

# Retrospective Operation of Amendments in Taxing Statutes vis-à-vis Judicial Decisions

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## ABSTRACT

The cardinal principle of interpretation of a taxing statute is that every statute is prospective unless it is expressly stated that it is retrospective. The term retrospective means operating from a date in the past or taking effect from a past date. Thus, a taxing statute is said to have retrospective operation only when it is expressly or by necessary implication states that it will operate from a date in the past. The Indian revenue in spite of this settled principle of interpretation often tends to retrospectively impose tax for the purpose of gaining revenue. In addition to this, the Indian government has many times made retrospective amendments in the disguise of clarificatory and declaratory amendments. However, the Indian judiciary has always been the saviour of these kind of interpretations and amendments. The judiciary has given different principles both in favour of and against retrospective operation of taxing statutes. Thus, this paper first of all tries to identify the principles against and in favour of retrospective operation of taxing statutes. Then it explains about how a declaratory or clarificatory amendment of a taxing statute should be interpreted. Finally, it points out the rules laid down by the judiciary on retrospective operation of taxing statutes.

**Keywords:** Clarificatory amendments, Declaratory amendments, Judicial rulings, Principles of interpretation, Retrospective operation.

## INTRODUCTION

The principles of interpretation of statutes applies to the taxing statutes in the same manner as it applies to non-taxing statutes. Generally, amended laws will have

prospective operation only unless it is specifically mentioned that such amendment will have retrospective effect. Therefore, if there is no such express mention then the amended law will always operate prospectively only. Sir Peter Benson Maxwell has stated that no Act shall be construed to have retrospective effect unless there is such a construction which appears very clearly in the terms of the Act or such construction emerges through necessary and distinct implications. He further added that, the general presumption is that the legislature does not intend to do things which are unjust. This presumption forms the basis for leaning against giving retrospective effect to certain statutes. Therefore, a statute is construed to operate only to the cases or facts which come into existence after the statute is passed unless a retrospective operation is clearly intended.<sup>[1]</sup>

In case of a tax law extra caution has to be given while its application as tax is pecuniary burden upon the individual. Thus, any law imposing taxes are expected to be operated prospectively only unless it is otherwise clearly expressed. Retrospective amendments are usually made in a taxing statute in order to correct any mistakes or loopholes which are present in the statute. The major question which arises here is whether it is necessary to give retrospective effect. The general view is that a taxing statute must be given prospective operation only. However, there are certain situations in which retrospective operation becomes necessary for the benefit of the taxpayers. For example, when an existing provision in

tax legislation contains complex procedural compliances then any amendment made to simplify such procedures must be given retrospective effect. Thus, a retrospective operation cannot be said to be detrimental all the time. But most of the times retrospective operation in taxing statutes leads to imposition of an additional tax with effect from a date in the past on which such tax was not actually present.

### **PRINCIPLES AGAINST RETROSPECTIVE OPERATION OF TAXING STATUTES**

There are two important legal maxims which are regarded as Principles against retrospectivity. They are *Lex Prospicit Non Respicit* and *Nova Constitutio Futuris Formam Imponere Debet Non Praeteritis*.

#### **Lex Prospicit Non Respicit**

The general principle of law known as *Lex Prospicit Non Respicit* is a principle against retrospectivity. This principle against retrospectivity is the principle of fair play. This is a Latin term which means the law looks forward and not backward.<sup>[2]</sup> The term *lex* means a system of law, *prospicit* means to look forward and *non respicit* means not to look behind. Thus, this principle in simple term means a law is deemed and presumed to operate prospective and not retrospective. Therefore, laws must always look forward and must not go back. It must not deal or affect the events in the past. This principle is also called as Retrospective principle.<sup>[3]</sup> It is a principle which is against the retrospective operation of laws. This principle is based on the ideology that the conduct of a mankind has to be regulated only by an existing law which is present at the time of doing such act or for any future acts. Thus, a law should not be made for regulating the past transactions which is already done. Therefore, only the laws which are existing while doing an act are expected to be applied. In *Philips v. Eyre* [(1870) LR 6 QB 1] the court observed that

a retrospective legislation is contrary to the general principle that a legislation which is enacted to regulate the conduct of mankind then such legislation when introduced for the first time must deal with the future acts and it must not change the character of past transactions which was carried on upon the faith of the then existing law.

