‘GAAR’ and Rule of Law: Mutually Incompatible?

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Pursued on the avowed premise that ‘tax avoidance, like tax evasion, seriously undermines the achievements of the public finance objective of collecting revenues in an efficient, equitable and effective manner’, the intent underlying the General Anti-Avoidance Rules of GAAR has found unequivocal resonance with the Government of India and its publicly stated desire to position GAAR as a pivotal ingredient of the direct tax laws of the country. While the Indian judiciary remains unfazed with the heated debate on ‘substance versus form’ or ‘doctrine of commercial substance’ and continues to pursue the Duke of Westminster principle, the Indian Parliament has chosen to adopt a head-on stand and has legislated GAAR in the Indian income tax law. Even though the implementation of GAAR has been deferred for the time being, like the Damocles sword, the GAAR provisions continue to occupy an overarching position in the law and sooner or later will come to haunt the subjects of these tax laws.

In the wake of these developments this article makes an attempt to examine the judicial acceptability of GAAR in the event the overriding powers vested with the tax-administration in terms of these rules is subjected to challenge before the country. The principle hypothesis of this article is to examine, upon an appraisal of the statutory provisions as existing in the income tax law of India (amended as lately as in 2013), whether GAAR would run foul of the ‘rule of law’ which has been declared as an inviolable tenet of the constitutional ethos permeating the Indian legal system.

The article is divided into ten parts. The first part is the introduction and sets out the relevant considerations to put the appraisal exercise in context. The second part revisits the attributes of the legal system perceived as restraint by the tax-administration to appraise the factors pressing the need for GAAR. The third part examines the factors surrounding the first unveiling of GAAR in the Indian context to note the facets of the GAAR introduced as a part of the draft Direct Tax Code Bill in 2009 culminating in the Direct Tax Code Bill 2010. The fourth part examines threadbare the statutory provisions relating to GAAR as introduced (with corresponding amendments) in the Income Tax Act, 1961. The fifth and sixth parts revisit the foundational elements of the ‘rule of law’ regime generally and in the Indian legal system specifically in their respective content. The seventh part examines the relevant ‘rule of law’ considerations appropriate for testing the permissibility of action in terms of GAAR. In the eighth and ninth part this article examines, albeit briefly, the legal position relating to GAAR in Canada and New Zealand respectively to cull out their experience with GAAR of these similarly placed commonwealth jurisdictions. Based on a holistic appraisal of these factors the tenth and the last part to draw the conclusions thereon.

Introduction

“The tax which every individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought to be clear and plain to the contributor, and to every other person. Where it is otherwise, every person subject to the tax is put more or less in the power of the tax gatherer, who can either aggravate the tax upon any obnoxious contributor, or extort, by means of terror of such aggravation, some present or perquisite to himself. The uncertainty of taxation encourages the insolence and favours the corruption of an order of men who are naturally unpopular, even where they are neither insolent nor corrupt. The certainty of what each individual ought to pay is, in taxation, a manner of so great importance, that a very considerable degree of inequality, is not near so great an evil as a very small degree of uncertainty.”

Adam Smith

The message for the policy-makers in these resounding and immortal words of Smith is loud and clear; let there be certainty in the rules for taxation you draft or the rules would come to haunt the citizens and the rule-enforcers equally. The policy-makers, however, are resolute in their intent and

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the rules unyielding. The unbridled powers to investigate, extract or even scathe the tax-payer are not exceptional across jurisdictions. The provisions of the Direct Tax Code Bill, 2010 (as incorporated into the Income Tax Act, 1961) suggest that the Indian policy-makers have taken the lead from their western counterparts in as much as these provide extensively the ‘special provisions relating to avoidance of tax’, the prevailing wisdom for such move seemingly being that “on consideration of economic efficiency and fiscal justice, a taxpayer should not be allowed to use legal constructions or transactions to violate horizontal equity”\(^2\). Given this backdrop, this article makes an attempt to test the compatibility of such ‘General Anti-Avoidance Rules’ (‘GAAR’) regime in the light of the constitutional set-up in India and the ‘Rule of law’ that it so fiercely provides as the bedrock of governance.

**Why ‘GAAR’?**

Legal realists attribute the issue of tax-avoidance to the principle of strict construction accorded to fiscal statutes\(^3\) and ‘certainty’ as an important consideration of fiscal policy\(^4\). Moral and equitable considerations are foreign to fiscal enactments\(^5\) and “every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be”\(^6\). These principles have been, though inconsistently, followed both in the United Kingdom as well as in India\(^7\) and serve as the core premise for judicial appreciation of fiscal cases in most civilized countries. This judicial bent legally permits the tax-payer to plan his affairs to reduce the tax liability in the absence of any tax-avoidance provision.\(^8\) Thus the tax-payers are free to structure their transactions in a manner which would lead to reduction of their tax liability i.e. legal permission to indulge in tax-minimization. This interpretative premise of fiscal statutes forms the reason for discord and is attributed in theory as the principle factor for indulgence by those-with-means into aggressive tax-strategies. Their concern is aptly reflected by the contentions of the Advocate General Poiares Maduro raised before the Grand Chamber of the European Court of Justice where he expressed the antagonistic view in the following terms;

\[\text{“77. …It is true that tax law is frequently dominated by legitimate concerns about legal certainty, deriving, in particular, from the need to guarantee the predictability of the financial burden imposed on taxpayers and the principle of no taxation without representation. However, a comparative analysis of the Member States’ legal rules is sufficient to make it clear that such concerns do not exclude the use of certain general provisions and indeterminate concepts in the realm of tax law to prevent illegitimate tax avoidance. Legal certainty must be balanced against other values of the legal system. Tax law should not become a sort of legal ‘wild-west’ in which virtually every sort of opportunistic behaviour has to be tolerated so long as it conforms with a strict formalistic interpretation of the relevant tax provisions and the legislature has not expressly taken measures to prevent such behaviour.”}^{9}\]

Despite such vigorous contentions, judiciary has long recognised a self-restraining approach while tacking alleged tax-avoidance disputes in the wake of the pressing need to maintain the rule of law. To quote the House of Lords, “it may seem hard that a cunningly advised taxpayer should be able to avoid what appears to be his equitable share of the general fiscal burden and cast it on the shoulders of his fellow citizens. But for the Courts to try to stretch the law to meet hard cases (whether the hardship appears to bear on the individual taxpayer or on the general body of taxpayers as represented by the Inland Revenue) is not merely to make bad law but to run the risk of subverting the rule of law itself.”\(^10\)

The iteration of these compelling legal considerations has caused a topsy-turvy development of the jurisprudence with precedents on both sides\(^11\) and thus anti-avoidance rules are advocated to compel the change in judicial standards of adjudication in such matters.

