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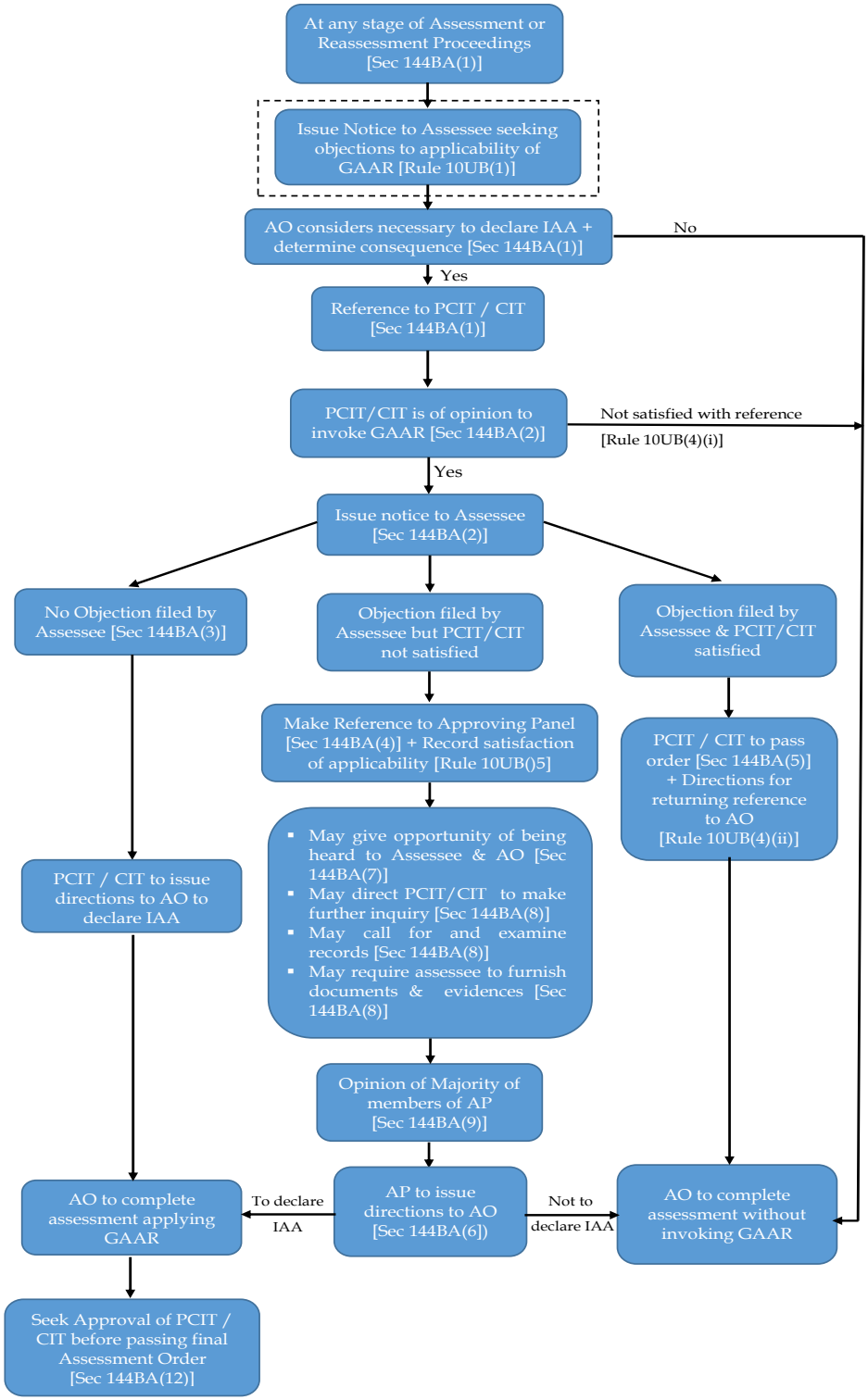
CA Harshal Bhuta & CA Tanvi Vora

Guidelines and rules under GAAR

The procedure for invoking Chapter X-A and thereafter determining tax consequences is contained under Section 144BA read with Rule 10UA, Rule 10UB and Rule 10UC. Section 144BA was initially inserted by the Finance Act, 2012 with effect from 1-4-2014 to provide for procedure to invoke provisions of Chapter X-A. Section 144BA was subsequently amended by Finance Act, 2013 and its applicability was also deferred to 1-4-2016 consequent to deferral of applicability of Chapter X-A. The Finance Act, 2013 amended section 144BA on various counts, the important ones dealing with (a) the binding nature of directions issued by the Approving Panel and (b) on strengthening the constitution of Approving Panel.

