in India. The benefit of the transitional phase will be determined by LBC satisfaction. The clause states that treaty benefits will be granted after the assesse has satisfied the purpose and fide business requirements, as well as that the company is not a casing or conduit company. It is simple to understand that GAAR does not apply to grandfathered agreements hence controversy is unlikely to ensue. The exchanges covered by LBC but rather how GAAR applicable to them will be discussed in the portion of this section that follows.

5.2. Restriction of Advantage Clause under Indian Tax Treaties

Indian Tax Treaties: Establishment of LBC

The phrase is a unique proviso that guarantees that only legal inhabitants of the opposing

trading nation are eligible to receive treaty advantages. A restriction benefit requirement could be objective like mandating a minimum investment or it could be subjective like the principal purpose as well as bona genuine evaluation. The India-Mauritius Treaty is an outstanding analogy both of subjective and objective benefit limitation clauses. Due to the policy goal of avoiding treaty shopping, India's treaty intends at source-based taxation rather than resident-based taxation. However, the controversy grew into the Azadi Bachao Andolan case.

LBC Restriction Advantage Benefit Clause not preventing GAAR from taking effect

The intent of LBC is to make sure that only genuine residents from the other country can benefit from of the treaty, but the question would be whether Arbitral award can be used to penetrate this same corporate shield and examine residence. As stated by the This Committee, the LBC should be brought before the system of GAAR because it is a special as well as specific law. The maxim Lex special is derogatlegi general states that special law takes precedence over general law. Thus, GAAR is not applicable in the case of a transaction covered by the LBC. It states that "aside from anything included in Section 90 (2), the provisions of Chapter X-A of the Act shall be applicable to the tax payer, even if they are not beneficial to him."

As a result, Section 90(2) allows agreements to enforce rather than Act to the extent that it has a more positive outcome, but is overridden by Act if the agreement is inadequate as per GAAR. As a result, if any arrangement is incompatible with the provisions of Chapter X-A, the assesses will be denied the advantages of the treaty. The Shame Commission's Report on GAAR acknowledged the aforementioned inadequacy. As a result, despite the fact that treaty contains LBC, it is currently overridden by GAAR.

Due to the broad scope of GAAR, the current legal position is that arrangements may be rejected by GAAR even after satisfying the requirements of Consignee. The India-Mauritius LBC agreement allows for both objective and subjective examination. Subjective examination states that if an assesses affairs are structured with the primary goal of gaining an advantage on advantages in Article 13(3B) of the Conference; he may be denied treaty benefits. An arrangement shall be presumed, unless the assesse proves to the contrary, to have been entered into, or carried out, again for main goal of obtaining a tax incentive, if the main purpose of a phase in, or a part of, the agreement is to obtain a tax incentive, notwithstanding fact that the main purpose of the whole agreement not to obtain a tax benefit. If any portion of it was designed to acquire a tax benefit, GAAR will strike it down. Though the primary goal of the

entire arrangement may be presumed to be illegal. On the surface, the arrangements aligned with LBC appear to be in conflict with GAAR.

Furthermore, if the effects of the arrangement do not satisfy the LBC, the concerned taxpayer will be ineligible for tax advantages under the relevant treaty. While in instances where the arrangements are found to be inadmissible by GAAR, the arrangements are regarded to have never come into force or to have been ignored. It will also show that the expenses, deductions, or relief supplied in the agreement have been relocated.

5.3. Disadvantages of Application of GAAR on LBC

The benefit of the treaty would be denied if the transaction is prohibited by the India-Mauritius DTAA. The rates of Investment Income arising from the alienation of shares in Mauritius from 2017 to 2019 are 50% of the applicable rates in India, resulting in a double tax liability. It should be mentioned that the track record of Indian tax office has seen little development and progress and is regarded as poor. The GAAR procedure is provided for in Section 144 BA of the IT Act, but it is very broad. Furthermore, it is essential to consider that assesses have had a presumption of being able to receive treaty benefits by obtaining TRC, and TR C is released after LBC are comfortable. In contrast hand, GAAR will be applicable after the filling stage.[5] As a result, treaties with LBC and GAAR applicability will cause investors to be confused and uncertain about whether they are entitled to tax benefits despite obtaining TRC. This fear is obvious in different two well-known cases, namely Vodafone and Apple, which have been operating under the Treaty for several years but have been denied tax benefits. In the case of Vodafone, the tax liability was Rs. 12,000 Crore26, while Apple's was $14 Billion27. A notice or amendment will be issued for clarification, as suggested by the Shame Committee. The explanation or clarifying may be established through a new section or auxiliary subsection stating that GAAR is not applicable to treaties with LBC. Delegation of powers can also be used to specify a list of treaties. A legitimately used tax benefit has legal sanction and will not result in revenue loss. GAAR meets the very same requirements as LBC in India in order to prevent tax evasion through treaty shopping. In general, GAAR will strike tax advantages in cases where LBC has denied them. In the event that base erosion exceeds the amount sought to also be taken into custody.

[5] Income Tax Act, 1961, §144ba (The Application Of The Gaar Is At The Stage Of Assessment Or Reassessment).S

6. Conclusion

There will nearly certainly that create antipathetic effect on capitalist conviction. Investor confidence will be hurt even when they are not subsequently penalized by GAAR examination since they will go through drawn-out legal processes without being required to abide by the Limitation of Advantages rules. Furthermore, exchanges are covered by various provisions and they will not be eligible for specified protocol and will be taxed. As a result, the proposed change is unlikely to result in any revenue loss. It is imperative that the Indian Government deal with the problem by revising the statute to indicate that GAAR should not be subjected to agreements containing a restriction of treaty provisions as well as out of an excessive amount of caution to list such agreements by means of legislative power. The impending challenge of combating a hazy framework and fear of arbitrary application of GAAR. Exchanges with low-tax agreement jurisdictions will be subject to extensive scrutiny. The main point of contention is that existing law cannot override treaties. The High Courts that have issued contrary opinions have provided fertile ground for the challenge, and the logic laid out by the High Court of Delhi would then assistance it. Nonetheless, Articles 253 and 246 of the Constitution are in the same boat. The shackles of federalism imposed by Article 246(3) are removed by the effect of the non-obstante clause in Article 253 and are not to take precedence over each other. As a result, it is likely to fail on constitutional grounds. The High Court of Madras has interpreted the same. It will also not invalidate the GAAR under international law. As a result, Limitation of Benefits provisions can prevent the application of GAAR to the DTAA. Because it is a special law, it will be interpreted before GAAR, but the present incarnation under S. 90(2A) provides that both will apply concurrently. Transactions that satisfy the LBC because of their broader scope but may be impacted by GAAR. Apart from being denied benefits, the individual will be charged higher taxes and face other penalties outlined in the statute.