Constitutionality of Retrospective Taxing Statutes

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Introduction

The judgment of Supreme Court of India in Vodafone Case gave strong signals to the world that Indian Judiciary is Supreme The Finance Bill 2012 introduced in Indian Parliament with retrospective amendments in Indian Income Tax Act to bring Tax net to Vodafone like deals. The arguments for against this attempt of legislature trigged the authors of this paper for this endeavor. retrospective amendment "retrospective" in relation to statutes etc. means "operative with regard to past time". The change effected does not say that it shall be operative with effect from any earlier. The “Retrospective”, is used in more the senses than one. Ordinarily courts consider any statute as retrospective if it operates on cases or facts which came into existence prior to its commencement in the sense that if affects, even if for the future only, the character or consequence of transactions previously entered into or of other past conduct. “Thus, a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisite for its action is drawn from a time antecedent to its passing,” Halsbury's Laws of England, 4th Edn., Vol. 44, p. 570, para. 921.

CONSTITUTIONALITY OF RETROSPECTIVE STATUTES

India is a country following a written Constitution and requires no law made by the legislature shall be contrary to the provisions of the Constitution. No matter even if it is taxing statute. Indian Constitution never prohibits legislature from enacting retrospective laws. However as part of Human Rights Jurisprudence accepted all over the world, [1]Our Constitution says “No person shall be convicted of any offence except for violation of a law in force at the time of the commissio

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general rules which are not exhaustive according their lordships:

(i) A statute which alters substantive rights is presumed to be prospective in operation. However it should be understood as retrospective, if so provided unequivocally or when it is obliviously implied. In the case of a procedural statute the general rule is otherwise. It is presumed to be retrospective in operation.

(ii) Any law which deals with forum and limitation is procedural in nature. On the other hand law which deals with right of action and right of appeal, is substantive in nature though those are remedial in nature.

(iii) litigants are having vested rights in substantive laws, but no such right exists in procedural laws.

(iv) However even procedural Statute should not generally be of retrospective operation, if it would result in creation of new disabilities or obligations, or to impose new duties in respect of transactions already accomplished.

(v) A Statute which changes procedure and creates new rights and liabilities shall be presumed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

Can Taxing Statutes be retrospective?

The argument that taxing statutes cannot be retrospective was rejected by Hon’ble Apex Court from the early stages of the Constitution itself.[11] In fact in our Country most of the retrospective legislations are taxing statutes only. However for many reasons quite a few jurists equate Taxing statutes with penal statutes. Here lies the significance of the question ‘Whether Taxing statutes can be retrospective?’ Of Course the wordings Art.20(1) of Our Constitution is no way hurdle for any legislature in enacting a retrospective taxing statute, as the words “offence”, ‘ Charge’ etc makes it clear that it applies only to pure criminal cases. However the spirit and purpose of law that no person shall be punished for an act which is not an offence at the time when it is committed is nothing but it is arbitrary to make any one legally answerable for any act which is innocent or permissible while he/she is doing it. Then, how can you justify a law which collapses someone’s tax planning which he has consciously made according to the law which existed at time he made out the plan? Citizens really do have the right to know their obligations as taxpayers. Blackstone highlighted this point. . In a society that honours the rule of law, one cannot be punished for arranging tax liability in a way which is subsequently altered.[12] The Hon’ble Supreme Court held[13] that a retrospective taxing statute can be reasonable if it is in the public interest by virtue of clause (6) of Art. 19.” Therefore in the opinion of Apex Court a retrospective taxing statute is not per se unreasonable because it is retrospective. Court at times justifies it on the ground of public interest also. Of Course whatever might be the objective criteria which the courts may laid down for determining reasonableness on an ultimate analysis “reasonableness” is subjective and abstract and horse solely under the control of the ultimate deciding authority. Tobias Lonnquist observes[14] “A clear trend has been identified in relation to the interpretation of statutes from a strict or literal approach towards a more purposive approach. This has even been the case for revenue law which for some time has been considered as a penal statute. This trend is evident in other tax jurisdictions, both civilian and common law. After comparing and contrasting the various arguments for and against the purposive approach, it has been concluded that this observed change should not be welcomed in relation to the taxation legislation. Such an approach poses a serious threat to the separation of powers”, as the judicial arm would be able to read words into the legislation as they see fit. Even worse, however, is the threat to human rights, that is, the ability of the taxpayers to protect what is rightfully their own”. Many Jurists of Private International Law also considered taxing statutes as Penal Statutes. Many times foreign revenue laws were not implemented in common law countries by treating it as a Penal Statute. In support of the affirmative of this proposition, a dictum in Wisconsin v. Pelican Ins. Co. was often cited in U.S.A.[15] The view that taxing statute is penal statute is rejected in State of Maryland v. Turner,[16] as well as Moore v. Mitchell[17]. In U.S.A Supreme Court held that where a retrospective tax law is challenged on
constitutional grounds, it is necessary to consider the nature and the circumstances in which it is laid to find out whether its retroactive operation is harsh and oppressive enough to break the constitutional bonds.[18] The contention that the retroactive application of the Revenue Acts is a denial of the due process guaranteed by the Fifth Amendment of U.S Constitution[19] was not accepted by the Hon’ble U.S. Supreme Court in Stockdale v. Insurance Companies[20]; RailroadCo.v. Rose[21]; Flintv. Stone Tracy Co[22]; Billings v. United States[23]; Brushaber v. Union Pacific R. Co.[24]; In MC Cray v. U.S.A[25] Supreme Court opined that the Constitution is not self-destructive. Constitution won't meant to take away by one provision powers conferred by another.