Section 144BA gives an elaborate procedure for invoking Chapter X-A. Before making an analysis of the various procedural regulations, a simplified snapshot of the procedure is presented below by way of a flowchart. The flowchart depicts the various steps involved in the procedure from making a reference to the Principal Commissioner of Income Tax ('PCIT') or Commissioner of Income Tax ('CIT') by the Assessing Officer ('AO') to passing of final order by him.


At any stage of Assessment or Reassessment Proceedings [Sec 144BA(1)]
Issue Notice to Assessee seeking objections to applicability of GAAR [Rule 10UB(1)]
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No
Yes
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The table below presents the time limits involved in the assessment procedure where provisions of Chapter X-A are to be invoked:

Section / Rule	Step	Time limit	Prescribed Form
Applicable to Assessing Officer:			
Sec 144BA(1)	Make reference to PCIT / CIT to invoke	At any stage of assessment or reassessment proceedings	Form 3CEG
Applicable to PCIT / CIT:			
Sec 144BA(2) r.w. Rule 10UB(4)(i)	Issue of directions by the PCIT / CIT to the AO where PCIT / CIT is satisfied that provisions of GAAR are not required to be invoked considering the reference received from the AO	Rule 10UC(1)(iii)(a) → 1 month from the end of the month in which reference is received by the PCIT/ CIT from the AO	Form 3CEH
Sec 144BA(2)	Furnishing of objections by assessee in response to notice of the PCIT / CIT	Sec 144BA(2) → Within time period specified in the notice subject to maximum of 60 days	—
Sec 144BA(3)	Issue of directions by the PCIT / CIT where no objections are received from the assessee in response to the notice issued	Rule 10UC(1)(i) → 1 month from the end of the month in which date of compliance of notice of PCIT / CIT falls	—
Sec 144BA(5) r.w. Rule 10UB(4)(ii)	Issue of directions by the PCIT / CIT to the AO where PCIT / CIT is satisfied that provisions of GAAR are not required to be invoked considering the reply of the assessee	Rule 10UC(1)(iii)(b) → 2 months from the end of the month in which the final submission of the assessee in response to notice issued by the PCIT / CIT is received	Form 3CEH
Sec 144BA(4)	Reference by the PCIT / CIT to the Approving Panel after recording satisfaction of applicability of GAAR provisions	Rule 10UC(1)(ii) → 2 months from the end of the month in which the final submission of the assessee in response to notice issued by the PCIT/ CIT is received	Form 3CEI
Applicable to Approving Panel			
Sec 144BA(6)	Issue of directions by the Approving Panel	Sec 144BA(13) → 6 months from the end of the month in which the reference from PCIT / CIT is received excluding: • Period for getting inquiries conducted through competent authority under Double Taxation Avoidance Agreements or one year, whichever is less	—

Section / Rule	Step	Time limit	Prescribed Form
		• Period during which proceeding of the Approving Panel is stayed by an order or injunction of any court Where the above exclusions leave a time period of less than 60 days for the issue of directions, the remaining period shall be extended to 60 days	—
Applicable to Assessing Officer – For Passing Final order			
Sec 144BA(12)	AO to pass final order pursuant to directions issued by PCIT / CIT or Approving Panel after seeking prior approval of PCIT / CIT u/s. 144BA(12))	Sec 153 → Within over limit as specified in section 153 (which excludes the period commencing from the date of reference received by PCIT / CIT u/s. 144BA(1) and ending on the date of direction under 144BA(3) or 144BA(6) or order 144BA(5) is received by the AO)	—

Analysis of procedural regulations have been made hereunder stage wise:

A. Sec. 144BA(1) – Reference by AO to PCIT/CIT

This sub-section deals with reference that AO can make to the PCIT or CIT as the first step towards invoking Chapter X-A. Since this sub-section provides the threshold that AO needs to cross before making reference to PCIT/CIT, this sub-section has been analysed in greater detail.

