# Tax Frauds, WB Policy, Cases (Module 2)

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#### **Tax Planning vs Avoidance**

- Tax planning is an art and science of paying the right amount of taxes after giving due consideration to all the tax benefit provided by the law in the form of legality as well as substance.
- Tax Avoidance = if for the sake of getting export benefit a domestic company sets up a subsidiary abroad to route transaction through such a subsidiary.
- This is a <u>concept in between tax planning and tax avoidance</u>, which is newly coined term known as "Aggressive Tax Planning".
- In many cases of tax avoidances, the underlying substance is absent or is minuscule.

Parameters	Whether Legal	Whether Moral
Tax Planning	Yes	Yes
Tax Avoidance	Yes	No
Tax Evasion	No	No
Aggressive Tax Planning	Yes	Depends (GAAR)

#### GAAR

### Indian GAAR – A Snapshot



#### S.96: IMPERMISSIBLE AVOIDANCE ARRANGEMENT (IAA)

#### Essential two conditions:

- The Main Purpose + Obtain Tax Benefit (part or whole or in any step of such arrangement)
- 2. "Either of the given four conditions":
  - a) Not at Arm's Length
  - b) Represents Misuse or Abuse of the provisions of the Act
  - c) "Lacks Commercial Substance"
  - d) Entered or carried on in a manner not normally employed for "Bona-fide Purposes".

# Comparison

Tax Exemptions	Tax Evasions
Refers to expenditure, income, or investment on no tax is levied.	Refers to avoiding tax payments through illegal means or frauds.
Reduces the overall taxable income	Does not alter the taxable income
Undertaken by employing government provisions like HRA, LTA, VRS, etc.	Undertaken by using <u>unfair means.</u>
Helps taxpayers save their hard-earned money through lawful means	Helps taxpayers save their money through unlawful, fraudulent means.
Leads to no penalties if done wisely and as per the available provisions	Leads to serious penalties and fines

#### **Tax Evasion**

- Tax evasion is illegal action in which a individual or company to avoid paying tax liability. It involves:
- ☐ hiding or false income, without proof of inflating deductions,
- not reporting cash transaction etc.
- Tax evasion is serious offense comes under criminal charges and substantial penalties
- Tax evasion is big business
- use of <u>offshore tax</u> havens and other secrecy jurisdictions
- GST Fraud in India
- In FY19, over 1,600 cases of fake invoicing were detected involving more than ₹11,250 crore
- Tax fraud of ₹6,520 crore was detected in the April-June period of FY 20-21
- Cases of tax credit availment by issue of fake invoices were of ₹11,251 crore in 2018-19 and ₹2,805 crore in April-June of FY 20 -- Minister of State for Finance Anurag Thakur, in written reply to Rajya Sabha.

# Offences & penalties

- Hiding the pan card number
- Providing an incorrect pan card number
- Not filing a TDS return
- Not collecting tax at source
- Not paying tax as per self-assessment Section 140A (1).
- Failure to comply with a demand notice
- Not getting audited
- The penalties for tax evasion are high, from 100% to 300% of the tax for undisclosed income.

# Using Technology to intercept fraud

- Tax officers = taken various measures to curtail fraud, and field formations of Central Board of Indirect Taxes and Customs (CBIC) are sensitised to keep a check on these kinds of activities and take necessary action.
- "A specialised directorate within the CBIC engaged in <u>Data</u> <u>Analytics and Risk Management</u> disseminates analytical reports and intelligence inputs to field formations of CBIC for the purpose of scrutiny, audit and enforcement, to check GST evasion in general and fraudulent credit availment in particular," - Shri Anurag Thakur

# IT Dept reopen old tax assessments – Algorithm

- IT department reopens old tax assessments with help of the 'Insight' portal, tax officials shortlisting names of tax dodgers after the portal scans the data using an algorithm.
- Tax officials = to send a preliminary letter as per newly introduced Section 148A of IT Act mentioning that an assessee's data has been flagged for a specific assessment year.
- The IT department has to inform the assessee that his data has been extracted by the Directorate of Income Tax (Systems) as 'high-risk VRU (variable report upload) as per the 'risk management system' in line with the 'risk management strategy' formulated by CBDT.
- The assessee will get a week to respond. If the assessee fails to respond, the case will be reopened automatically.
- If the portal shows enough names on time, the Mumbai department, which accounts for more than 30% of the IT collections, could end up issuing about 50,000+ initial letters under section 148A

- As per the amended law, the <u>department can go back 11 years</u> (i.e. ten years from the end of the assessment year during which the notice is received) when total income that has skipped tax is presumed to be more than Rs 50 lakh;
- it is 4 years when income below Rs 50 lakh escaped taxation.
- The data uploaded on the portal is procured from overseas authorities, banks, CBI, ED and other third parties.