**GAAR under the Direct Taxes Code Bill**

“Targeted Anti Avoidance Rules” (TAAR) or “Specific Anti Avoidance Rules” (SAAR) have already been in vogue from long and therefore the idea of giving place to anti-avoidance rules in tax legislation is not new to India at all. Chapter - X of the Income Tax Act, 1961 christened as ‘special provisions relating to avoidance of tax’ already provides anti-avoidance rules relating to transfer-
pricing\textsuperscript{12}, transactions with Non-Residents\textsuperscript{13}, securities transactions\textsuperscript{14}, etc. These statutory rules have further been supplemented by judiciously developed anti-avoidance rules.\textsuperscript{15} However these specific anti-avoidance rules cannot combat the more creative forms of tax avoidance that employ transactions that tax-administrations cannot predict. Thus the Direct Taxes Code Bill introduced GAAR, igniting a hitherto foreign debate in India on the impact and contours of GAAR in the direct tax laws of the country.

The Government of India expressed the pressing need for adopting statutory rules against tax-avoidance when it unveiled the first draft of the Bill for public discussion in 2009. The accompanying Discussion Paper expressed the rationale for the introduction of the GAAR in the following terms;

“24.1 Tax avoidance, like tax evasion, seriously undermines the achievements of the public finance objective of collecting revenues in an efficient, equitable and effective manner. Sectors that provide a greater opportunity for tax avoidance tend to cause distortions in the allocation of resources. Since the better-off sections are more endowed to resort to such practices, tax avoidance also leads to cross-subsidization of the rich. Therefore, there is a strong general presumption in the literature on tax policy that all tax avoidance, like tax evasion, is economically undesirable and inequitable. On considerations of economic efficiency and fiscal justice, a taxpayer should not be allowed to use legal constructions or transactions to violate horizontal equity.

24.2 In the past, the response to tax avoidance has been the introduction of legislative amendments to deal with specific instances of tax avoidance. Since the liberalization of the Indian economy, increasingly sophisticated forms of tax avoidance are being adopted by the taxpayers and their advisers. The problem has been further compounded by tax avoidance arrangements spanning across several tax jurisdictions. This has led to severe erosion of the tax base. Further, appellate authorities and courts have been placing a heavy onus on the Revenue when dealing with matters of tax avoidance even though the relevant facts are in the exclusive knowledge of the taxpayer and he chooses not to reveal them.

24.3 In view of the above, it is necessary and desirable to introduce a general anti-avoidance rule which will serve as a deterrent against such practices. This is also consistent with the international trend.”

This understanding was reiterated in the Second Discussion Paper issued by the Government wherein it was stated that “a statutory GAAR can act as an effective deterrent and compliance tool against tax avoidance in an environment of moderate tax rates.” This backdrop has a clear reflection upon the tax-avoidance practices in vogue as it has been specifically noted that “increasingly sophisticated forms of tax avoidance are being adopted by the taxpayers and their advisers” and judicial decisions\textsuperscript{16} acknowledge growing public resentment against such tax-avoidance tactics in the country. Thus clearly the GAAR was intended to serve as a panacea against tax-avoidance strategies prevalent in India.

**GAAR under the Income Tax Act, 1961**

The Direct Taxes Code Bill, 2010, after its introduction in the Parliament, was referred to the Standing Committee on Finance of the Parliament. In its Report evaluating the nuances of the Bill the Committee noted various fallouts of GAAR being invoked, both on equitable as also pragmatic considerations. These were; (a) the “provisions to deter tax avoidance should not end up penalizing tax-payers, who have genuine reasons for entering into a bonafide transaction”; (b) the “proposals should not lead to any fiscal uncertainty or ambiguity”, and (c) “it should be ensured that any of the proposals does not pave the way for avoidable litigation, which is already at a very high level in tax matters.”\textsuperscript{17}

Despite the request for ensuring inbuilt safeguards in the draft GAAR proposed in the Direct Taxes Code Bill, the Government of India went ahead to introduce GAAR in the unamended and rather expanded form in the Income Tax Act, 1961. The impetus for the same was the then-recent decision of the Supreme Court in \textit{Vodafone International} (supra) wherein the Court revisited the entire debate of substance-versus-form of transactions in context of tax-avoidance transactions to reaffirm its earlier view in favour of the tax-payers following the \textit{Duke of Westminster} principle. The Memorandum to the
Finance Bill, 2012 seeking to amend the provisions of the Income Tax Act, 1961 clearly noted the divergence of judicial views on tax-avoidance and thus the impelling need to introduce GAAR in India in the following terms:

“The question of substance over form has consistently arisen in the implementation of taxation laws. In the Indian context, judicial decisions have varied. While some courts in certain circumstances had held that legal form of transactions can be dispensed with and the real substance of transaction can be considered while applying the taxation laws, others have held that the form is to be given sanctity. The existence of anti-avoidance principles are based on various judicial pronouncements. There are some specific anti-avoidance provisions but general anti-avoidance has been dealt only through judicial decisions in specific cases.

In an environment of moderate rates of tax, it is necessary that the correct tax base be subject to tax in the face of aggressive tax planning and use of opaque low tax jurisdictions for residence as well as for sourcing capital. Most countries have codified the ‘substance over form’ doctrine in the form of General Anti Avoidance Rule (GAAR).

In the above background and keeping in view the aggressive tax planning with the use of sophisticated structures, there is a need for statutory provisions so as to codify the doctrine of “substance over form” where the real intention of the parties and effect of transactions and purpose of an arrangement is taken into account for determining the tax consequences, irrespective of the legal structure that has been superimposed to camouflage the real intent and purpose. Internationally several countries have introduced, and are administering statutory General Anti Avoidance Provisions. It is, therefore, important that Indian taxation law also incorporate a statutory General Anti Avoidance Provisions to deal with aggressive tax planning.”

On this premise the Government introduced GAAR in the Income Tax Act, 1961. The newly inserted rules provide that an arrangement whose main purpose or one of the main purposes is to obtain a tax benefit and which also satisfies at least one of the four tests, can be declared as an ‘impermissible avoidance arrangements’, where the four tests are that the arrangement (a) creates rights and obligations, which are not normally created between parties dealing at arm’s length; (b) results in misuse or abuse of provisions of tax laws; (c) lacks commercial substance or is deemed to lack commercial substance; (d) is carried out in a manner, which is normally not employed for bonafide purpose.

To serve as a guideline both for tax-administration in identifying and for the judiciary in sustaining the objection of the tax-administration, the substance-over-form test has been enacted by a general rule that “an arrangement shall be deemed to lack commercial substance if the substance or effect of the arrangement as a whole, is inconsistent with, or differs significantly from, the form of its individual steps or a part”. Supplementing this general rule, specific instances have been identified where the arrangements will be deemed to be lacking commercial substance. These are where the transactions involve or include (i) round trip financing; (ii) an accommodating party; (iii) elements that have effect of offsetting or cancelling each other; or (iv) a transaction which is conducted through one or more persons and disguises the value, location, source, ownership or control of funds which is the subject matter of such transaction.

