



General Anti-Avoidance Rule ('GAAR')

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Basic Scheme of GAAR

GAAR Chapter X-A

Section 95 to 102 + 144BA

Section 95

Basic Enabling
Provision

Section 96 & 97

Impermissible
Avoidance
Agreement
(IAA)

Section 98

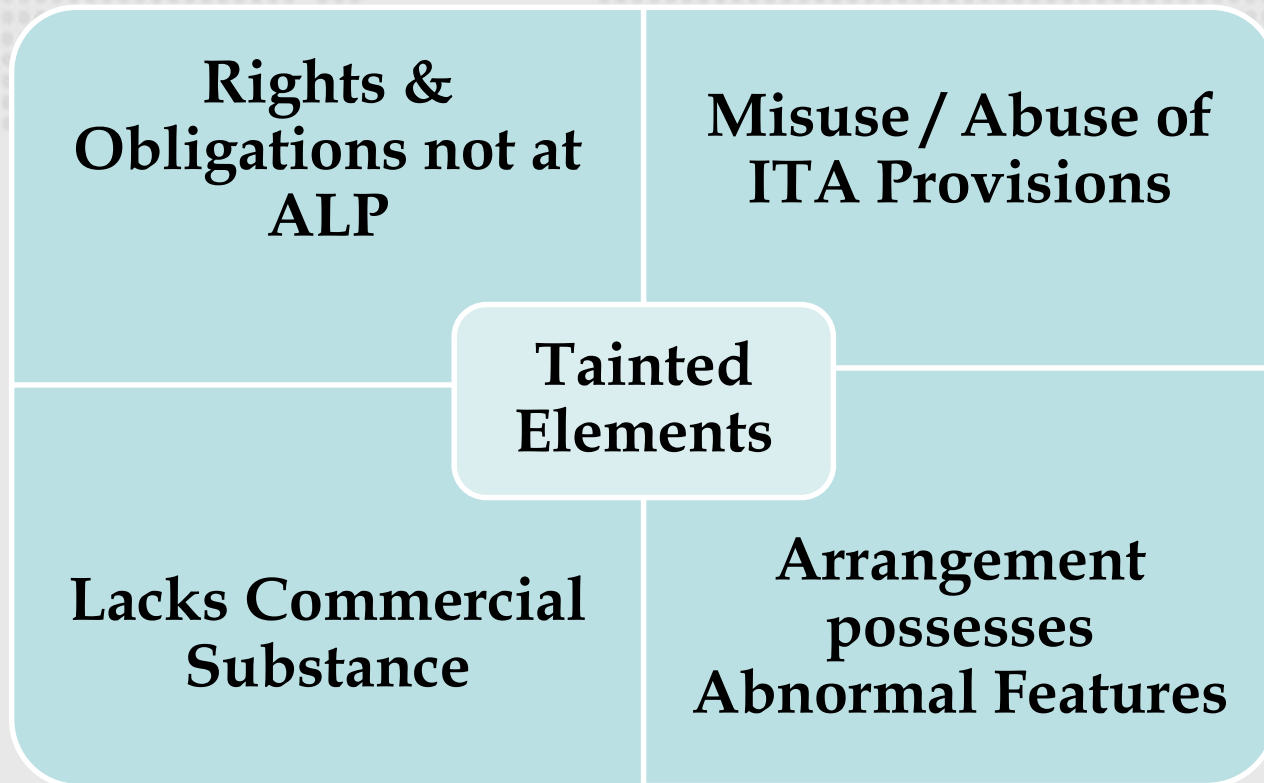
Consequences

S.99 – Parameters
for determining
tax benefit
S.100 – Provisions
in lieu of / in
addition to
S.101 – Guidelines
and conditions
S.102 – Definitions
S.144BA – GAAR
Assessment

Section 96

❑ Cumulative Conditions:

Main Purpose of an **Arrangement** is **Tax Benefit** + Any 1 of the Tainted Elements



Section 96 – Arrangement

❑ Definition of Arrangement:

“**arrangement**” means, –

- a) any step in or a part or a whole of
- b) any transaction, operation, scheme, agreement or understanding
- c) whether enforceable or not
- d) includes alienation of property in such transaction

❑ Onus of proving main purpose of arrangement?

