



Seminar on tax audit

Amendments in international taxation

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Bhaumik Goda

BGSS & Associates

Chartered Accountants

Where Passion Delivers Value

Agenda

Secondary Adjustment

- Section 92CE
- Clause 30A of TAR

Interest limitation

- Section 94B
- Clause 30B of TAR

GAAR

- Section 95 to section 102
- Clause 30C

CbCR

- Section 286
- Clause 42

Effective from 20 August 2018

Secondary adjustment

Rationale

- Transaction between AEs needs to be at ALP
- PA achieves the purpose of correction of tax base – but cash remains with overseas AE
- SA achieves:
 - Alignment of cash profit with TP
 - Get forex into India
 - Charge income to MAT
 - Subject subsequent repatriation to DDT
- SA closes loop – gives economic effect to transaction as if original transaction was at ALP in all respect

Internationally SA is treated as constructive dividend, capital contribution or loan. India has opted to treated SA as loan

Illustrative transaction

1 Interest free loan to subsidiary

2 Corporate guarantee to subsidiary without appropriate mark up

3 Payment of excess royalty to AE

Support services provided from India without commensurate mark up

Export/import of goods from AE

4

5

Tax audit disclosure

“30A. (a) Whether primary adjustment to transfer price, as referred to in sub-section (1) of section 92CE, has been made during the previous year? (Yes/No)

(b) If yes, please furnish the following details:-

- i. Under which clause of sub-section (1) of section 92CE primary adjustment is made?
- ii. Amount (in Rs.) of primary adjustment
- iii. Whether the excess money available with the associated enterprise is required to be repatriated to India as per provisions of sub section (2) of section 92CE? (Yes/No)
- iv. If yes, whether the excess money has been repatriated within the prescribed time? (Yes/No)
- v. If no, the amount (in Rs.) of imputed interest income on such excess money which has not been repatriated within the prescribed time:

SA provisions

Particulars	Provisions	Remarks
Trigger	<p>Where a PA to TP:</p> <ul style="list-style-type: none"> • Has been made suo moto by assessee in his ROI • Made by AO has been accepted by assessee • Is determined by APA entered into by assessee • Is made as per safe harbour rules • Is arising as a result of resolution of assessment by way of MAP 	<p>Applicability to SDT</p> <ul style="list-style-type: none"> • Pain reading even SDT are also covered. However, section 92B(2) requires repatriation of funds to India suggesting that provision are not applicable to SDT <p>Meaning of acceptance by assessee</p> <ul style="list-style-type: none"> • Issue arises whether adjustment made by CIT(A) accepted by assessee is covered by PA • Rule 10CB makes specific reference to ‘order passed by AO or appellate authority’ • Better view – scope restricted to order passed by AO. On order passed by CIT(A), AO order cease to exist • Rules cannot enlarge scope of provisions

SA provisions

Particulars	Provisions	Remarks
Exclusion	<ul style="list-style-type: none"> Amount of PA made in any previous year does not exceed 1 crs; and PA is made in respect of an assessment year commencing on or before 1 day of April 2016 	<p>Ambiguity in exclusion</p> <ul style="list-style-type: none"> “Any in previous year’ and And’ resulted in confusion on scope of exclusion Circular 2/2018 explaining provision of FA 2017 clarified SA shall not be carried out: <ul style="list-style-type: none"> PA made in the case of an assessee in any previous year does not exceed 1 crs; or PA is made in respect of an assessment year commencing on or before 1 day of April 2016 Circular clarifies ‘and’ to be read as ‘or making conditions non-cumulative Arguably, ‘any’ needs to be read as ‘a’ making threshold of 1 cr available for each financial year

SA provisions

Particulars	Provisions	Remarks
Exclusion	<ul style="list-style-type: none">Amount of PA made in any previous year does not exceed 1 crs; andPA is made in respect of an assessment year commencing on or before 1 day of April 2016	Year of applicability <ul style="list-style-type: none">Applies to PA made in AY 2017-18 onwardsRoll back option exercised under APA for yearsMAP proceeding pertaining to earlier years