There are various important terms that need deliberation under this sub-section. These have been analysed below:

i. "At any stage of assessment or reassessment proceedings": The expression 'assessment proceedings' or 'reassessment proceeding' has not been defined under the Income Tax Act, 1961. Instead, the word 'assessment' has been defined u/s. 2(8) to simply include 'reassessment'. This definition is of little help in understanding the expressions. It is for this reason that the meaning of 'assessment proceeding' has been disputed repeatedly and been the subject matter of several judicial decisions. Having regard to the provisions regarding procedure for assessment as contained under Chapter XIV of ITA, Supreme Court[1] has explained that the process of assessment involves (i) filing of the return of income under section 139 or under section 142 in response to a notice issued under section 142(1); (ii) inquiry by the AO in accordance with the provisions of sections 142 and 143; (iii) making of the order of assessment by the AO under section 143(3) or section 144; and (iv) issuing of the notice of demand under section 156 on the basis of the order of assessment. Therein, while dealing with the interpretation of time period

1 In Auto & Metal Engineers vs. Union of India [1998] 229 ITR 399 (SC)

allowed for completion of assessment u/s. 153 of ITA, it held that the expression 'assessment proceeding' must be construed to comprehend the entire process of assessment starting from the stage of filing of the return under section 139 or issuance of notice under section 142(1) till the making of the order of assessment under section 143(3) or section 144.

The words 'reassessment proceeding' may be interpreted accordingly. It may be relevant to mention here that the reassessment proceedings may have been initiated based on certain reasons recorded prior to issue of notice u/s. 148(2) which may be different from those compelling the AO to make reference under Chapter X-A. This is expressly sanctioned under Explanation 3 to Section 147.

Further, the phrase 'at any stage of assessment or reassessment proceedings' denotes pendency of the assessment or reassessment proceedings. In other words, the time period for assessment or reassessment proceedings must be open during which the AO can make a reference. It may be noted here that in accordance with Explanation 1(xi) to Section 153, once reference has been made by AO to PCIT/CIT, the period commencing therefrom till receipt of direction from PCIT/CIT or Approving Panel ('AP') is excluded from computing the period of limitation given under Section 153 for completion of assessment / reassessment proceedings.

Although the procedure for assessment is contained under Chapter XIV and Chapter XIV-B of ITA, it may be relevant here to examine whether different proceedings envisaged under ITA could also be covered within the scope of 'assessment / reassessment proceedings'.

a. *Assessment proceeding against representative assessee*: The object of assessing the income of the non-resident in the hands of the representative assessee is on account of the fact that it is quite often difficult to recover the tax from the non-resident. Section 166 of ITA confers powers on the AO to assess either the representative assessee or the principal assessee to whom the income has accrued. If the revenue department is of the opinion that the agent is to be taxed as a representative assessee, then it would call upon the agent to file a return and only thereafter the agent could be taxed as a representative assessee. Once the revenue department chooses to tax such agent as a representative assessee of the non-resident, in accordance with Section 161(1), tax shall be levied upon and recovered from such 'representative assessee' *in like manner and to the same extent* as it would be leviable upon or recoverable from the non-resident. It may be noted here that Section 161 makes a 'representative assessee' liable only as regards the income in respect of which such agent is a representative assessee viz. income of the non-resident. Further, under Section 162(1), every 'representative assessee' has the right to recover the amount of income tax paid on behalf of the non-resident from such non-resident. Alternatively, the representative assessee can retain the amount of income tax from the amount payable to the non-resident. In case of a disagreement between the representative assessee and the principal for the amount to be retained by the representative assessee for discharging the liability of income tax, such representative assessee can obtain a certificate

from the AO u/s. 162(2) stating the amount to be retained pending final settlement. Once such certificate is obtained, the AO cannot recover an amount more than the amount specified in the certificate.

From a plain reading of the provisions dealing with the liability of the representative assessee u/s. 161, it seems that Sec. 144BA(1) would cover within its scope the assessment proceeding against the 'representative assessee' too since the representative assessee is considered to have beneficially earned the income which in fact would be accruing to the non-resident. Similarly, within the contours of Section 161(1), assessment is also made in the name of 'representative assessee' though deemed to be in the representative capacity only. However, for want of material and evidence in the possession of such representative assessee, practical considerations may weigh against invoking Chapter X-A during the assessment proceeding against representative assessee. Secondly, the amount to be retained by the representative assessee as certified by the AO may not have taken into account the tax consequences arising out of declaration of an arrangement as an impermissible avoidance arrangement because the AO could not have made reference u/s 144BA(1) for invoking provisions of Chapter X-A at the time of issuance of such certificate for want of pendency of assessment proceeding at the time of application for certificate.