Section 96 – Tax Benefit

□ Definition of Tax Benefit :

“**tax benefit**” includes, –

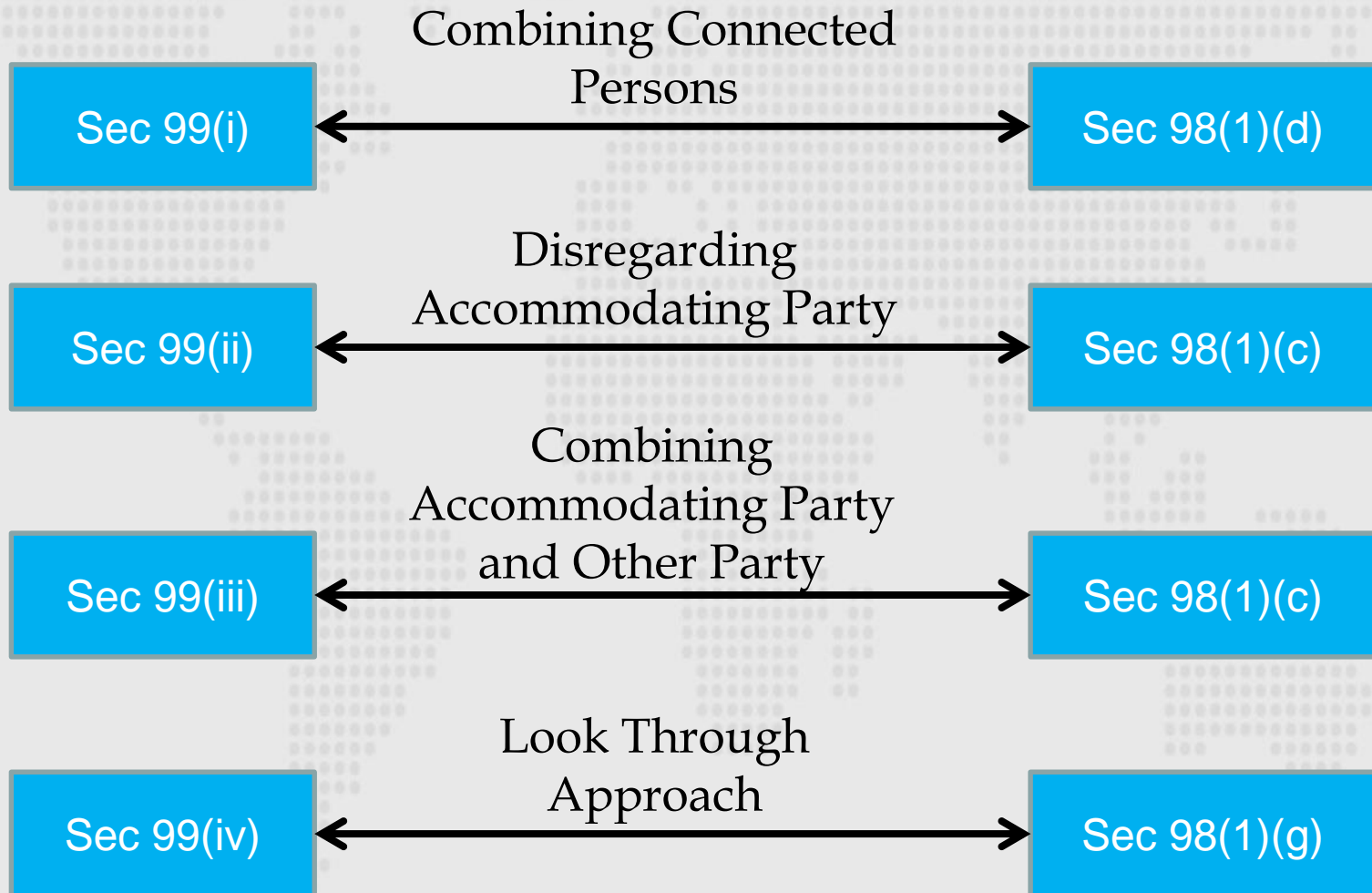
- a) a reduction or avoidance or deferral of tax or other amount payable under this Act; or
- b) an increase in a refund of tax or other amount under this Act; or
- c) a reduction or avoidance or deferral of tax or other amount that would be payable under this Act, as a result of a tax treaty; or
- d) an increase in a refund of tax or other amount under this Act as a result of a tax treaty; or
- e) a reduction in total income; or
- f) an increase in loss,
in the relevant previous year or any other previous year;