SA provisions

Particulars	Provisions	Remarks
Consequence	<ul style="list-style-type: none"> • Excess money available with AE needs to be repatriated into India within prescribed time • If not, excess money to be treated as loan and interest to be charged at prescribed rate 	<p>Deem dividend</p> <ul style="list-style-type: none"> • Sec 2(22)(e) requires actual payment by way of loan or advance • Book entry adjustment does not give rise to loan as required under sec 2(22)(e) [G. R. Govindarajulu Naidu v. CIT, (1973) 90 ITR 13 (Mad); CIT v. Smt. Savithiri Sam, (1999) 236 ITR 1003 (Mad)] <p>One time or perpetual presumption</p> <ul style="list-style-type: none"> • Excess money continues to be loan till repatriated into India <p>Interest on interest</p> <ul style="list-style-type: none"> • Outstanding interest on SA does not result in PA – so no interest on interest

Interest

- Rule 10CB has been prescribed u/s 92CE
- Time Limit for repatriating excess funds to India is as follows

Type of PA	Time prescribed under rule 10CB	Remarks
Voluntary TP adjustment	90 days from due date of filing of return under section 139(1) of the Act.	Due date u/s 139(1) refers to the due date of original return and not return filed u/s 139(4)/139(5)
Safe harbor provisions		
PA pursuant to APA u/s 92CD (proposed)	Date on which APA has been entered into by taxpayer	
PA pursuant to MAP (proposed)	Date of giving effect by tax officer under Rule 44H to the resolution arrived at under MAP	MAP itself may indicate time period for repatriation and may hence override Rule 10CB
PA due to adjustment made by AO accepted by the tax payer	90 days from date of the order of Assessing Officer or the appellate authority, as the case may be	

Rule 10CB – Interest rates

- Rule 10CB(2) prescribes the following rates at which interest is to be levied on failure to repatriate excess funds with time specified in Rule 10CB(1)

Transaction currency	Interest Rate
Indian Currency	One year marginal cost of fund lending rate of State Bank of India as of 1st of April of the relevant FY plus 325 basis points
Foreign Currency	Six month London Interbank Offered rate as of 30th September of the relevant FY plus 300 basis points

- Relevant FY for the purpose of Rule 10CB(2) would be the year for which interest is to be computed