b. *TDS recovery proceedings u/s. 201(1):* Section 201 deals with consequences of failure to deduct tax or pay tax upon deduction. While deciding a case under the provisions of the Income-tax Act 1922, Supreme Court[2] has observed that every order which contemplates computation of income for determination of the amount of tax payable is not an order of assessment within the meaning of the Income Tax Act of 1922 nor does prescribing of procedure for determining and imposing tax liability make it an order of assessment. When the liability to pay tax arises not from the charge created by statute, but from the order of the Income-tax Officer itself, the order so made is not an order of assessment. In other words, if the liability to pay tax arises on account of charging provisions rather than machinery provisions, an order determining the tax liability would be called an order of assessment. A person is liable to pay tax on income earned by him on account of charge of income tax created under the statute on such income. Whereas tax is required to be deducted on payment of such income by another person under the machinery provisions of ITA and if such other person fails to deduct tax on such payment, then tax on such payment can be recovered from the person making the payment yet again under the machinery provisions of ITA rather than provisions creating a charge. Since proceedings under Section 201(1) are merely machinery provisions, an order holding the deductor as an assessee-

2 In M.M. Parikh, Income Tax Officer vs. Navanagar Transport and Industries Ltd. [1967] 63 ITR 663 (SC)

in-default would not amount to an assessment order and accordingly, the proceedings too would not amount to assessment proceedings. Therefore, AO cannot make a reference for invoking provisions of Chapter X-A during pendency of proceedings u/s. 201(1). As a corollary, since no assessment proceedings are pending at the time of determination of liability to deduct tax under Section 195, the question of making a reference by AO for invoking provisions of Chapter X-A while adjudicating under Section 195(2)/195(3)/197 is ruled out[3].

c. *Penalty proceedings:* It is possible for an assessee to lead evidence which is independent of the evidence led in one or the other proceeding, i.e., the assessee is entitled to lead further evidence in penalty proceedings over and above the evidence placed in assessment proceedings. Therefore, one may encounter a situation wherein the assessee would have placed additional material on record during penalty proceedings and the AO may want to make a reference for invoking provisions of Chapter X-A having regard to such material. It may be noted here that Gujarat High Court[4] has categorically held that assessment proceedings and the penalty proceedings are quite distinct and different and that the term assessment cannot encompass penalty proceedings under ITA. Therefore, AO cannot make a reference for invoking provisions of Chapter X-A during the pendency of penalty proceedings.

An arrangement may involve various parties[5] physically located at different places. The jurisdiction of assessment of such parties may also vary[6]. Simultaneously, the tax benefit may differently accrue to different parties and so could be the resultant tax consequences that may be determined respectively for each party. Under such circumstances, it may not be incorrect to assume that individual references should be made by the AO during respective assessment / reassessment proceedings. To put it differently, reference by AO to jurisdictional PCIT/CIT during assessment /reassessment proceeding of one of the parties to the arrangement should not be treated as an automatic valid reference for other parties to the arrangement too. Inevitably, this would also have bearing on the tax consequences, if any, to be determined for each party to the arrangement.

ii. *"Having regard to"*: A simple meaning of the phrase would be 'to take into account or consideration'. However, it could be better appreciated when viewed in light of the change in language of statute under Sec. 92CA(4) *vide* Finance Act 2007. Section 92CA(4) deals with computation of total income of the assessee after receipt of order of TPO. Under Sec. 92CA(4), the words 'having regard to' were replaced by the words 'in conformity with' w.e.f. 1-6-2007. Referring to the decision of

3 This can further be supported by referring to the Supreme Court observation in the case of Vodafone International Holdings B.V. [2012] 341 ITR 1 (SC) that liability to deduct tax is different from assessment under the Act.

4 In CIT vs. Parmanand M. Patel [2005] 278 ITR 3 (Gujarat)

5 As defined u/s. 102(6) of ITA.

6 Although from news reports, it can be gathered that Income Tax Department may launch jurisdiction free e-assessments shortly. Source: http://www.business-standard.com/article/economy-policy/i-t-dept-to-launch-jurisdiction-free-assessment-from-oct-117091401557_1.html.

Supreme Court[7] in the context of Wealth Tax, the Delhi High Court[8] then had interpreted the words 'having regard to' to mean that the AO could take into consideration any other material placed before him by the assessee in addition to and instead of solely relying upon the order of the TPO. In other words, the order of TPO was not binding or conclusive or decisive for the AO and he could take into account other materials before passing the order of assessment. After the change in text of the statute, it emerged that the AO would not have such an option now and that the order of TPO would become binding upon him for computation of total income.

iii. "Considers": Supreme Court[9] has interpreted the word 'consider' to mean to think over. It connotes that there should be active application of the mind. In other words, the term 'consider' postulates consideration of all the relevant aspects of the matter.

iv. "Necessary": Again, Supreme Court[10] in the same case has interpreted the word necessary to mean indispensable, requisite; indispensably requisite, useful, incidental or conducive; essential; unavoidable; impossible to be otherwise; not to be avoided; inevitable.

v. "May": Use of the word 'may' under section 144BA(1) denotes discretion in the hands of the AO.