Comments:

- *Time Value of Money*
- *Other Amounts payable – Interest etc*
- *DTAA – Art 23(2) of India-Brazil; Art 13(5) of India-UAE*

Section 99 vs Section 98

Determination of Tax Benefit vs Consequences



Section 96 - Tainted Elements

Rights & Obligations not at ALP

Situations other than where ALP & FMV regulations apply
E.g. Overvaluing FTS component under a composite contract with service provider from UAE

Misuse / Abuse of ITA Provisions

Following law in letter but not in spirit
E.g. Gift from nephew to uncle - (1) Gift to lineal ascendant + (2) Gift to brother

Lacks Commercial Substance

Dealt with in following slides

Arrangement possesses Abnormal Features

Not a purpose test but a manner test
E.g. Buying shares of Real Estate Holding Co instead of buying property directly. Sec 50C vs 50CA. LTCA definition.

Section 97 – Lacks Commercial Substance

❑ Section 97 (1) (a) : Substance over Form Principle

- E.g. Interest Rate equivalent to fixed IRR

❑ Section 97 (1) (b) :

- i. Round Trip Financing (E.g. in next slide)
- ii. Accommodating Party (E.g. in next slide)
- iii. Offsetting or Cancelling Elements (E.g. covered in case study)
- iv. Arrangement which disguises value / source / location / ownership / control of funds (E.g. Beneficial Ownership concept)

❑ Section 97 (1) (c) : Location of an asset / transaction / place of residence of any party for obtaining tax benefit