Providing detailed illustration of what instances / structures do not constitute ‘commercial substance’ it is further provided that in the event of finding of an ‘impermissible avoidance arrangement’ the tax-administration is empowered not just in “treating the impermissible avoidance arrangement as if it had not been entered into or carried out” but also in “disregarding, combining or recharacterising any step in, or a part or whole of, the impermissible avoidance arrangement”. The underlying idea of invoking GAAR is to undo the form and structure of the transaction intended to avoid tax by reconstructing it in a manner in which it normally would have been. To this effect it is provided that “if an arrangement is declared to be an impermissible avoidance arrangement, then the consequences, in relation to tax, of the arrangement, including denial of tax benefit or a benefit under a tax treaty, shall be determined, in such manner as is deemed appropriate, in the circumstances of the case.”
The tax-administration has been further empowered to deal with instances of creative accounting by providing that in such instances of impermissible avoidance arrangement “(i) any equity may be treated as debt or vice versa; (ii) any accrual, or receipt, of a capital nature may be treated as of revenue nature or vice versa; or (iii) any expenditure, deduction, relief or rebate may be recharacterised.” To deal with instances involving multiple parties it has been provided that the transaction may be re-determined by the tax-administration by “disregarding any accommodating party or treating any accommodating party and any other party as one and the same person”, or “deeming persons who are connected persons in relation to each other to be one and the same person for the purposes of determining tax treatment of any amount” or by “reallocating amongst the parties to the arrangement (i) any accrual, or receipt, of a capital or revenue nature; or (ii) any expenditure, deduction, relief or rebate”. In fact the tax-administration has now been given statutory power to lift the corporate veil as it is now permitted to determine the correct effect of an impermissible avoidance arrangement by “considering or looking through any arrangement by disregarding any corporate structure”. Thus the declaration of the law by the Supreme Court that the tax-administration cannot “look through” the transactions but can only determine taxability by “looking at” them has been statutorily done away with; a quintessential instance of legislative overruling of judicial decisions.

The ‘tax benefit’, entitlement or availment of which may trigger these rules, has also be defined very widely to cover “(a) a reduction or avoidance or deferral of tax or other amount payable under the Income Tax Act; (b) an increase in a refund of tax or other amount under the Act; (c) a reduction or avoidance or deferral of tax or other amount that would be payable under the Act, as a result of a tax treaty; (d) an increase in a refund of tax or other amount under the Act as a result of a tax treaty; (e) a reduction in total income; or (f) an increase in loss”. In as much as even tax deferment in a year is availment of tax-benefit in that year, non-payment of taxes in a particular year (even with the obligation to pay subsequently) alone can be the reason to invoke GAAR.

Further, in an act which actually amounts to unilaterally repudiating a bilateral treaty, it has been provided that treaty benefit (i.e. the beneficial taxation regime under the Double Taxation Avoidance Agreements) will not be available to transactions where GAAR is invoked. Thus by a minor amendment the entire debate on renegotiating the tax treaty with Mauritius has been set to naught. The need to introduce ‘limitation of benefits’ provision in the tax treaty is also diluted as in view of the amended provisions of the Income Tax Act the transactions covered under GAAR will in any case not be entitled to favourable outcome under these treaties.

In short, therefore, Chapter-X of the Income Tax Act, 1961 providing for the ‘General Anti-Avoidance Rule’ confers wide powers with the tax-administration not just to disregard the actions of the taxpayers but also to extrapolate or recast them in the manner which according to the tax-administration should yield the highest tax-revenue. The very fact that this exercise would be undertaken subsequent to the transactions having taken place and with the tax-administration antedating them post facto has a bearing on the ‘principle of certainty’ firmly embedded in the application of fiscal statutes. In fact the omnipotent tool of GAAR enabling the tax-administration to mould the past in the manner which befits them would render the actions of the taxpayers as existing in a perpetual state of flux. Arguably the conferment of such wide powers upon tax-administration may create apprehension of exploitation and vindictiveness though the law conceives guidelines to curb opportunistic behaviour by the members of tax-administration.

To ensure that the application of these rules is undertaken on a fair and rationale basis, the applicability of these rules has been deferred by Finance Act, 2013 to 1st April, 2016 and certain suggestions of the Expert Committee constituted to advice on GAAR have also been incorporated by making suitable amendments in the Act. However what is important to be noted is that the Government has only deferred implementing GAAR but not diluted its intent of subjecting the allegedly tax-avoidance mechanicals being subjected to the over-arching powers of the department under the proposed GAAR. This calls for an appraisal of GAAR on the touchstone of ‘rule of law’ regime in the country which severely stands out against arbitration and unyielding powers being placed upon the officers of the executive government.

Founding ‘Rule of Law’
Enumerating the ingredients of a ‘rule of law’ based legal system, A.V. Dicey in his famous treatise entails the pivotal considerations operating in such legal systems in the following terms;

“When we say that the supremacy or the rule of law is a characteristic of the English constitution, we generally include under one expression at least three distinct though kindred conceptions.

We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.”

Explaining the rationale and necessity of insisting on such a condition as a predominant facet for a ‘rule of law’ based regime, it is further stated as under;

“in almost every continental community the executive exercises for wider discretionary authority in the matter of arrest, of temporary imprisonment, of expulsion from its territory, and the like, then is either legally claimed or in fact exerted by the government in England; and a study of European politics now and again reminds English readers that wherever there is discretion there is room for arbitrariness, and that in a republic no less than under a monarchy discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects.”

Thus the foremost evil which according to Dicey comes in the way of a ‘rule of law’ regime is arbitrary and discretionary power with the Government. Accordingly, in order to ensure that the governance takes place in a rule-based regime, one and all are made subject to law and law alone, the judge of which is the court and not the Government. This aspect was echoed even by the Supreme Court in the famous Indira Gandhi case where it was observed that “the rule of law means that the exercise of powers of Government shall be conditioned by law and that subject to the exceptions to the doctrine of equality, no one shall be exposed to the arbitrary will of the Government”.

This aspect has been repeatedly affirmed and reiterated by the courts in India. On these lines it has been held that “it must be emphasised that the absence of arbitrary power is the first essential of the Rule of law upon which our whole constitutional system is based. In a system governed by Rule of law the discretion when conferred must be confined within clearly defined limits. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is always the antithesis of a decision taken in accordance with law. The Rule of law implies taking a decision by applying the known principles.”