Once the meaning of the various terms used u/s. 144BA(1) have been appreciated, one could progress to analyse the burden of proof for invoking Chapter X-A. Rephrasing the text of Section 144BA(1) with the meanings as understood above, Section 144BA(1) would signify that the AO should make a reference to PCIT/CIT only if he finds it inevitable to invoke Chapter X-A post his active application of mind by taking into consideration the material and evidence placed before him during assessment or reassessment proceedings. The phrase 'considers that is it necessary' gains importance in light of the meanings ascribed to the words therein raising the threshold for making a reference to PCIT/CIT. It denotes that active application of mind is significant and absolutely essential before making a reference and that such reference cannot be based on conjectures and surmises. This view becomes more evident when one refers to the text of Rule 10UB(1) and 10UB(2) where the AO is mandated to issue a notice to the assessee seeking objections for invoking Chapter X-A[11]. Moreover, such notice has to set out concrete basis and reasons for alleging as to why an arrangement satisfies the pre-requisites of Section 96 and also list the documents and evidences relied upon to make such an allegation. Only if the AO finds it indispensable to make a reference after an opportunity has been given to the assessee for rebuttal, should he make one. This implies that the burden of proof lies initially with the AO and that he has to cross a high threshold before making a reference to PCIT/CIT[12]. It is perplexing at this stage to comprehend use of the word 'may' towards the end of Section 144BA(1) especially when one reaches the conclusion that AO could make a reference only if he finds it indispensable[13]. Once he has made up his mind that it is essential to make a reference, any discretion given to him thereafter would become meaningless.

7 In Juggilal Kamlapat Bankers vs. W.T.O. [1984] 1 SCC 571

8 In Sony India (P.) Ltd. vs. CBDT [2007] 288 ITR 52 (Delhi)

9 In Bhikhubhai Vithalbhai Patel vs. State of Gujarat AIR 2008 SC 1771

10 Ibid

11 The issuance of notice seeking objections of assessee has not been specified u/s. 144BA(1).

12 Contrast with presumption u/s. 96(2) for pre-supposing obtaining tax benefit as the main purpose of an arrangement.

13 Perhaps the word 'may' should be read as 'shall'.

As indicated in the timelines above, reference by AO to PCIT/CIT is required to be made in Form 3CEG. Certain inconsistencies in Form 3CEG are listed below:

Point number	Description	Inconsistency
General	Reference to Commissioner under Rule 11UB and Form 3CEG	References to Commissioner have not been updated yet to include Principal Commissioner post amendment under Income Tax Act *vide* Finance (No. 2) Act, 2014 w.r.e.f. 1-6-2013
5(b)	Assessment years proposed to be covered other than those for which proceedings are pending	Reference u/s. 144BA(1) could be made only where assessment proceedings are pending
6	Factual matrix of the arrangement including details of other parties	The assessee may be in a position to give details only to the best of his knowledge and may not himself have a complete picture of the arrangement
10	Whether notice under Rule 10UB(1) has been served? If yes, date of service of notice	It projects as if issuance of notice to assessee is not mandatory before making a reference to PCIT/CIT
14	Consequences in relation to tax likely to arise if arrangement is declared as impermissible avoidance arrangement	The determination of tax consequences arises after declaration of an arrangement as impermissible avoidance arrangement. Therefore, seeking this information in Form 3CEG may give an impression of impropriety in making the decision of whether provisions of Chapter X-A need to be invoked. However, for seeking such information, benefit of doubt may be accorded to the fact that tax benefit in the first place cannot be estimated if the tax consequences are not perceived beforehand.

B. Sec. 144BA(2) – Formation of opinion by PCIT/CIT:

After the AO has made a reference to PCIT/CIT, the PCIT/CIT has to opine on whether the provisions of Chapter X-A are required to be invoked. If he is of the opinion that the provisions of Chapter X-A are indeed required to be invoked, then he should issue a notice to assessee setting out the reasons and basis of such an affirmative opinion. The purpose of issuing such notice by PCIT/CIT to assessee is to invite objections from assessee and to provide an opportunity of being heard to the assessee.