Arguably, interest should start at the end of 90 days period

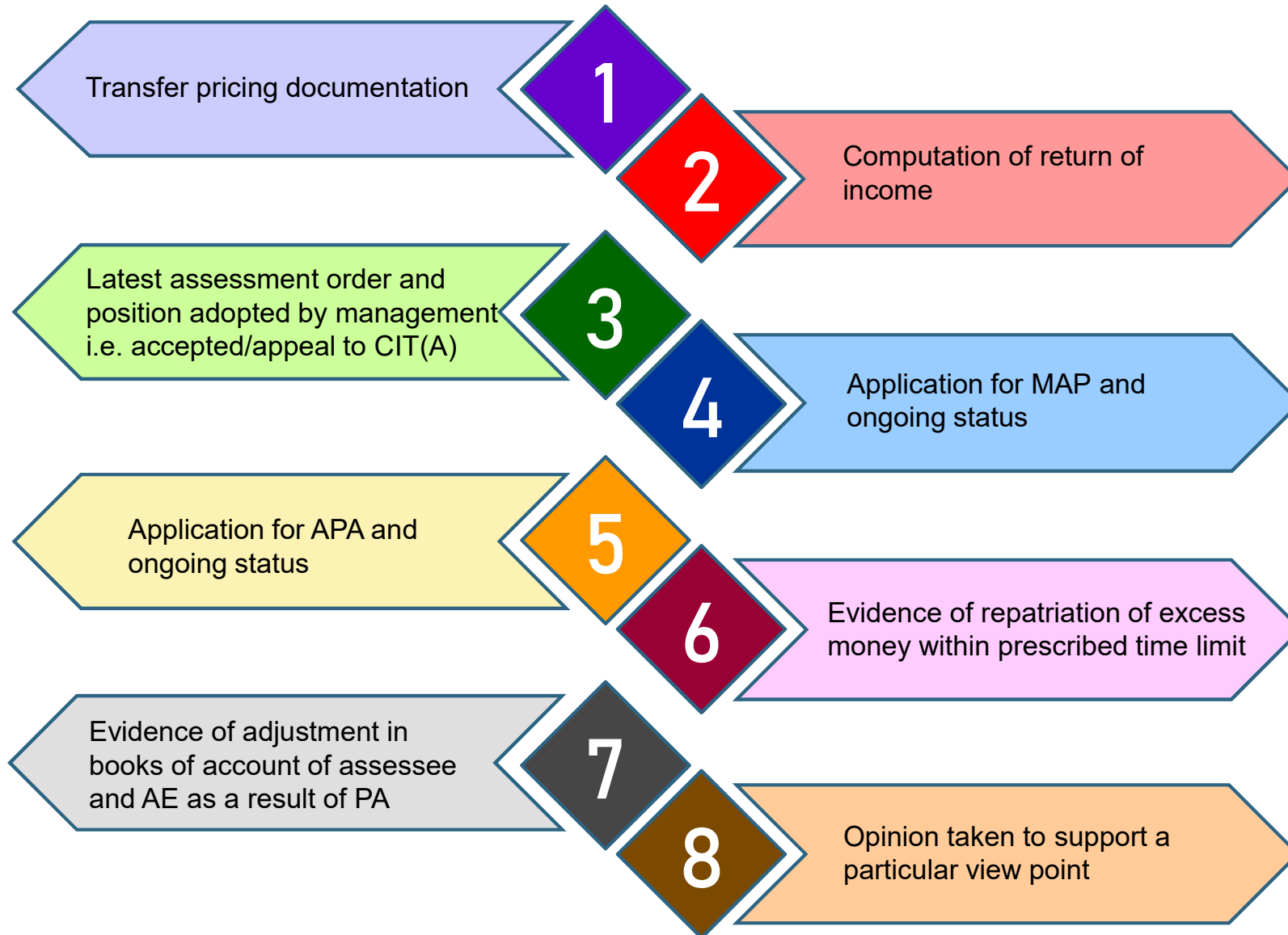
SA provisions

Particulars	Provisions	Remarks
<p>Definition of SA</p>	<ul style="list-style-type: none"> SA means an adjustment in the books of account of assessee and its AE to reflect that actual allocation of profits between assessee and its AE are consistent with the TP determined as a result of PA, thereby removing imbalance between cash profit and actual profit 	<p>Books of account</p> <ul style="list-style-type: none"> Mandates adjustments in BOA SA to be considered for MAT However, interest on deem loan need not be subject to MAT if not credited to P&L Possibility of double – normal taxation in Year 1 on account of TP adjustment and MAT in subsequent year on account of SA - Reliance on Nagarjuna Fertilizer [373 ITR 252] to defend double taxation Unlikely for charge to fail in absence of recording SA in BOA of assessee and AE [See Arunkumar Muchhala v CIT (2017) 399 ITR 256 (Bom)]

Other issues

- Applicability of provision where PA is made under TNMM involving several parties
- Relieve of interest charge on account of voluntary write off of loan ?
- Relieve of charge on account of impossibility of performance:
 - Repatriation of fund to India prohibited on account of regulatory law in FCO
 - AE turning bankrupt
- Situation in case of merger/liquidation of AE

Documentation



Situation 1 – Voluntary adjustment made in ROI

“30A. (a) Whether primary adjustment to transfer price, as referred to in sub-section (1) of section 92CE, has been made during the previous year? (Yes/No) - **Yes**

(b) If yes, please furnish the following details:-

- i. Under which clause of sub-section (1) of section 92CE primary adjustment is made? – **(i) – voluntary adjustment**
- ii. Amount (in Rs.) of primary adjustment – **3,00,00,000**
- iii. Whether the excess money available with the associated enterprise is required to be repatriated to India as per provisions of sub section (2) of section 92CE? (Yes/No) - **Yes**
- iv. If yes, whether the excess money has been repatriated within the prescribed time? (Yes/No) - **No**
- v. If no, the amount (in Rs.) of imputed interest income on such excess money which has not been repatriated within the prescribed time: **Zero**

Note: As per Rule 10CB ICO is permitted to repatriate excess money upto 28 February 2019. Accordingly, no imputed interest is offered to tax