As the Supreme Court explained, “in our constitutional system, the central and most characteristic feature is the concept of the Rule of law which means, in the present context, the authority of the law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the appropriate action in the competent court. The Rule of law rejects the conception of the Dual State in which governmental action is placed in a privileged position of immunity from control by law. Such a notion is foreign to our basic constitutional concept.”

Positioning ‘Rule of law’ in India

Having examined the essential tenet of the ‘rule of law’ based system of governance, it is imperative to establish its position in the Indian constitutional jurisprudence to determine as to whether this ‘rule of law’ is only an ideal seeking aspiration affinity or is an essential and inviolable tenet of constitutional governance in the country.

The landmark case of Kesavananda Bharati established the doctrine of ‘basic structure’ under the Constitution of India, whereby certain axiomatic concepts were postulated as the heart and soul of the Constitution and were declared to be inviolable. In terms of this unprecedented and unique thirteen-bench judge decision of the Supreme Court, these concepts could not be done away with even by amending the Constitution. Some of these concepts, such as ‘supremacy of the Constitution’; ‘republican and democratic form of Government’; ‘secular character of the Constitution’; ‘separation of power between the legislature, executive and the judiciary’; ‘federal structure of the constitution’; etc.
have been identified in the Kesavananda Bharati (supra) itself whereas the later decisions of the Supreme Court have added on to these indispensible postulates of the Constitution of India.

A Nine Judge Bench of the Supreme Court in I.R. Coelho declared that ‘rule of law’ is part of the ‘basic structure’ of the Constitution of India. Opining upon the inter se positioning of ‘rule of law’ with other constituents of basic structure, the Court declared the law in the following terms;

“129. Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary.

130. Realising that it is necessary to secure the enforcement of the fundamental rights, power for such enforcement has been vested by the Constitution in the Supreme Court and the High Courts. Judicial review is an essential feature of the Constitution. It gives practical content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. It may be noted that the mere fact that equality, which is a part of the basic structure, can be excluded for a limited purpose, to protect certain kinds of laws, does not prevent it from being part of the basic structure. Therefore, it follows that in considering whether any particular feature of the Constitution is part of the basic structure—rule of law, separation of powers—the fact that limited exceptions are made for limited purposes, to protect certain kind of laws, does not mean that it is not part of the basic structure.”

This implies that the nuances and postulates underlying the ‘rule of law’ form the essential pivotal on which the Constitution is based and these are inviolable. However it must be duly noted that is not after the declaration in Kesavananda Bharati (supra) or I.R. Coelho (supra) that ‘rule of law’ was elevated to the status of a guiding star for judicial review. On the contrary ‘rule of law’ has traditionally been recognized, following the commonwealth practice, as being an essential facet of the Indian constitutional ethos. An Eleven Judge Bench of the Supreme Court in Golak Nath had earlier enunciated the legal position relating to ‘rule of law’ under the Constitution in the following terms;

“The rule of law under the Constitution has a glorious content. It embodies the modern concept of law evolved over the centuries. It empowers the Legislatures to make laws in respect of matters enumerated in the 3 Lists annexed to Schedule VII. In Part IV of the Constitution, the Directive Principles of State Policy are laid down. It enjoins it to bring about a social order in which justice, social, economic and political — shall inform all the institutions of national life. It directs it to work for an egalitarian society where there is no concentration of wealth, where there is plenty, where there is equal opportunity for all, to education, to work, to livelihood, and where there is social justice. But, having regard to the past history of our country, it could not implicitly believe the representatives of the people, for uncontrolled and unrestricted power might lead to an authoritarian State. If, therefore, preserves the natural rights against the State encroachment and constitutes the higher judiciary of the State as the sentinel of the said rights and the balancing wheel between the rights, subject to social control. In short, the fundamental rights, subject to social control, have been incorporated in the rule of law. That is brought about by an interesting process. In the implementation of the Directive Principles, Parliament or the Legislature of a State makes laws in respect of matter or matters allotted to it. But the higher Judiciary tests their validity on certain objective criteria, namely, (i) whether the appropriate Legislature has the legislative competency to make the law; (ii) whether the said law infringes any of the fundamental rights; (iii) even if it infringes the freedoms under Article 19, whether the infringement only amounts to ‘reasonable restriction’ on such rights in ‘public interest.’ By this process of scrutiny, the court maintains the validity of only such laws as keep a just balance between freedoms and social control. The duty of reconciling fundamental rights in Article 19 and the laws of social control is cast upon the courts and the touchstone or the standard is contained in the said two expressions. The standard is an elastic one; it varies with time, space and condition. What is reasonable under certain circumstances may not be so under different circumstances. The constitutional philosophy of law is reflected in Parts III and IV of the Constitution. The rule of law under the Constitution serves the needs of the people without unduly infringing their rights. It recognizes the social
reality and tries to adjust itself to it from time to time avoiding the authoritarian path. Every institution or political party that functions under the Constitution must accept it; otherwise it has no place under the Constitution." (emphasis supplied)

In a number of subsequent decisions the importance of maintaining the ‘rule of law’ has been underscored in both fiscal as also non-fiscal statutes. For illustration, in Epuru Sudhakar the Supreme Court set-aside the order of remission of sentence granted to a convict by the Governor where the Court found the remission to have been granted on extraneous grounds. Holding that such action was inter alia violative of the ‘rule of law’ regime, the Supreme Court expounded the legal position in the following terms:

"66. … The Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central plan in the Rule of Law. Every prerogative has to be subject to the Rule of Law. That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent. The Rule of Law principle comprises a requirement of ‘Government according to law’. The ethos of ‘Government according to law’ requires the prerogative to be exercised in a manner which is consistent with the basic principle of fairness and certainty.”

Later and more recently in Dayanand, the Supreme Court went on to invoke the ideas of noted jurist Raz to hold that ‘regularity, predictability and certainty in Government’s dealings with the public’ was the hallmark of a ‘rule of law’ regime and observed as under;

"102. The concept of “due process of law” has played a major role in the development of administrative law. It ensures fairness in public administration. The administrative authorities who are entrusted with the task of deciding lis between the parties or adjudicating upon the rights of the individuals are duty-bound to comply with the rules of natural justice, which are multifaceted. The absence of bias in the decision-making process and compliance with audi alteram partem are two of these facets. The doctrine of legitimate expectation is a nascent addition to the rules of natural justice. It goes beyond statutory rights by serving as another device for rendering justice. At the root of the principle of legitimate expectation is the constitutional principle of rule of law, which requires regularity, predictability and certainty in Government’s dealings with the public – J. Raz, The Authority of Law [(1979) Chapter 11]. The “legal certainty” is also a basic principle of European community. European law is based upon the concept of vertrauensschutz (the honouring of a trust or confidence). It is for these reasons that the existence of a legitimate expectation may even in the absence of a right of private law, justify its recognition in public law.”