It is necessary to understand the meaning of the phrase 'he is of the opinion' since it is integral to this sub-section. Supreme Court[14] has equated the use of term 'of the opinion' with 'reason to believe' and held that the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be

14 Supra

a direct nexus or live link between the material before PCIT/CIT (viz. details consolidated and presented in Form 3CEG by AO) and the formation of his opinion that the provisions of Chapter X-A are required to be invoked. This is also evident from the words 'setting out reasons and basis of such opinion in the notice to assessee' used under Section 144BA(2).

Although not clearly spelt out under Section 144BA(2), use of prefix 'if' before the words 'he is of the opinion that the provisions of Chapter X-A are required to be invoked' denotes that PCIT/CIT could also return the reference made to him by AO if he arrives at the conclusion that the reference under Form 3CEG setting out details about the arrangement (and reasons persuading AO to make a reference amongst other information) does not sufficiently lead to the belief that the provisions of Chapter X-A are required to be invoked. This view is fortified if one refers to the text of Rule 10UB(4)(i) where PCIT/CIT is required to issue directions to AO in Form 3CEH for returning the reference made u/s. 144BA(1) when he is satisfied that provisions of Chapter X-A are not required to be invoked.

C. Sec. 144BA(3) to Sec. 144BA(5) – Possible outcomes after sending notice to assessee by PCIT/CIT

Sec. 144BA(3) – No objection is furnished by the assessee: Under such circumstances, PCIT/CIT would issue directions to AO to declare the arrangement as an impermissible avoidance arrangement. It may be noted that there is no prescribed format for issuing directions unlike under section 144BA(2) where Form 3CEH has been prescribed for returning reference to AO. The use of words 'as he deems fit' succeeding the words 'issue such directions' implies grant of liberty to PCIT/CIT in using the format of his choice for issuing directions u/s. 144BA(3).

Sec. 144BA(5) – PCIT/CIT is satisfied by reply of assessee: After receiving objections from the assessee and having heard the assessee, if the PCIT/CIT is satisfied that the provisions of Chapter X-A are not required to be invoked, then he shall communicate the same to the AO by way of an order in writing with a copy to the assessee. Additionally, PCIT/CIT also needs to issue corresponding directions in Form 3CEH for returning the reference to AO in accordance with Rule 10UB(4)(ii).

Sec. 144BA(4) – PCIT/CIT is not satisfied by reply of assessee: Where PCIT/CIT is not satisfied by the explanation given by assessee in response to the notice issued u/s. 144BA(2), then he would make a reference to the Approving Panel under this section in Form 3CEI after recording his satisfaction regarding applicability of provisions of Chapter X-A therein in accordance with Rule 10UB(5).

D. Sec. 144BA(7); Sec. 144BA(8) r.w. Sec. 144BA(19); Sec. 144BA(9) – Proceedings and powers of AP

Sec. 144BA(7) – Opportunity of being heard by AP: Before the Approving Panel gives direction to AO, it has to provide opportunity of hearing to both - the assessee and the AO when such directions may prove prejudicial to respective interests. The provision under this Section is founded on the principles of natural justice and is similar to that contained under Section 144C(11) in case of proceedings conducted by Dispute Panel Resolution ('DRP').

Sec. 144BA(8) r.w. (19) – Powers of AP; Significance of powers equivalent to AAR:

While conducting the proceedings under Chapter X-A, AP has been accorded the following powers u/s. 144BA(8):

i. Directing PCIT/CIT to conduct further inquiry if required; Directing income-tax authority other than PCIT/CIT to conduct an inquiry and present a report containing result of such inquiry to it;

ii. Call for and examine such records relating to the matters it deems fit; and

iii. Require the assessee to furnish such documents and evidence as it may direct.

In addition to the above powers conferred upon AP u/s. 144BA(8), it has also been accorded u/s. 144BA(19) the powers that are vested with Authority for Advance Rulings ('AAR') u/s 245U of ITA. Section 245U in turn makes a mention of the powers vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) that are specified u/s. 131 of ITA. For the sake of clarity, the powers specified u/s 131(1) are as under:

a) Discovery and inspection;

b) Enforcing the attendance of any person, including any officer of a banking company and examining him on oath.

c) Compelling the production of books of account and other documents; and

d) Issuing commissions.