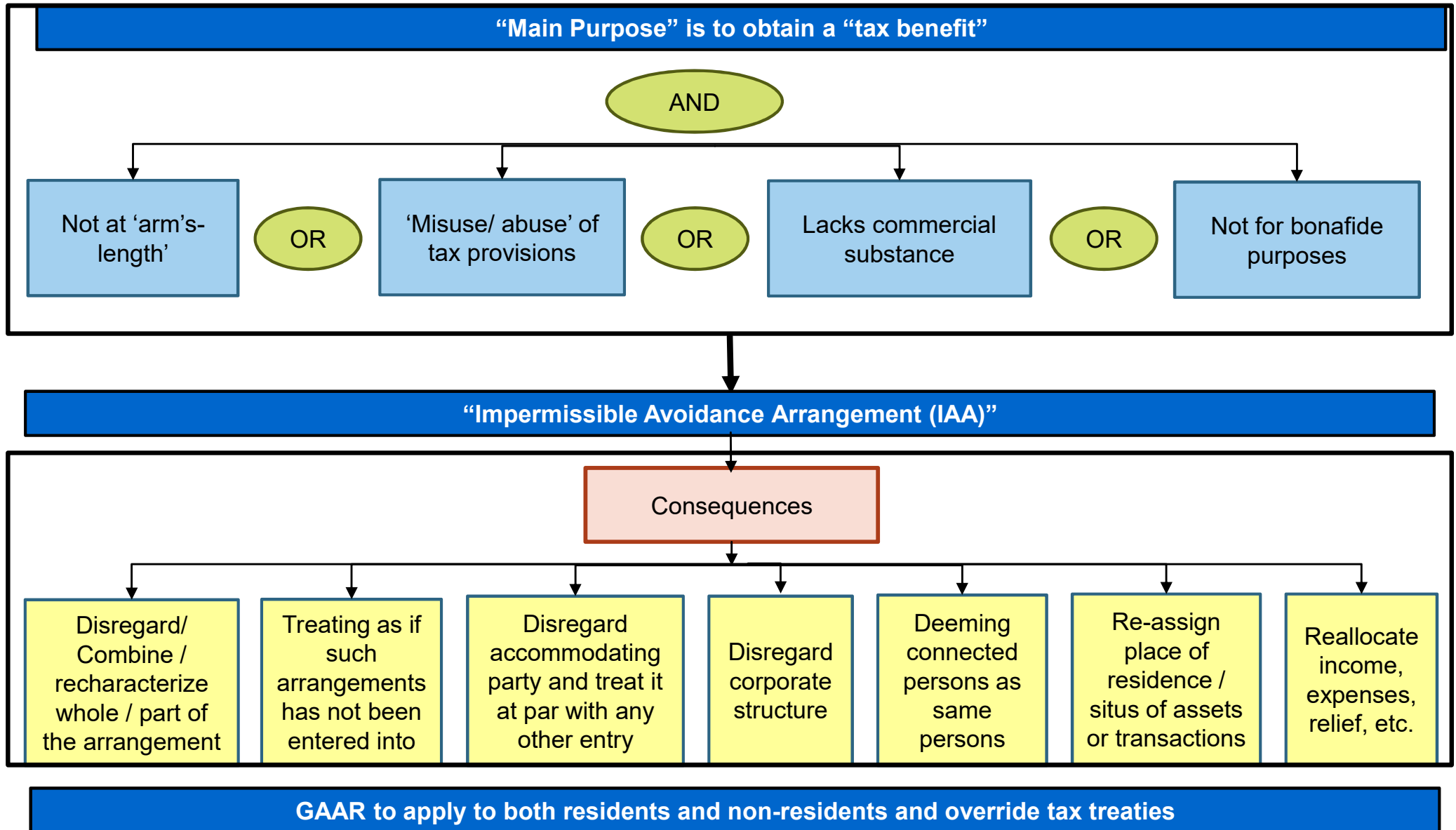


GAAR


Background

- Codify principle of substance over form
- Wide powers to tax authorities to tackle highly abusive transactions
- Safe harbour (Rule 10U)
 - benefit in the relevant assessment year arising, in aggregate, to all the parties to the arrangement does not exceed a sum of rupees three crore
 - FII who satisfies prescribed conditions
 - NR investing in offshore derivatives of FII
 - any income accruing or arising to, or deemed to accrue or arise to, or received or deemed to be received by, any person from transfer of investments made before the 1 April, 2017 by such person
- Limited grandfathering to investment and not to income stream arising out of investment made prior to 1 April 2017