On the minimum standards of fairness in Government action, the Supreme Court in Chanchal Goyal declared that the doctrine of legitimate expectation etc. had a foundation in the country governed by ‘rule of law’ in the following terms;

"12. What remains to be considered is the plea of legitimate expectation. The principle of “legitimate expectation” is still at a stage of evolution as pointed out in De Smith’s Administrative Law (5th Ed., para 8.038). The principle is at the root of the rule of law and requires regularity, predictability and certainty in the Governments’ dealings with the public. Adverting to the basis of legitimate expectation, its procedural and substantive aspects, Lord Steyn in Pierson v. Secy. of State for Home Department (All ER at p. 606) goes back to Dicey’s description of the rule of law in his Introduction to the Study of the Law of the Constitution (10th Edn., 1968, p. 203) as containing principles of enduring value in the work of a great jurist. Dicey said that the constitutional rights have roots in the common law. He said:

“The ‘rule of law’, lastly, may be used as a formula for expressing the fact that with us, the law of constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and its servants; thus the Constitution is the result of the ordinary law of the land.”
This, says Lord Steyn, is the pivot of Dicey’s discussion of rights to personal freedom and to freedom of association and of public meeting and that it is clear that Dicey regards the rule of law as having both procedural and substantive effects. “The rule of law enforces minimum standards of fairness, both substantive and procedural.” On the facts in Pierson, the majority held that the Secretary of State could not have maintained a higher tariff of sentence than that recommended by the judiciary when admittedly no aggravating circumstances existed. The State could not also increase the tariff with retrospective effect.”

Thus fair-play in governmental action has been elevated to a touchstone for examining the sustainability of such actions and there is no exception to the applicability of these considerations, as a sub-set of ‘rule of law’ based regime, in fiscal statutes. On how the raising and collection of public revenue is essentially governed by law, Dicey states that “… the main point, of course to be borne in mind, is that all taxes are imposed by statute, and that no one can be forced to pay a single shilling by way of taxation which cannot be shown to the satisfaction of the judges to be due from him under Act of Parliament”.

On the same accord, in Dabur India the Supreme Court expressed in no uncertain terms its displeasure with actions of revenue officers acting contrary to law to hold as under;

“31. Before we part with this case, two aspects have to be adverted to – one was regarding the allegation of the petitioner that in order to compel the petitioners to pay the duties which the petitioners contended that they were not liable to pay, the licence was not being renewed for a period and the petitioners were constantly kept under threat of closing down their business in order to coerce them to make the payment. This is unfortunate. We would not like to hear from a litigant in this country that the government is coercing citizens of this country to make payment of duties which the litigant is contending not to be leviable. Government, of course, is entitled to enforce payment and for that purpose to take all legal steps but the government, Central or State, cannot be permitted to play dirty games with the citizens of this country to coerce them in making payments which the citizens were not legally obliged to make. If any money is due to the government, the government should take steps but not take extra-legal steps or manoeuvre.”

On similar count the Supreme Court recently in Brij Mohan Lal declared that arbitrariness, unfair actions or policies contrary to the letter, intent and philosophy of law and policies would not be tolerated even in the context of fiscal statutes in the following terms;

“101. Cases of this nature can be classified into two main classes: one class being the matters relating to general policy decisions of the State and the second relating to fiscal policies of the State. In the former class of cases, the courts have expanded the scope of judicial review when the actions are arbitrary, mala fide or contrary to the law of the land; while in the latter class of cases, the scope of such judicial review is far narrower. Nevertheless, unreasonableness, arbitrariness, unfair actions or policies contrary to the letter, intent and philosophy of law and policies expanding beyond the permissible limits of delegated power will be instances where the courts will step in to interfere with government policy.”

Thus it is clear that the constitutional ethos preempt ‘rule of law’ in governance in India and administration of fiscal laws is not an exception to the general rule of fair play. The doctrine of equality under Article 14 of the Constitution has been so expanded by the judiciary that grant of unbridled power by the legislature to the executive has never been tolerated. Prescription of guidelines circumscribing the perimeter for the executive to act within is the general norm and even in the context of fiscal policy every deviation is strenuously addressed.

‘Rule of Law’ considerations relevant for GAAR

From the discussion above it be fairly concluded thus a GAAR, even if broad-ranged and under mandate to retort to contrived transaction, has to find its feet and operate within the narrow permissible gauge of administrative action. The Supreme Court has categorically held that fairness and reasonableness must be the pivotal touchstones to check exercise of wide discretion vested with administrative authorities – a test which squarely applies to tax-administration in the wake of wide
powers conferred by the statutory GAAR. The law to this effect was declared by the Supreme Court in Rash Lal Yadav\(^5\) in the following terms:

"6. ... If the statute confers drastic powers it goes without saying that such powers must be exercised in a proper and fair manner. Drastic substantive laws can be suffered only if they are fairly and reasonably applied. In order to ensure fair and reasonable application of such laws courts have, over a period of time, devised rules of fair procedure to avoid arbitrary exercise of such powers. True it is, the rules of natural justice operate as checks on the freedom of administrative action and often prove time-consuming but that is the price one has to pay to ensure fairness in administrative action. And this fairness can be ensured by adherence to the expanded notion of rule of natural justice. Therefore, where a statute confers wide powers on an administrative authority coupled with wide discretion, the possibility of its arbitrary use can be controlled or checked by insisting on their being exercised in a manner which can be said to be procedurally fair."

It is imperative, consequently, for the legislature to provide detailed rules discerning fairness and controlling the discretion of field formations entrusted with the authority to administer GAAR. Failure to provide such restrictions may evince violation of constitutional norms with a high degree of probability of being declared arbitrary and thus unenforceable.\(^5\)

On this accord, accepting the recommendations of the Expert Committee on GAAR, the mechanism for invoking GAAR has been modified by Finance Act, 2013. In terms thereof, the proposal of the Assessing Officer to invoke GAAR in a give case would not require a two-level approval; first by the administrative Commissioner\(^5\) and second by an ‘Approving Panel’\(^6\) comprising of a Chairman who is or has been a judge of a High Court, one member from the Indian Revenue Service not below the rank of Chief Commissioner of Income-tax and one who is an academic or scholar having special knowledge of matters, such as direct taxes, business accounts and international trade practices. At both these levels the taxpayer has a statutory right to put-forth his submissions\(^7\) against the non-invocation of GAAR. Thus a fair bit of procedural safeguard exists at the threshold stage to determine the applicability of GAAR, which may establish procedural fairness to pass muster of Article 14 test of arbitrariness in terms of the law declared by a seven-judge bench of the Supreme Court in Maneka Gandhi case\(^8\).