It is interesting to note that powers similar to those conferred upon AAR u/s. 245U have also been conferred upon the appellate tribunal u/s. 255(6). Further, Commissioner (Appeals) ('CIT(A)') and DRP are also listed as authorities which has been granted powers u/s. 131. Section 131 gives certain powers of a civil court of law to the income-tax authorities, quasi-judicial and judicial authorities created under ITA[15]. Though these authorities do not strictly act as civil courts of law, it is clear from this section that they act in a quasi-judicial capacity and ought to conform to the elementary rules of judicial procedure[16]. Exercising the powers of a civil court, income-tax authorities, quasi-judicial (including Approving Panel) and judicial authorities created under ITA may, under order XIII. R 10, of the Code of Civil Procedure, calls for books and documents seized by a magistrate in other proceedings. In the circumstances of a case the powers under this section may be coupled with a duty, - e.g. a duty to enforce the attendance of a witness whose evidence is material or to call for the assessee's books of account which are in the possession of public authority. The income-tax authorities, quasi-judicial and judicial authorities created under ITA can issue commission for any purpose for which a civil Court may issue a commission: to examine any person, to make a local investigation and examine accounts[17].

However, neither the procedure for conducting proceedings by CIT(A) nor by DRP nor by appellate tribunal under ITA makes reference to the powers specified precisely u/s. 144BA(8)(ii) and (iii) as they are specified for proceedings by AP. On a closer comparison of the powers mentioned u/s. 144BA(8)(ii) and (iii) with those mentioned u/s. 131, it appears that the powers mentioned u/s. 144BA(8)(ii) and (iii) are already included under the powers conferred by Section 131(1)(c) and there is an overlap to that extent.

Sec. 144BA(9) – Opinion of majority of members of AP: If the members of AP (being three in number) differ in opinion on any point, then such point is to be decided according to the opinion of majority of the members.

E. Sec. 144BA(6) – Outcome of proceedings by AP

Sec. 144BA(6) provides that AP shall issue directions as it deems fit for declaring an arrangement to be an impermissible avoidance arrangement. The text of Sec. 144BA(6) tends to suggest that AP can only declare an arrangement as an impermissible avoidance arrangement and cannot conversely hold otherwise. In other words, there is an ambiguity under Section 144BA(6) which suggests that AP cannot give directions to declare an arrangement as not being an impermissible avoidance arrangement. However, Memorandum to Finance Bill 2012 expressly states that the Approving Panel shall either declare an arrangement to be impermissible or declare it not to be so after examining material and getting further inquiry to be made.

15 See Commentary on Sec. 131 by Kanga & Palkhivala on The Law and Practice of Income Tax, 10th Edition.

16 Ibid

17 Ibid

The language deployed under Section 144BA(6) is similar to the language used under Section 144C(5) with respect to proceedings conducted by DRP. In the context of section 144C, it has been held by Delhi High Court[18] that DRP needs to pass a speaking order giving cogent and germane reasons for arriving at the conclusion. The AP could also therefore be expected to pass a speaking order setting out reasons for either declaring or declining to declare an arrangement as impermissible avoidance arrangement while dealing with the objections from the assessee.

F. Sec. 144BA(6) r.w. Sec. 144BA(11) – Applicability of the directions of AP to other previous year(s)

Sec. 144BA(6) states that while declaring an arrangement to be an impermissible avoidance arrangement, AP may specify the previous year or years to which such declaration shall apply[19]. Furthermore, Sec. 144BA(11) stipulates that where the direction issued by AP u/s. 144BA(6) specifies a previous year(s) other than the previous year for which proceedings are pending before the AO, then the AO need not seek fresh directions for such other previous year(s) for completing the assessment / reassessment proceedings of such other previous year(s).

It may be humbly submitted that Sec. 144BA(6) and Sec. 144BA(11) are subservient and restricted in their scope by section 144BA(1) whereby the AO first needs to cross the threshold provided u/s. 144BA(1) viz. making an individual reference for each respective previous year against which assessment / reassessment proceeding is pending. If the assessment / reassessment proceeding is not pending for any preceding or succeeding previous year to the previous year under question, then a reference cannot be made u/s. 144BA(1) for such preceding or succeeding previous year to begin with and consequently, declaration of arrangement as an impermissible avoidance arrangement in either of those years cannot be permitted to be made u/s. 144BA(6). If such direction could not be issued u/s. 144BA(6) on a valid basis, then completion of assessment / reassessment proceeding for such preceding or succeeding previous year could also be challenged to be ultra vires.

This brings one to the question on whether the direction issued by AP u/s. 144BA(6) for a particular previous year can be construed as valid reason for reopening the assessment of other previous year (within the time limit permitted u/s. 149) claiming that facts and circumstances for such other previous year remain the same? It is settled position that in absence of fresh material, a completed assessment cannot be reopened. Therefore, it may prove difficult to reopen an assessment for other previous year on such grounds.