Trigger of GAAR



Safeguards



1

Consent of Approval Panel



2

NO REPETITIVE GAAR


If examined once, no GAAR on same facts



3

RELEVANT PART

GAAR on relevant part, not entire arrangement



4

MINIMUM THRESHOLD


Rs 3 crs tax benefit in each FY



5

GRAND-FATHERING


Investments made before 1 April 2017



6

TAX TREATY


LoB Clause sufficient in some cases



7

IMPLEMENTING TRANSACTIONS

No interplay with choice of implementation



8

COURT SCHEMES

No GAAR if Court has examined tax implications



9

ADVANCE RULING

To obtain certainty

Tax Audit disclosure

Tax audit disclosure

30C. (a) Whether the assessee has entered into an impermissible avoidance arrangement, as referred to in section 96, during the previous year? (Yes/No)

(b) If yes, please specify:-

(i) Nature of the impermissible avoidance arrangement:

(ii) Amount (in Rs.) of tax benefit in the previous year arising, in aggregate, to all the parties to the arrangement:";

Key concerns

- GAAR is intent based law and TA may not have access to requisite facts
- Language of provisions are broad and ambiguous
- Limited grandfathering provision may require TA to review past transaction in case there is any tax benefit arising in current year
- Inability to determine aggregate tax benefit to all the parties in absence of access to documentation and facts

Audit process



- 1 Scrutiny of professional fees to understand issues dealt with by consultant
- 2 Reason for reduction in ETR vis-à-vis past years
- 3 New transaction with related parties and understand impact on tax
- 4 Deeper scrutiny of caveated tax opinions
- 5 Court scheme, annual reports and public disclosure
- 6 Management representation and based on facts confirmatory opinion

Interest limitation provisions

Tax audit disclosure

30B. (a) Whether the assessee has incurred expenditure during the previous year by way of interest or of similar nature exceeding one crore rupees as referred to in sub-section (1) of section 94B? (Yes/No)

(b) If yes, please furnish the following details:-

- i. Amount (in Rs.) of expenditure by way of interest or of similar nature incurred:
- ii. Earnings before interest, tax, depreciation and amortization (EBITDA) during the previous year (in Rs.):
- iii. Amount (in Rs.) of expenditure by way of interest or of similar nature as per (i) above which exceeds 30% of EBITDA as per (ii) above:
- iv. Details of interest expenditure brought forward as per sub-section (4) of section 94B:

A.Y	Amount (in Rs.)

- v. Details of interest expenditure carried forward as per sub-section (4) of section 94B:

A.Y	Amount (in Rs.)

Illustration

Sr No	Particular -	Amount (in INR million)
A	Excess interest carried forward from AY 18-19	50
B	Interest payable to AE in AY 19-20	10
C	EBIDTA	100
D	Computation of interest limitation	
E	30 % of EBIDTA	30
F	Interest payable to AE in AY 19-20	10
G	Limitation on interest u/s 94B(2) [lower of E or F]	10
H	Excess interest of AY 18-19 which can be set off in AY 19-20 [E-G]	20
I	Excess Interest of AY 18-19 carried forward to subsequent year. i.e. AY 20-21 [A – H]	30

Provisions

Provisions in brief

Applicability

- Borrower has to be Indian company or PE of foreign company
- Interest or other expenditure exceeds 1 crs
- Lender has to be NR
- Said expenditure is deductible under head 'PGBP'
- Also applies if debt is issued by lender which is not AE but AE:
 - Provides implicit or explicit guarantee
 - Deposits a corresponding or matching amount

Issues

- Meaning of implicit or explicit guarantee
- Whether part deposit of corresponding or matching amount attracts 94B
- Expenditure should be deductible – accordingly expenditure disallowed under TP, section 43B, section 40(a)(ia) should not form part of section 94B disallowance

Provisions

Provisions in brief

Computation

Literal reading:

- Excess shall mean:
 - Total interest paid or payable in excess of 30% of EBITDA (Limb 1) or
 - Interest paid or payable to AE whichever is less (Limb 2)

Circular 2 of 2018:

- Excess shall mean:
 - 30% of EBITDA or
 - Interest paid or payable to AE whichever is less