The express authority to tax is not limited or restricted by subsequent provisions or amendments, especially by the due process clause of the Fifth Amendment. The like practice of the legislature of Wisconsin has been approved by its courts. However Section 16 of Article 1 of Constitution of North Carolina Provides as follows “Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted. No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted.” In Unemployment Compensation Commission of North Carolina v. Wachovia Bank & Trust Co.Ltd.[26] Supreme Court of North Carolina held Taxes levied for the year 1936 under the Unemployment Compensation Act, , as void as violating this section.[27]

Effect of Retrospective law on already concluded matters.

A retrospective law will not atomatically nullify a judicial or quasi judicial decision. Therefore any such decision will be binding on the parties unless altered by appeal, revision, review or any other appropriate proceedings even after the coming into force retrospective statute.[28] Therefore the interesting thing to be noted as to retrospective taxing statutes is if reopening of assessment is barred by limitation a retrospective tax will not impose liability on an assessee who has no pending case before any court or income tax authorities. In National Agricultural Co-operative Marketing Federation of India Ltd. v. Union of India [30] Justice Ruma Pal held that retrospective amendment cannot be construed as authorizing the Revenue authorities to reopen assessments when the reopening is already barred by limitation. The amendment does not seek to touch on the periods of limitation provided in the Act. In the absence of any such express provision or clear implication, it cannot be understood that legislature intended to authorize the Income-tax Officers to commence proceedings which before the new Act came into force, irrespective of bar by the limitation.”[29] An explanation was added to Section 80IA of the Income Tax Act by Finance Act 2009 with retrospective effect from 01-04-2000[30]. In Doshion Ltd v. ITO[31] High Court of Gujarat held that the retrospective amendment will not re-open the assessment which are already made beyond 4 years period.[32] However Sec.113 of the Finance Act 2012 nullifies the effect of judgments which renders the notices issued by the Income Tax authorities invalid and validates such notices retrospectively.[33]. However in PUCL v. Union of India[34] apex Court held that Legislature cannot ask the instrumentality of the state not to obey any judicial decision. Legislature can only remove the basis of a judicial decision. Supreme Court cited Smt.Indra Nehru Gandhi v. Raj Narain[35] in Supreme Court held that legislature can only change basis of a judgment and cannot declare the judgment of a court to be void or not binding. It was considered by the Supreme Court as an encroachment of judicial power and in fact against the principle separation of powers. Recently in State of Tamilnadu v. K.Shyam Sunder & Ors[36] Supreme Court observed “passing the Act 2011, amounts to nullify the effect of the High Court and this Court's judgments and such an act simply tantamount to subversive of law ”.

Conclusion
If the taxing statutes are frequently visited by retrospective amendments the global ventures may feel not prudent to invest in India which in turn affect the growth of Indian economy and there may
possibility of India missing the global investments. In addition to that in the humble view of the authors, retrospective statutes are violative of human rights as it upsets legitimate expectation of the taxpayer which is based on the law existed at time when he made the plan. We are admitting that judicial decisions upheld retrospective taxing legislations. However in our opinion human rights jurisprudence has to develop in this area and retrospective statute should be condemned just like a penal statute. In our opinion only judicial limb of state can do this since legislature may not prevented by popular sentiments in bringing such legislations since from the perspective of a common man rich men and corporate should be taxed and he may not consider it as violation of justice. Even though authors used term ‘human rights’ in many places in this article authors are conscious about constitutional implication of the term.