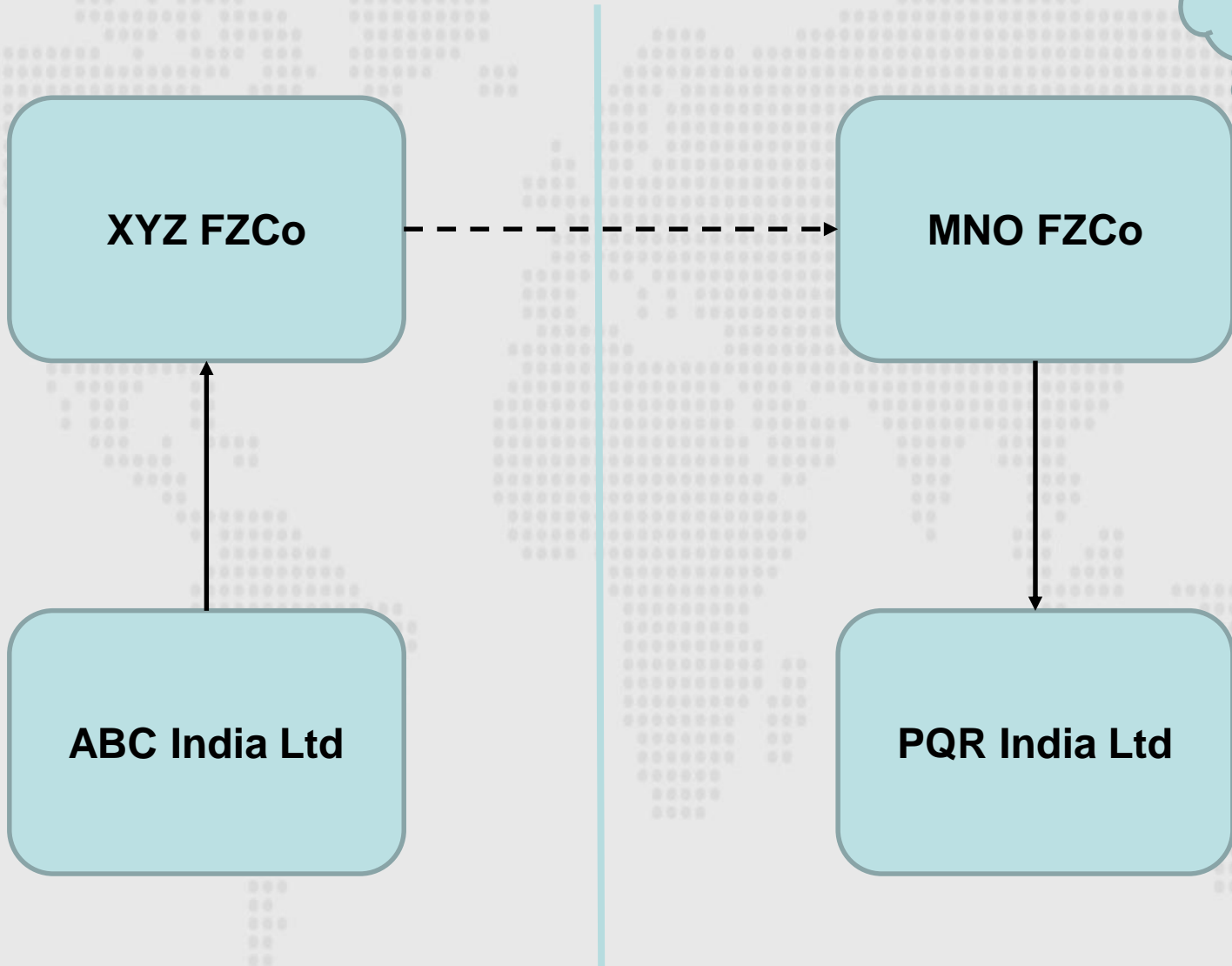
- E.g. Treaty Shopping

❑ Section 97 (1) (d) : No significant effect on business risk / net cash flow

- E.g. Merger for tax purposes

Intermediaries

Proxy
Mr. A



Section 97 – Lacks Commercial Substance

❑ Section 97 (4) : Relevant but not sufficient criteria

- i. the period or time for which the arrangement (including operations therein) exists;
- ii. the fact of payment of taxes, directly or indirectly, under the arrangement;
- iii. the fact that an exit route (including transfer of any activity or business or operations) is provided by the arrangement.

❑ Comments: To nullify ration of Vodafone decision

Section 98 - Consequences

- ❑ **Rule 10UA** - where only a part of an arrangement is impermissible, the tax consequence of IAA will be limited to that portion of the arrangement
- ❑ **Examples of consequences**
 - Disregarding/combining/recharacterizing step, part or whole of IAA
 - Disregarding accommodating party
 - Combining accommodating party and any other party
 - Combining connected persons
 - Reallocating/recharacterizing an accrual /receipt /expenditure /deduction /relief / rebate
 - Changing the place of residence / situs of an asset
 - Look through approach
 - Thin - capitalization

Section 102 - Definitions

Benefit

- Redundant ?

Connected Persons

- Similar to section 40(A)(2)(b) (other than group companies having same parent)

Fund

- Even without money transfer ?

Relative

- only for reference to connected persons definition

Substantial Interest

- only for reference to connected persons definition

Rule 10U- Exemption from GAAR

Tax Benefit \leq Rs. 3 crore

- India specific tax limit
- Arrangement specific limit
- Not taxpayer specific limit
- Not assessment year wise limit

FII not taking benefit of DTAA

Offshore Derivative Instrument Holder

Investments made before 01.04.2017

- Not arrangements (E.g. Aircraft Leasing / Loan Arrangements)
- Bonus Issue
- Conversion of CCD/ CCPS/ FCCB/ GDR
- Splitting up / consolidation of shares

Circular No 7 of 2017

- GAAR vs SAAR
- GAAR vs LOB Test
- Right of taxpayer to select / choose a method of implementing a transaction
 - setting up of a branch or subsidiary
 - setting up of a unit in SEZ or any other place
 - funding through debt or equity
 - purchase or lease of a capital asset
- GAAR vs AAR Ruling
- GAAR vs NCLT Approval
- Real income theory ?
- Corresponding adjustment ?

Section 144BA - Assessment Procedure

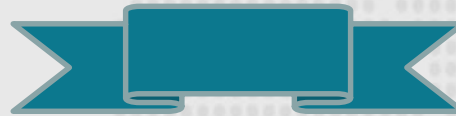


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- ❑ Directions issued by Approving Panel are binding on—
 - (i) the Assessee; and
 - (ii) the PCIT / CIT
- ❑ No appeal can be made against the directions of AP



Thank you



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