Issues

- EBITDA accounting or tax profit?
- Plain reading of section only provides for limitation of 'interest' – TAR provides for limitation of 'interest or similar expenditure'
- Consideration of 'total interest' – TAR supports Circular 2 of 2018
- Entire interest paid to AE disallowed in case of negative EBITDA

Provisions

Provisions in brief

Exclusion

- Specified assessee engaged in business of banking or insurance

Issues

- Applicability to NBFC

Provisions in brief

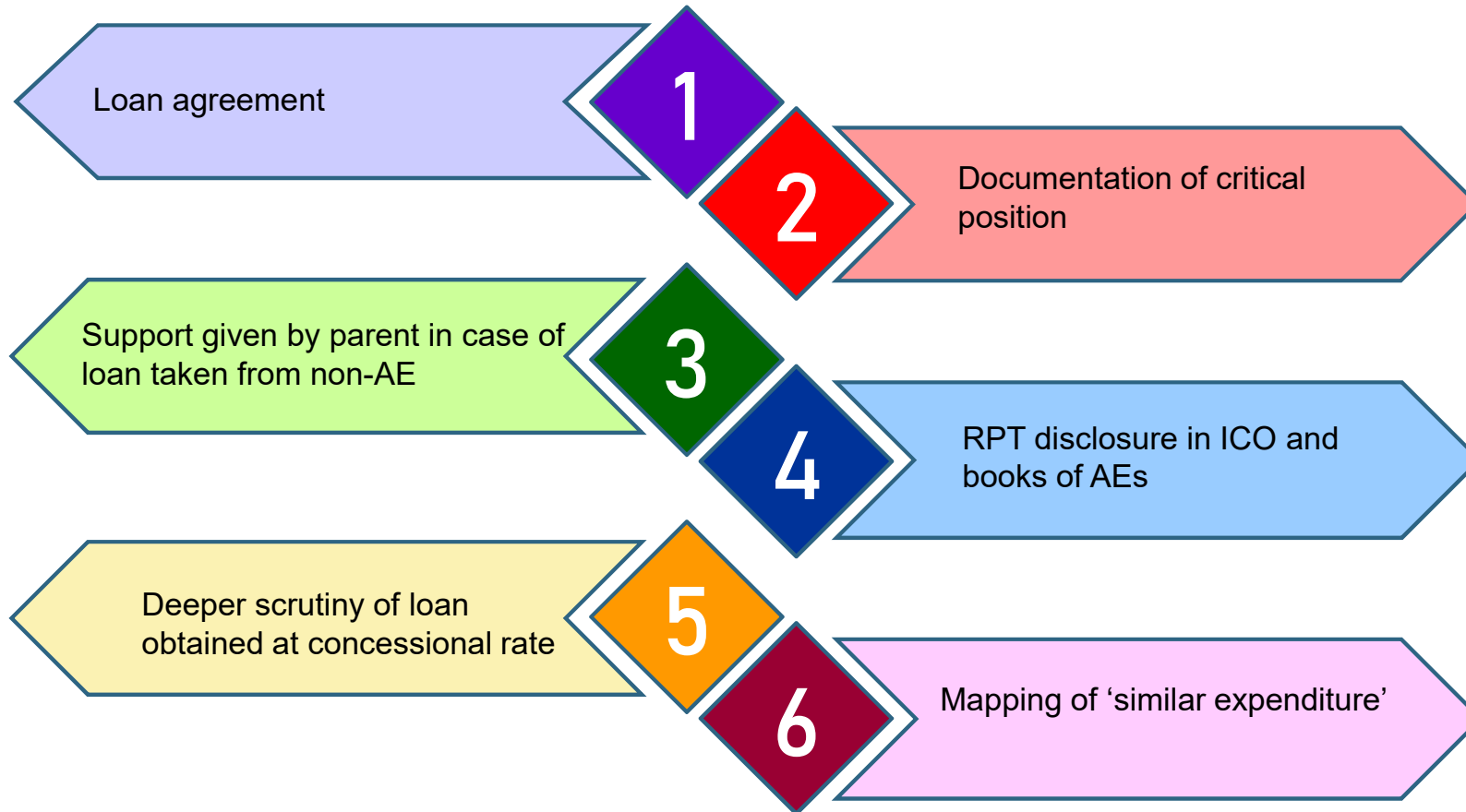
Carry forward

- Excess interest not set off can be carried forward for 8 AYs

Issues

- Manner of set off
- Transition in case of merger/demerger

Audit process



Details of Country by Country Reporting

Tax audit disclosure

Tax audit disclosure

43. (a) Whether the assessee or its parent entity or alternate reporting entity is liable to furnish the report as referred to in sub-section (2) of section 286 (Yes/No)