### **CBIC Cases & Observations**

- K.I. International Ltd.
- It is established principle of law that <u>fraud and justice do not dwell together.</u>
- An assessee acting in defiance of law has no right to claim innocence when he fails to exercise due care and diligence.
- Failing to cause enquiry with the issuing authority of DEPB scrips/TRAs crippled the importer appellants to claim bona fide.
- Enactments like Customs Act 1962, and Customs Tariff Act 1975, are not merely taxing statutes but are also potent instruments in the hands of the Government to safeguard interest of the economy. One of its measures is to prevent deceptive practices of undue claim of fiscal incentives.
- Mool Chand Sharma= Concealment and mis-declaration of imported whisky documents and the seal of Commissioner forged
- M/s. Duggar Fibre Pvt. Ltd.= There is a difference between the description of the goods declared and the nature thereof visible to the naked eye.... Therefore, mis-declaration of description of the goods is established. Once there is mis-declaration of description, the appellant loses right to raise the plea of over valuation because fraud vitiates every solemn act.

# Whistleblower Policy & Vigil Mechanism

#### Tata Power

#### "Raising Concerns

"We encourage our employees, customers, suppliers and other stakeholders to raise concerns or make disclosures when they become aware of any actual or potential violation of our Code, policies or law. We also encourage reporting of any event (actual or potential) of misconduct that is not reflective of our values and principles. Avenues available for raising concerns or queries or reporting cases could include:

- immediate line manager or the Human Resources department of our company
- designated ethics officials of our company
- the 'confidential reporting' third party ethics helpline (if available)
- any other reporting channel set out in our Company's 'Whistleblower' policy.

We do not tolerate any form of retaliation against anyone reporting legitimate concerns. Anyone involved in targeting such a person will be subject to disciplinary action. If you suspect that you or someone you know has been subjected to retaliation for raising a concern or for reporting a case, we encourage you to promptly contact your line manager, the Company's Ethics Counsellor, the Human Resources department, the CEO & MD or the office of the group's Chief Ethics Officer."

- Section 177(9) of the Companies Act, 2013 (the Act)
   mandates the following classes of companies to constitute a vigil mechanism –
- Every listed company;
- Every other company which accepts deposits from the public;
- Every company which has borrowed money from banks and public financial institutions in excess of ₹ 50 crore.

- Regulation 4(2)(d)(iv) of the <u>Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements)</u>
  Regulations, 2015 (Listing Regulations), inter alia, provides for the listed entity to devise an effective Whistleblower mechanism enabling stakeholders, including individual employees and their representative bodies, to freely communicate their concerns about illegal or unethical practices
- Whistleblower Policy ("the Policy") and Vigil Mechanism as part of this Policy has been formulated with a view to provide a mechanism for directors, employees as well as other stakeholders of the Company to approach the Ethics Counsellor / Chairman of the Audit Committee of the Company.

- The Audit Committee <u>shall review the functioning of the</u>
  Whistleblower mechanism, at least once in a financial year.
- Definitions ( selected)
- "Chief Ethics Counsellor (CEC)" means the CEC of Tata Power, who is the process owner for Business Ethics under Tata Code of Conduct. CEC is to be appointed by the Audit Committee based on recommendation of CEO & MD
- "Subject" means <u>a person against or in relation to whom a</u>
   <u>Protected Disclosure has been made or evidence gathered</u>
   <u>during the course of an investigation.</u>

- "Investigators" mean those persons authorised, appointed, consulted or approached by the Ethics Counsellor/Chairman of the Audit Committee and includes the auditors of the Company and the police.
- Protected Disclosure" means <u>any communication made in</u> good faith that discloses or demonstrates information that <u>may evidence unethical or improper activity.</u>
- "Whistleblower" means an Employee or director or any stakeholder making a Protected Disclosure under this Policy.

# Disqualifications

- a. While it will be ensured that genuine Whistleblowers are accorded complete protection from any kind of unfair treatment as herein set out, any abuse of this protection will warrant disciplinary action.
- b. Protection under this Policy would not mean protection from disciplinary action arising out of false or bogus allegations made by a Whistleblower knowing it to be false or bogus or with a mala fide intention.
- c.The Company/Audit Committee would reserve its right to take/recommend appropriate disciplinary action against
   Whistleblowers who make three or more Protected Disclosures, which have been subsequently found to be mala fide, frivolous, baseless, malicious, or reported otherwise than in good faith

#### Procedure

- a. All <u>Protected Disclosures concerning financial/accounting</u> matters should be addressed to the Chairman of the Audit <u>Committee of the Company for investigation.</u>
- b. In respect of all other Protected Disclosures, those concerning the CEC and employees at the work level should be addressed to the Chairman of the Audit Committee of the Company and those concerning other employees should be addressed to the CEC of the Company.

