

ET Now May 8, 2012, 02:12PM IST

[theory](#) | [Taliban](#) | [rush](#) | [proof](#) | [policy](#) | [per se](#) | [Nishith Desai Associates](#) | [Nishith Desai](#) | [Market](#) | [GAAR](#) | [founder](#) | [et now](#) | [atmosphere](#) | [Africa](#)

In an interview with ET Now, Nishith Desai, Founder, Nishith Desai Associates, shares his views on the GAAR issue. Excerpts:

ET Now: Even though the finance minister yesterday has clearly outlined that the GAAR implementation will be deferred by 1 year, the fine print is not clear. What is your understanding? When will GAAR be implemented? What will happen to the retrospective clause?

Nishith Desai: The retrospective clause and GAAR are slightly different issues. Certainly it will require some kind of grandfathering. That means the transactions that have taken place or structures that have been put in place will need to be grandfathered, in the sense exempt from GAAR. Second, we will have to be extremely cautious when it comes to general anti avoidance. Few countries in the world have, but they have provided statutory safeguards. We took some language from countries like South Africa, but removed these safeguards that have been provided statutorily. It is proposed that some safeguards will be provided through the issuance of circulars and policy statements. But we know that many of these circulars or the policy statements are so vaguely worded that this is going to cause a lot of problem.

Now, the problem with GAAR is not, *per se*, with the philosophy or otherwise, but more importantly how it would be implemented. There are two major issues in our country today. And there are two deficits, in addition to the fiscal deficit. One is the character deficit. The country has become infamous for its corrupt character. Second, there is a trust deficit between the tax department and the taxpayer. The atmosphere is so adversarial and there are targets set up by the government for collection of taxes. Now, you are not in a business of collecting taxes. You are actually ruling the country. You are trying to see that monies are collected for the benefit of the country. But if you put targets where tax collectors have incentive or some kind of a threat that if you do not collect tax rightly or wrongly by extortion or otherwise, then it creates a reign of terror. See how many appeals are pending in high courts, the Supreme Court and tribunals. Look at the litigations which are going on.

So, people are really concerned about corruption and there is no trust-based administration. I must congratulate customs for doing what they have done and suddenly behavioural change came in. The same thing we need to do as far as tax is concerned. Therefore, both foreign investors as well as domestic investors are concerned about the actual implementation of GAAR. And if it is not provided with clear safeguards, people would still be wary of immediately coming back to the market. Apart from whether they come back or not, the atmosphere would still remain somewhat nervous.

ET Now: The conditions that determine whether an arrangement is permissible containing commercial substance, are the same announced in the finance bill which was on budget day on March 16th? So how important therefore will this onus of proof measure be right now?

Nishith Desai: A couple of good things that have happened in this announcement that is the onus of proving that the taxpayer is indulged in some kind of tax evasion or tax avoidance taken benefit of taxation, that has been shifted to the tax department. How it is going to be implemented is still a bit of a problem. Ideally, the government should not just try to jump in or hurry and bring this legislation and then draft them badly. An interesting provision is now even advance ruling will be able to provide some kind of ruling on GAAR. Now with a billion people living in India, just look at how many people will go in advance ruling.

Right from small person to the top sophisticated entity, everybody will rush to advance ruling. There is no clarity that to what extent it is binding and there could be litigation over litigation. This is what something we really need to address and I would recommend that let us not be in a hurry. When Lord Macaulay drafted the Indian Penal Code 150-160 years ago, he took 8-10 good years, but the law has been hardly amended during the last 150-160 years. And we need to really think through everything. Draft laws very carefully so that people are not unnecessarily troubled.

As we know how could he visualise every single crime in the world and provide not only the definition of the crime, but also proportionate it, reasonable punishment if at all there was a violation of law. We are not in a Taliban raj where because somebody did something, you cut his head off. We are a democratic country.

ET Now: If I am a foreign institutional investor, if I have interest in Indian equities or if I am planning to increase my exposure to Indian equities, apart from this one year window, what else has changed for me in the last 24 hours?

GAAR needs to have clear safeguards: Nishith Desai

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Nishith Desai: In 24 hours what has happened is that I have got some comfort that the government has stepped back and it will think more judiciously, more in equitable manner and in a fair manner. That is little comfort that I have got, not absolute comfort, but there has been some degree of comfort that has been provided and still one of the major issues that has not been addressed is treaty overwrite. GAAR gives power to the tax commissioner to disregard any provision of a tax treaty. Tax treaty is a part of international law. It is Parliament or at a very high level, it is fine you can delegate to that extent. But you cannot give power at a commissioner's level or at the lower level to disregard any provision of any treaty. This is one important clarification that we need to really provide.

In fact, it may be even violative of Article 51 of the Constitution of India and there are other reasons why this whole section on GAAR will have to be more clear. Otherwise, it could be held unconstitutional on the grounds of vagueness, there is a [theory](#) on that. It is unconstitutional and No 3, there is excessive delegation of powers and some of these issues will have to be really looked into. My humble submission is that if you want to provide any discretion to any government officer, particularly of a serious nature, it must be really looked through. Because if you do not have a situation where you give responsibility and a person is not accountable for, then we will have a disaster. And that is what the Standing Committee on Parliament has recommended that if you implement GAAR, provide accountability, personal accountability on the official who abuses that power as well. I would strongly recommend that remove this target business. That is the worst thing that we are doing in the country today.