G. Sec. 144BA(10); Sec. 144BA(11) and Sec. 144BA(12) – Completion of assessment / reassessment proceeding and determination of tax consequences:

Unlike the power granted to CIT(A) u/s 251 or to DRP u/s 144C(8) to confirm, enhance or reduce the income of the assessee, equivalent powers have not been granted to AP for determining the tax consequences arising out an arrangement being declared as an impermissible avoidance arrangement. Neither has such power been granted to PCIT/CIT especially when they have been granted the adjudicating powers for determining whether an arrangement can be classified as an impermissible avoidance arrangement. The power to determine tax consequences lies solely with the AO and Sec. 144BA(10) and 144BA(11) simply state that the AO shall complete the proceedings in accordance with the directions received from PCIT/CIT/AP and in consonance with the provisions of Chapter X-A.

Sec. 246A(1)(b) of ITA removes the possibility of appealing against the order of AO before CIT(A).

18 In Vodafone Essar Ltd. vs. DRP [2012] 340 ITR 352 (Delhi)

19 It may be noted that PCIT/CIT has not been granted similar power u/s. 144BA(3) although Form 3CEG seeks information for previous years other than those for which assessment is pending.

Instead, such order can be directly appealed to the appellate tribunal u/s. 253(1)(e). It fails to appeal to a rational mind that an appeal does not lie before CIT(A) against the order of the AO to the extent of challenging the tax consequences especially when AO is the only income tax authority that is competent enough to determine tax consequences of an impermissible avoidance arrangement whereas on the other hand the PCIT/CIT/AP have only the adjudicating power to declare an arrangement to be an impermissible avoidance arrangement.

H. 144BA(12) – Prior approval of PCIT/CIT before passing of order by AO

All the orders of AO pertaining to assessment / reassessment proceedings which include determination of tax consequences need prior approval of PCIT/CIT in accordance with Sec. 144BA(12). A pertinent question that may arise hereunder is whether the PCIT/CIT could vary the tax consequences determined by the AO at the time of granting approval?

In the context of an administrative act under Land Acquisition Act, Supreme Court[20] has held that word 'approval' does not mean anything more than either confirming, ratifying, assenting, sanctioning or consenting. It further held that the power of granting or not granting prior approval cannot be equated with appellate power whereby the findings could be reversed. ITAT Bangalore 'B' Bench[21] has held that the aforesaid decision of Supreme Court would be applicable even to administrative approvals under Income-tax Act, 1961. The prior approval of PCIT/CIT is intended to curb the arbitrary application of Sec. 98 to an arrangement and thus would remain an administrative approval in nature. Therefore, PCIT/CIT may not have the power to review, adjudicate or vary the tax consequences determined by the AO but would be restricted to exercise oversight over the discretion of AO in determining tax consequences in accordance with Sec. 98 of ITA.

I. Sec. 144BA(14): No Appeal under ITA against directions of AP

Sec. 144BA specifies that the directions of AP are binding upon the assessee as well as the PCIT/CIT (including subordinate authorities below them). Further, no appeal shall lie against directions issued by AP u/s 144BA(6). It may be noted however that, in case of gross violation of principles of natural justice, the directions could be challenged by way of writ petition under Article 226 of Constitution.

J. Sec. 144BA(15) to (21)

These provisions deal with the constitution and administrative matters relating to AP.

Conclusion

Although it has been held by the Courts for long that it is not for the revenue authorities to dictate the manner in which an assessee should conduct his business, after the provisions of Chapter X-A having come into effect, once an arrangement is classified as an impermissible avoidance arrangement the revenue authorities may now indeed be in a position to dictate so. On a concluding note, there are sufficient checks and safeguards built-in for invoking the provisions of Chapter X-A. Essentially, the procedural provisions provide for respecting the principles of natural justice at every stage of the procedure defined for invoking the provisions of Chapter X-A. In addition, appointment to the Approving Panel of a member being academic or scholar having special knowledge of matters, such as direct taxes, business accounts and international trade practices would certainly boost confidence for the international community. However, one must remember that the Approving Panel does not have the authority to adjudicate upon the tax consequences and the only safeguard against potential arbitrary determination of tax consequences by AO is the administrative power given to PCIT/CIT to exercise oversight before according approval to the tax consequences so determined by the AO.

20 In Vijayadevi Navalkishore Bhartia vs. Land Acquisition Officer [2003] 5 SCC 83

21 In Toyota Kirloskar Motors (P.) Ltd. [2012] 28 taxmann.com 293 (Bangalore)