However a question arises as to whether these procedural limitations placed on the tax-administration are sufficient for GAAR provisions to sustain scrutiny on ground of violations of due-process under the Constitution, which is also an essential ingredient of a ‘rule of law’ regime. It is unfortunate that this interplay of GAAR vis-à-vis concern of ‘rule of law’ has neither been addressed in the Indian perspective nor debated while introducing GAAR in the tax legislation in India. Nonetheless one can take recourse to the response of the South African tax-administration defending its action to introduce GAAR in its income tax legislation which makes an interesting analysis on the interplay of GAAR and the concerns relating to the obliterating of ‘rule of law’. The South African Discussion Paper on GAAR\(^9\) on this aspect states as under:

"The third and perhaps most basic issue from both a practical and conceptual standpoint concerns the ‘uneasy tension’ between a GAAR and the basic notion of the rule of law. In this regard, Graeme Cooper has identified three separate ideas that may be involved here. The first is that taxes ought to be ‘imposed through a proper parliamentary process rather than through administrative discretion, or even judicial discretion’. The second is that ‘having enacted laws, the government and the administration must then comply with the laws that parliament passed’. As Mr. Cooper notes, '[t]hese two ideas recognise that parliament has extensive power to say what the law is, subject of course to any substantive constitutional prohibitions'. In short, ‘government having stated through a law the tax consequences of various transactions and events is not free either to vary those consequences or to amplify them with the benefit of hindsight’.

The third idea is that ‘what parliament enacts must be a law – it must have the characteristics that make a law . . . In a tax context, this idea is expressed by the argument that taxpayers should be able to predict in advance (or at the very least, identify in retrospect) and with a sufficient degree of certainty, the tax consequences of their actions according to rules created through the Parliamentary processes referred to’. Thus, to the extent that a GAAR grants (or appears to grant) the government
unfettered authority to recast a transaction for tax purposes or to vary the applicable tax consequences, the provision can be seen as authorising a form of taxation by administrative decree or analogy - or even worse, the imposition of what may amount to an incontestable tax. Certainty and predictability are undeniably important in the tax arena. However, as both Lord Templeman and Richardson, P have observed, they are ‘not absolute values’. There has also been a growing recognition that a GAAR cannot be overly precise if it is to be effective. More important, any uncertainty created by a stronger GAAR would leave the overwhelming majority of ordinary taxpayers and ordinary business transactions unaffected. As one commentator has noted:

‘The root cause of unpredictability is aggressive tax planning by taxpayers and their advisers, who seek to apply a wide variety of provisions of the code and regulations in contexts in which they were never intended to be applied to produce results they were never intended to produce.

The level of predictability is not unmanageable in the vast bulk of cases involving transactions in the ordinary course of the taxpayer’s business. Unpredictability abounds and is inevitable, however, in cases involving transactions outside the ordinary course of business, especially transactions designed specifically to produce tax losses vastly disproportionate to before-tax losses and transaction costs’.

Indeed, as Lord Greene succinctly put it more than half a century ago: ‘It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers’. At a more fundamental level, it is important to emphasise that while the ‘legal right of the taxpayer to decrease the amount of what would otherwise be his taxes, or all together avoid them, by means which the law permits’ cannot be doubted, the success or failure of any scheme ultimately depends upon the tax laws themselves and section 103 is one such law.”

Thus it is acknowledged by the tax-administration that there does exist ‘uneasy tension’ between GAAR and ‘rule of law’ and that from the ‘rule of law’ perspective the application of GAAR to determine the tax liability suffers from three ills i.e. (a) instead of tax being imposed under law through proper parliamentary process, it is imposed by way of administrative discretion conferred on the authorities under GAAR; (b) when the law has been enacted by the parliament and taxpayer has acted to undertake transactions on that basis, it is not proper for the government to vary the consequences of these transactions by applying GAAR subsequently; and (c) taxation laws are required to be stated with certainty such that the tax-payers can address their transactions sufficiently. However these objections are sought to be overruled by pointing out that the cause for unpredictability itself is the aggressive tax planning by taxpayers and thus the tax-administration is well within its rights to take rectifying measures.

Whatever may be the stand adopted by the tax-administration, the final analysis lies with the courts. Fortunately India is not the first common-law country experimenting with GAAR and indeed the application of GAAR in other jurisdictions has been tested on numerous aspects including its apparent conflict with the ‘rule of law’. It is in this context that the judicial-appraisal meted to GAAR in other common-law jurisdictions becomes relevant. In particular the case of Canada and New Zealand, marking contrast in judicial reasoning, shed considerable light on the diverse issues involved in this debate.

**GAAR: The case of Canada**

A case-study of anti-avoidance rules in Canadian legislation provides great insights on how the judicial attitude towards such rules is critical for their successful application. Section 245 of the Income Tax Act, 1985 of Canada, which sets out anti-avoidance rules, was introduced in 1988. On the lines of general anti-avoidance rules, the provision defines ‘avoidance transaction’ in a wide manner by including any transaction which “would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit.” It is provided that in case of such transactions ‘the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.” The expression ‘tax benefit’, which triggers the
application of these rules, has also been expansively defined to mean “a reduction, avoidance or
deferral of tax or other amount payable under this Act or an increase in a refund of tax or other
amount under this Act.” Thus, evidently, the GAAR provision confers wide powers to the Canadian
tax-administration to counter tax-avoidance transactions. The interpretation of the Courts, however,
has been otherwise.

In Canada Trustco case the Supreme Court of Canada held that despite the enactment of GAAR within
the statute it was imperative for the Court to adopt an interpretation which resulted into “consistent,
predictable and fair results.” Dealing with the claim of tax authorities to apply GAAR on tax deferral
benefits obtained by the tax-payer by adopting a ‘sale and lease-back’ transaction, the Court
extensively examined the principle of literal interpretation of fiscal statutes and also noted the fact that
the Duke of Westminster principle was still applicable. Noting the setting of enactment of GAAR,
explanatory notes to the legislation and despite acknowledging that “the GAAR’s purpose is to deny
the tax benefits of certain arrangements that comply with a literal interpretation of the provisions of
the Act, but amount to an abuse of the provisions of the Act” the Court went on to reject the
projection of the tax-administration. The Canadian Supreme Court inter alia observed as under;

“1. ... The Act continues to permit legitimate tax minimization; traditionally, this has involved
determining whether the taxpayer brought itself within the wording of the specific provisions
relied on for the tax benefit. Onto this scheme, the GAAR has superimposed a prohibition on
abusive tax avoidance, with the effect that the literal application of provisions of the Act may be
seen as abusive in light of their context and purpose. The task in this appeal is to unite these two
approaches in a framework that reflects the intention of Parliament in enacting the GAAR and achieves
consistent, predictable and fair results.