References

[1] Art 22(1) of Statute of International Criminal Court Provides as follows: “A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”

Art.24(1) of Statute of International Criminal Court Provides as follows: “No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.”


[7] [1962]3SCR547


[11] Ibid 2,3,4


[15] Court held that rule against application foreign criminal is applicable to revenue laws

[16] 75 Misc. 9, 132 N.Y.S. 173 (1911).

[17] 281 U.S. 18 (1930). In addition that MS Journal says that there is no similarity between tax and penalty except in both cases there is an interested party. Former is civic obligation while latter is criminal in nature.

[18] WELCH v. HENRY ET AL. 305 U.S. 134; 59 S. Ct. 121; 83 L. Ed. 87; 1938 U.S. LEXIS 1115; 21 A.F.T.R. (P-H) 973; 118 A.L.R. 1142;In EDMUND B. FAIRFIELD et al. v. THE PEOPLE ex rel. Samuel H. McCrea, Collector, etc. 94 Ill. 244; 1879 Ill. LEXIS 263 Supreme Court held that retrospective statutes affecting vested rights are treated as . However this is not applicable to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirn rights already existing, and in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations. Except when there are constitutional restrictions the legislature can authorize municipalities to levy and collect retrospective taxes and for this purpose use the assessment roll of a previous year. Legislations of this nature are used to collect taxes defectively levied. There can be no much objections as to their validity.

[19] 5th Amendment Provides “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any
person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

[20] 20 Wall.323,331
[21] 95 U.S.78,80
[22] 220 U.S. 107
[23] 232 U.S. 261,282
[24] 240 U.S.1,20
[26] 215 N.C. 491; 2 S.E.2d 592; 1939 N.C. LEXIS 298
[27] Court observed “Since the State Unemployment Compensation Act, ch. 1, Public Laws of 1936, is in effect a tax upon an act or acts, and since the statute was not ratified until 16 December, 1936, and the determination of "employment" within the coverage of the act must be determined from records for the calendar year 1936, and since no benefits there from could be obtained by employees for the calendar year 1936, in so far as the act attempts to require the payment of contributions for the calendar year 1936, it is retroactive and void as being in conflict with the State Constitution.”
[28] Madan Mohan Pathak v. Union of India [1978] 2 SCC 50; AIR 1978 SC 803 Supreme Court held that the decision is an authority for the principle that a judicial decision which has become final inter parties, cannot be set at naught by legislative action. It was followed in S.R. Bhagwat v. State of Mysore [1995] 6 SCC 16; AIR 1996 SC 188 ; Cauvery Water Disputes Tribunal, In re [1993] Suppl. I SCC 96 (II)
[30] Sec.147 of Income Tax Act
[31] SPECIAL CIVIL APPLICATION No. 18574 of 2011 (16/01/2011)
[32] Gujarat High Court observed that despite the vires of the impugned explanation reopening of the concluded assessments cannot be done. Court quashed the notice for reopening. obviously subsequent assessment order on the basis of the notice is also quashed.
[33] Notwithstanding anything contained in any judgment, decree or order of any Court or Tribunal or any authority, all notices sent or purporting to have been sent, or taxes levied, demanded, assessed, imposed, collected or recovered or purporting to have been levied, demanded, assessed, imposed, or recovered under the provisions of Income-tax Act, 1961, in respect of income accruing or arising through or from the transfer of a capital asset situate in India in consequence of the transfer of a share or shares of a company registered or incorporated outside India or in consequence of an agreement, or otherwise, outside India, shall be deemed to have been validly made, and the notice, levy, demand, assessment, imposition, collection or recovery of tax shall be valid and shall be deemed always to have been valid and shall not be called in question on the ground that the tax was not chargeable or any ground including that it is a tax on capital gains arising out of transactions which have taken place outside India, and accordingly, any tax levied, demanded, assessed, imposed or deposited before the commencement of this Act and chargeable for a period prior to such commencement but not collected or recovered before such commencement, may be collected or recovered and appropriated in accordance with the provisions of the Income-tax Act, 1961 as amended by this Act, and the rules made thereunder and there shall be no liability or obligation to make any refund whatsoever.
[34](2003) 4 SCC 399
[35] 1976 2 SCR 347
[36] AIR 2011 SC 3470