(b) if yes, please furnish the following details:

(i) Whether report has been furnished by the assessee or its parent entity or an alternate reporting entity

(ii) Name of parent entity

(iii) Name of alternate reporting entity (if applicable)

(iv) Date of furnishing of report

Provisions

Provisions in brief

- Section 286 of Act provides that every parent entity or Alternate reporting entity (ARE) resident in India of an international group shall furnish Country by Country Report (CBCR)
- Parent entity means entity which is required to consolidate all financial statements of the group companies
- Alternate reporting entity means entity which has been nominated by the group to undertake filing of CBCR instead of parent entity
- Rule 10DB has been notified which prescribes threshold and forms for filing CBCR
- CBCR has to be filed provided Consolidated Group Revenue of the International Group > INR 5500 crores
- International Group has been defined to mean a parent entity along with all its group companies for which it has to file a consolidated financial statement for financial reporting purposes

CbC Reporting Requirements

Form	Applicability	Due Date
3CEAC	<ul style="list-style-type: none">Intimation by every constituent entity of the international group being resident in India whose parent entity is not resident in India	31 January, 2019
3CEAD	<ul style="list-style-type: none">Main CbC Report Form<ul style="list-style-type: none">By every parent entity or alternate parent entity resident in India.	31 March, 2019

Provisions in brief

Section 286(2)

(2) Every parent entity or the alternate reporting entity, resident in India, shall, for every reporting accounting year, in respect of the international group of which it is a constituent, furnish a report, to the prescribed *authority within a period of twelve months from the end of the said reporting accounting year*, in the form and manner as may be prescribed

Meaning of reporting year

"reporting accounting year" means the accounting year in respect of which the financial and operational results are required to be reflected in the report referred to in *sub-sections (2) and (4)*

Meaning of accounting year

Accounting year means-

- (i) previous year, in a case where the parent entity or alternate reporting entity is resident in India
- (ii) an annual accounting period, with respect to which the parent entity of the international group prepares its financial statements under any law for the time being in force or the applicable accounting standards of the country or territory of which such entity is resident, in any other case

Tax audit disclosure

Tax audit disclosure

43. (a) Whether the assessee or its parent entity or alternate reporting entity is liable to furnish the report as referred to in sub-section (2) of section 286 (Yes/No) - **Yes**

(b) if yes, please furnish the following details:

(i) Whether report has been furnished by the assessee or its parent entity or an alternate reporting entity – **No/Yes ???**

(ii) Name of parent entity - **ABC**

(iii) Name of alternate reporting entity (if applicable) – **N/A**

(iv) Date of furnishing of report – **N/A**

Situation 1- Parent Co follows calendar year

- As per section 286(2), Parent Co is required to submit report by 31 December 2018

Situation 2 – Parent Co follows financial year

- As per section 286(2), Parent Co is required to submit report by 31 March 2019

Does notification require amendment ? Need appropriate disclosure as part of Notes

Tax audit disclosure

Tax audit disclosure

Situation 1- Parent Co follows calendar year

- As per section 286(2), Parent Co is required to submit report by 31 December 2018

Situation 2 – Parent Co follows financial year

- As per section 286(2), Parent Co is required to submit report by 31 March 2019
- Does notification require amendment ?
- Need appropriate disclosure as part of Notes

“Company has filed report as required under section 286(2) for FY 2016-17 within prescribed time limits. However, as per section 286(2) report for FY 2017-18 is required to be furnished by 31 March 2019”

Thank You

Our Offices

MUMBAI

605, Zee Nayak, M.G. Road, Vile Parle (East),
Mumbai – 400 057

Email : bhaumik@bgss.co.in

Mobile No: +91 98339 15583

AHMEDABAD

402, Suyojan Tower, Hotel President Lane, CG
Road, Ahmedabad, - 380009

Email : saumya@bgss.co.in

Mobile No: +91 90999 27783