41. ... The courts cannot search for an overriding policy of the Act that is not based on a unified, textual,
contextual and purposive interpretation of the specific provisions in issue. First, such a search is
incompatible with the roles of reviewing judges. The Income Tax Act is a compendium of highly
detailed and often complex provisions. To send the courts on the search for some overarching policy and
then to use such a policy to override the wording of the provisions of the Income Tax Act would
inappropriately place the formulation of taxation policy in the hands of the judiciary, requiring judges to
perform a task to which they are unaccustomed and for which they are not equipped. Did Parliament intend
judges to formulate taxation policies that are not grounded in the provisions of the Act and to apply
them to override the specific provisions of the Act? Notwithstanding the interpretative challenges
that the GAAR presents, we cannot find a basis for concluding that such a marked departure from
judicial and interpretative norms was Parliament’s intent.

42. Second, to search for an overriding policy of the Income Tax Act that is not anchored in a
textual, contextual and purposive interpretation of the specific provisions that are relied upon for
the tax benefit would run counter to the overall policy of Parliament that tax law be certain,
predictable and fair, so that taxpayers can intelligently order their affairs. Although Parliament’s
general purpose in enacting the GAAR was to preserve legitimate tax minimization schemes while
prohibiting abusive tax avoidance, Parliament must also be taken to seek consistency, predictability and
fairness in tax law. These three latter purposes would be frustrated if the Minister and/or the courts
overrode the provisions of the Income Tax Act without any basis in a textual, contextual and
purposive interpretation of those provisions.” (emphasis supplied)

Having held so, the Canadian Supreme Court went on to vindicate the tax-payer’s stand by declaring
that the “Parliament intends taxpayers to take full advantage of the provisions of the Act that confer
tax benefits. Parliament did not intend the GAAR to undermine this basic tenet of tax law.” Even
though subsequently the Canadian courts have upheld the application of GAAR where the tax-
administration has been able to demonstrate that a specific tax policy was frustrated or defeated by the
series of transactions in addition to exhibiting abuse of tax-provisions and obtainment of tax-benefit,
there is no shortage of judicial precedents in Canada where potentially tax-abusive transactions have
been upheld despite GAAR on the ground that GAAR cannot be understood to unsettle settled
principles of tax legislation.
These decisions from Canada clearly highlight the need to preserve the other provisions of the tax law from being overridden by GAAR. The insistence of the Canadian Supreme Court to preserve and further ‘consistency, predictability and fairness in tax law; even in the wake of an overarching GAAR provision is a quintessential illustration of subjecting their application to the ‘rule of law’. Thus the Canadian experience of administering GAAR clearly brings to fore the fact that while tax-administration may passionately persecute even seemingly innocuous schemes carrying potential tax advantage for the tax-payer, the judicial may not be willing to join the bandwagon and instead may develop additional safeguards to err in favour of the tax-payer rather than the tax-administration.

**GAAR: The New Zealand example**

While the Canadian Courts have sought to place greater reliance upon the principle of certainty than upon GAAR, the situation in New Zealand is to the converse. The decision of the New Zealand Supreme Court in *Ben Nevis* case<sup>69</sup> clearly reflects the conservative judicial outlook on introducing addition requirements not found in the statute. The Court therein *inter alia* observed as under;

> “113. The appellants also argued that tax avoidance legislation should be interpreted in a way which gives taxpayers reasonable certainty in tax planning. *But Parliament has left the general anti-avoidance provision deliberately general.* That approach has been retained despite the introduction of a civil penalties regime in relation to taxpayers who take certain types of incorrect tax position. *The courts should not strive to create greater certainty than Parliament has chosen to provide.* We consider that the approach we have outlined gives as much conceptual clarity as can reasonably be achieved. As in many areas of the law, there are bound to be difficult cases at the margins. But in most cases we consider it will be possible, without undue difficulty, to decide on which side of the line a particular arrangement falls.” (emphasis supplied)

Thus the widely worded GAAR provisions in the New Zealand law [Section BG1 of Income Tax Act, 1994] have been permitted<sup>70</sup> to apply generally on all artificial devices leading to tax-benefit. Reverting to the contention of such unbridled application of GAAR leading to uncertainty, the New Zealand Supreme Court in *Glenharrow Holdings* case<sup>71</sup> held as under;

> “[48] It may be said, and indeed the appellant does say, that to approach the question of the intent and application of the Act in this way is not to respect the bargain struck by the parties and would allow the Commissioner to restructure their bargain for them, with different GST consequences, and would thus be productive of uncertainty. *But that uncertainty is inherent where transactions have artificial features combined with advantageous tax consequences not contemplated by the scheme and purpose of the Act.* There will also inevitably be uncertainty whenever a taxing statute contains a general anti-avoidance provision intended to deal with and counteract such artificially favourable transactions. *It is simply not possible to meet the objectives of a general anti-avoidance provision by the use, for example, of precise definitions, as may be able to be done where an anti-avoidance provision is directed at a specified type of transaction.*

> [49] Transactions which are driven only by commercial imperatives are unlikely to produce tax consequences outside the purpose of the legislation and, in any isolated case in which the commercial drivers do have unusual consequences, the existence of those consequences will surely alert the parties to the possibility that the Commissioner may consider invoking the general anti-avoidance provision and may have to be persuaded that the intent of the legislation is not actually being offended.” (emphasis supplied)

Thus evidently New Zealand, which is also a common-law jurisdiction and has followed the *Duke of Westminster* principle for long, has given way to the principle of certainty in favour of permitting the tax-administration to neutralize tax-avoidance strategies by applying GAAR. The judicial approach in New Zealand is at contrast with that adopted in other common-law countries where the judiciary has limited the application of GAAR rather than promoting its frequent application.

**Conclusion**

A debate on whether GAAR is good or bad is unending and requires consideration on a wide range of variables. However the moot point which is sought to be addressed under its appraisal from a ‘rule of
law’ perspective is whether it unduly tilts the slides in favour of the tax-administration to the peril of the tax-payer, thereby putting at stake consistency, predictability and fairness which form the fulcrum in tax law. Even though GAAR has been deferred in its application, the appraisal of various perspectives noted in this article is a pointer to the future of tax litigation where inter alia (a) the limitations imposed by the Supreme Court on arbitrary and unfair actions of the tax-administration will require revisiting; (b) the debate on substantive due procedure will re-emerge; and (c) continuation of essential tenets of fiscal statutes i.e. strict construction, legal certainty, and no taxation without law, will be subjected to test. If the diametrically opposite stands adopted by the Canadian and New Zealand courts are a guide on the competing ‘rule of law’ considerations in the wake of GAAR, it is anyone’s guess as to whether GAAR will be sustained in India given that Indian courts also follow the same common law tradition and are known for vociferously professing individual ideologies in determination of tax disputes.

