

**'ODI holders may see respite from double taxation'**

Siddharth Shah of Nishith Desai Associates spoke to CNBC-TV18 shortly after the Finance Minister gave clarifications on P-Note.

***Below is the edited transcript of the interview. Also watch the accompanying video.***

**Q: How have you read the clarification that the finance minister has given on the P-Note and your key takeaways?**

A: I would look at it more positively. The clarification in whatever form so far seems to suggest that the offshore derivative instrument (ODI) holders, the indirect taxability of the ODI holders are something which there would be some respite for the market. Hence you are then left only with the issue of FII itself which maybe the issuers of ODI may need to deal with the GAAR provisions. To that extent that risk of taxation of FIIs which ultimately maybe passed back to the ODI holders but that is only a one level risk if this clarification comes out absolutely clearly on ODI.

**Q: Aliff Fazalbhoy and Ketan Dalal interpret that double taxation is avoided but the fact that the FII from certain destinations could be taxed or the ODI instruments itself could be retrospectively taxed, all those questions remain you think?**

A: Yes, that is correct. That is exactly the clarification which seems to be bringing out the double tax risk of the ODI holders being taxed as well as the FIIs being subjected to further taxes. That risk will get eliminated but the treaty related risk, the GAAR provisions and the override on treaty jurisdictions risks would still continue with this.

**Q: The FIIs which are under direct taxation would come under the ambit of GAAR. How easy will it be to invoke the GAAR provisions for them for them to prove whether they are the genuine investors or not? What could be the level of taxation perhaps they will have?**

A: The way I look at it is that the treaty, the GAAR provisions essentially requires that any arrangement should not be for availing of tax benefit. The only exception is unless I am able to demonstrate commercial substance. With treaty jurisdictions it will depend on how much of a substance is going to be sufficient from a tax perspective and that only time will tell. Whether a mere pooling of investors is sufficient or anything more that would be required to be demonstrated as commercial substance for use of a treaty jurisdiction.

I think that is going to be left to the interpretation of courts and others when they start applying GAAR. But on the rates of taxation I think for the FIIs the taxability, as there would be capital gain, should be 15% on short-term and long-term and it will be less of an issue. Unless of course there has been situations where the income of FIIs have also been treated as business income especially on case of derivatives and other sources of income in which case that income could go as high as 40%.