# **WB Identity**

- The Whistleblower <u>must disclose his/her identity in the covering</u> <u>letter forwarding such Protected Disclosure</u>.
- Anonymous disclosures are not favoured as it would not be possible to interview the Whistleblowers.
- However, when an anonymous Whistleblower provides specific and credible information that supports the complaint, such as alleged perpetrators, location and type of incident, names of other personnel aware of the issue, specific evidence, amounts involved etc. while choosing to maintain anonymity, then there are often sufficient grounds for the Company to consider an investigation into the complaint

# Investigation

- a. All <u>Protected Disclosures reported under this Policy will be</u>
   thoroughly investigated by the CEC /Chairman of the Audit Committee
   of the Company who will investigate / oversee the investigations under
   the authorization of the Audit Committee.
- If any member of the Audit Committee has a conflict of interest in any given case, then he/she should excuse himself/herself and the other members of the Audit Committee should deal with the matter on hand.
- In case where a company is not required to constitute an Audit Committee, then the Board of directors shall nominate a director to play the role of Audit Committee for the purpose of vigil mechanism to whom other directors, employees and stakeholders may report their concerns.
- b. The CEC / Chairman of the Audit Committee <u>may at their discretion</u>, consider involving any Investigators for investigation.

#### TATA POWER

- Subjects have a right to consult with a person or persons of their choice, other than the CEC /Investigators and/or members of the Audit Committee and/or the Whistleblower. Subjects shall be free at any time to engage counsel at their own cost to represent them in the investigation proceedings.
- Subjects have a responsibility not to interfere with the investigation. Evidence shall not be withheld, destroyed or tampered with, and witnesses shall not be influenced, coached, threatened or intimidated by the Subjects

- Unless there are compelling reasons not to do so, <u>Subjects will be</u> given the opportunity to respond to material findings contained in an investigation report.
- No allegation of wrongdoing against a Subject <u>shall be</u> <u>considered as maintainable unless there is good evidence in</u> <u>support of the allegation.</u>
- Subjects have a right to be informed of the outcome of the investigation. If allegations are not sustained, the Subject should be consulted as to whether public disclosure of the investigation results would be in the best interest of the Subject and the Company.
- The <u>investigation shall be completed normally within 45 days of</u>
   the receipt of the Protected Disclosure

### **Protection toWB**

- No unfair treatment will be meted out to a Whistleblower by virtue of his/her having reported a Protected Disclosure under this Policy.
- The Company, as a policy, <u>condemns any kind of discrimination</u>, <u>harassment</u>, <u>victimization or any other unfair employment practice</u> <u>being adopted against Whistleblowers</u>.
- Complete protection will, therefore, be given to Whistleblowers against any unfair practice like retaliation, threat or intimidation of termination/suspension of service, disciplinary action, transfer, demotion, refusal of promotion, or the like including any direct or indirect use of authority to obstruct the Whistleblower's right to continue to perform his/her duties/functions including making further Protected Disclosure.
- Reasonable out-of-pocket expenses as per the company policy will be reimbursed on submission of actual receipts.

- The Company will take steps to minimize difficulties, which the Whistleblower may experience as a result of making the Protected Disclosure.
- Thus, if the Whistleblower is required to give evidence in criminal or disciplinary proceedings, the <u>Company will arrange for the</u> <u>Whistleblower to receive advice about the procedure, etc.</u>
- Whistleblower may report any violation of the above clause to the Chairman of the Audit Committee, who shall investigate into the same and recommend suitable action to the management.
- The identity of the Whistleblower shall be kept confidential to the extent possible and permitted under law.
- Whistleblowers are cautioned that their identity may become known for reasons outside the control of the CEC / Chairman of the Audit Committee (e.g. during investigations carried out by Investigators).

 Any <u>other Employee or Director assisting in the said investigation shall</u> also be protected to the same extent as the Whistleblower.

#### Investigators

- Investigators <u>are required to conduct a process towards fact-finding</u> <u>and analysis</u>. Investigators shall derive their authority and access rights from the CEC / Audit Committee when acting within the course and scope of their investigation.
- Technical and other resources may be drawn upon as necessary to augment the investigation.
- All Investigators shall be independent and unbiased both in fact and as perceived.
- Investigators have a <u>duty of fairness</u>, <u>objectivity</u>, <u>thoroughness</u>, <u>ethical</u>
   <u>behaviour</u>, <u>and observance of legal and professional standards</u>

- Investigations will be launched only after a preliminary review which establishes that:
- i.the <u>alleged act constitutes an improper or unethical activity or conduct</u>, and
- ii. either the allegation is supported by information specific enough to be investigated, or matters that do not meet this standard may be worthy of management review, but investigation itself should not be undertaken as an investigation of an improper or unethical activity