Apart from being tested and retested, whether or not GAAR will serve its purpose i.e. undoing all tax-avoidance strategies employed or conceived in future is also an issue which will also be closely monitored and judged in the coming times. Whatever be its success-rate, however, one is reminded of the following words of Justice Sabyasachi Mukharji which remain to be true ever after two decades but unfortunately have not been addressed both by the policy framers in the Government as also the Parliament and who have instead chosen to aggressively pursue GAAR as a panacea to reform the alleged tax-avoidance culture in vogue in the country:

“13. It is true that tax avoidance in an underdeveloped developing economy should not be encouraged on practical as well as ideological grounds. One would wish, as noted by Reddy, J. that one could get the enthusiasm of Justice Holmes that taxes are the price of civilization and one would like to pay that price to buy civilization. But the question which many ordinary tax payers very often in a country of shortages with ostentatious consumption and deprivation for the large masses ask is does he with taxes buy civilization or does he facilitate the wastes and ostentatiousness of the few. Unless wastes and ostentatiousness in government’s spendings are avoided or eschewed, no amount of moral sermons would change people’s attitude to tax avoidance.”

Endnotes
4. Commissioner of Customs v. Tullow India Operations Ltd. MANU/SC/1697/2005: (2005) 13 SCC 789: AIR 2006 SC 536 holds that “it is no doubt true that the fiscal liability has to be certain”. See also, Adam Smith, supra.
5. To restate the often-quoted phrase of Rowlatt, J. in Cape Brandy Syndicate v. Inland Revenue Commissioner (1921)1 KB 64 at 71, “in a taxing Act, one has to look merely at what is clearly said. There is no room for any intention. There is no equity about a tax. There is presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language”
7. See Tarun Jain, How Vodafone has overruled Azadi Bachao Andolan decision, (2012) 250 CTR (Articles) 8-22 for a detailed enunciation of the legal position.
11. See Sanofi Pasteur Holding SA v. Department of Revenue MANU/AP/0013/2013: (2013) 257 CTR 401 (AP) for discussion of the relevant decisions on this aspect.
12. Section 92 to 92F.
13. Section 93.
Section 94.

The Supreme Court in Vodafone International (supra) notes that “the concept of GAAR is not new to India since India already has a judicial anti-avoidance rule, like some other jurisdictions.” This decision also notes that the Direct Taxes Code Bill, 2010 “envisages creation of an economically efficient, effective direct tax system, proposing GAAR. GAAR intends to prevent tax avoidance, what is inequitable and undesirable.”


(2012) 342 ITR (St.) 305 at paragraph 98.

(2012) 342 ITR (St.) 234 at 282.

Section 95 providing for ‘applicability of General Anti-Avoidance Rule’.

Section 96 defining ‘impermissible avoidance agreement’.

Section 97(1)(a).

Section 97(1)(b).

Section 97, defining ‘arrangement to lack commercial substance’.

Section 98, providing ‘Consequences of impermissible avoidance agreement’.

Section 98(1)(b).

Section 98(1)(c).

Section 98(1)(d).

Section 98(1)(e).

Section 98(1)(g).

Vodafone International (supra).

Section 102(10).

Section 90(2A).

Section 101 provides that the GAAR “shall be applied in accordance with such guidelines and subject to such conditions and the manner as may be prescribed”.


Id. at pg. 188.


Chanchal Goyal v. State of Rajasthan MANU/SC/0133/2003: (2003) 3 SCC 485. See also the decision in Reliance Energy Ltd. v. Maharashtra State Road Development Corporation Ltd. MANU/SC/3810/2007: (2007) 8 SCC 1 wherein it has been observed that “according to Lord Goldsmith, commitment to the ‘rule of law’ is the heart of parliamentary democracy. One of the important elements of the ‘rule of law’ is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of ‘reasonableness’, then such an act or decision would be unconstitutional.”

Id. at pg. 315.

See Dabur India Ltd. v. State of Uttar Pradesh MANU/SC/0320/1990: (1990) 4 SCC 113. See also the recent decision of the Orissa High Court in Management Committee v. Income Tax Officer (2012) 252 CTR 363 (Ori) wherein the High Court passed strictures upon the conduct of the Income Tax department to observe that “it is expected that the Department shall be careful in future not to indulge in any such avoidable circumstances thereby creates an impression that the intention of the Department is not to help the assessee but to harass them.”

“the country is governed by rule of law and despite existence of a valid legislation operating in the field, executive whims or caprice cannot be permitted to have any role to play. Validity of a tax imposed by the State Legislature, thus, must be determined on the constitutional anvil of the legislative competence and not on any other basis”.

51. Alok Kumar Banerjee v. Union of India MANU/SC/0263/1984: (1984) 3 SCC 127 which declares that “the principle which has been well established is that Legislature must lay down the guidelines, the principles of policy for the authority to whom power to make subordinate legislation is entrusted.”


55. Section 144BA(4).

56. Section 144BA(6).

57. Section 144BA(4) in respect of determination by the Commissioner and Section 144BA(7) in respect of determination by the Approving Panel.


61. Section 245(3).

62. Section 245(2).

63. Section 245(1).


65. Paragraph 16.

66. Paragraph 61.

67. Earl Lipson v. Queen (2009) 1 SCR 3. Speaking for the majority, LeBel J. observed, “The GAAR is neither a penal provision nor a hammer to pound taxpayers into submission. It is designed, in the complex context of the ITA, to restrain abusive tax avoidance and to make sure that the fairness of the tax system is preserved. A desire to avoid uncertainty cannot justify ignoring a provision of the ITA that is clearly intended to apply to transactions that would otherwise be valid on their face.” Id. at para 52. See also Mathew v. Queen (2005) 2 SCR 643 and Copthorne Holdings Ltd. v. Queen (2011) 3 SCR 721.

68. For illustration see Mil Investors S.A. v. Queen 2006 TCC 460 (Tax Court of Canada) holding that “there is nothing inherently proper or improper with selecting one foreign regime over another. Respondent’s counsel was correct in arguing that the selection of a low tax jurisdiction may speak persuasively as evidence of a tax purpose for an alleged avoidance transaction, but the shopping or selection of a treaty to minimize tax on its own cannot be viewed as being abusive. It is the use of the selected treaty that must be examined.”

69. Ben Nevis Forestry Ventures Ltd. v. Commissioner of Inland Revenue (2008) NZSC 115 where the judges differed upon the issue of precedence of SAAR over GAAR but were unanimous to hold that the transaction in question was an instance of tax-avoidance and thus subject to GAAR.

70. Ian Harvey Penny & Gary John Hooper v. Commissioner of Inland Revenue (2011) NZSC 95.