When it comes to taxation laws, it is for the Indian and foreign taxpayers or investors to arrange their economic affairs keeping in mind the present and future prospective laws. Therefore, such arrangement of affairs must not be extricated by retrospective application of law. This is the general expectation of the taxpayers when it comes to taxation laws.

Therefore, retrospective legislations are regarded as contrary to the above general principle of law. It is a well settled law that unless there are contrary intention tax legislations are presumed and intended to be having prospective operation only. It implies that a statute must not be given a retrospective operation so as to impair an existing right or duty. However retrospective operation can be given to procedural matters for convenience but it should not affect the essence of the statute. Therefore, if there is confusion as to the intent of the legislature whether its intent is to give retrospective or prospective effect, it must be given prospective effect only. Only when the language of a statute clearly expresses without any doubt or ambiguity that retrospective effect should be given, it can be operated retrospectively. Thus, if there is no express provision as to retrospectivity then it should be treated prospective only.

#### **Nova Constitutio Futuris Formam Imponere Debet Non Praeteritis**

The general principle of law *Nova Constitutio Futuris Formam Imponere Debet, Non Praeteritis* is a principle against the retrospective operation of statutes. It is a Latin term which means a new law must be construed in such a way that it interferes as little as possible with the vested rights. In

simple terms it means laws should neither be given retrospective operation nor it shall apply to past transactions unless there is a contrary intention expressly stated in the face of the statute. Thus, it must be given effect prospectively only that is from the time when it is being enacted and it shall apply to future transactions only. This is a fundamental principle of English law relating to interpretation of a statute.

In *Delhi Cloth & General Mills Co. Ltd. v. Commissioner of Income Tax* (AIR 1927 PC 244) the Hon'ble Supreme Court made reference to the following words of *Lord Blansburg, provision of a statute which touches the right which is in existence at the time of passing of the statute must not to be applied retrospectively in the absence of express provision or necessary intendment*. The court in this case discussed in detail about the principle of *nova constitutio futuris formam imponere bebet, non praeteritis*.

In *MRF Limited, Kottayam v. Assistant Commissioner (Assessment) Sales Tax & Ors*, [(2006) 8 SCC 702] the Hon'ble Supreme Court has adapted the principle of *nova constitutio futuris formam imponere bebet, non praeteritis* by holding that this principle will come into picture when an Act is enacted with the object of affecting an existing right or for imposing a new burden or for impairing an existing obligation. Therefore, only if there is an express word in the legislation which is sufficient to show the intention of legislature to affect an already existing right or imposing a new obligation it can be given retrospective effect.

In the case of *Keshvan Madhavan Memon v. State of Bombay*, (1951 SCR 228) and *Vallabhaneni Lakshmana Swamy and others v. Valluru Basavaiah and others* [(2004) 5 ALD 807, (2004) 5 ALT 755] the Hon'ble Supreme Court and the Andhra Pradesh High court respectively, has applied the principle of *nova constitutio futuris formam imponere bebet, non praeteritis*. The court in this case held that it is a cardinal principle of construction that every

statute is *prima facie* prospective unless contrary intention is expressly or impliedly given in that statute. The court further pointed out that the general rule is to impose new burden to hinder existing obligations.

In *Commissioner of Income Tax Mumbai v. Essar Tele Holdings Limited through its Manager*, [(2018) 3 SCC 253] the Hon'ble Supreme Court has made reference to the legal maxim *nova constitutio futuris formam imponere bebet, non praeteritis*. It held that out of various guiding rules of interpretations of taxing statutes it is a well settled principle that every statute is *prima facie* prospective in operation unless it is expressly or by necessary implication shown to have retrospective effect.

Hence, according to this principle, for a law to be qualified as a retrospective law the words used in it should expressly provide or necessarily connote that it must be give retrospective operation, otherwise it will be deemed to be prospective.

Thus, from the above principles it becomes clear that a taxing statute must be given prospective effect only unless there is a clear and express contrary intention. The ideology behind these principles of interpretation is that, the taxing statutes are in the nature of penal statutes and thus settled matters or past transactions or past events should not be disturbed by giving it a retrospective effect. It is also based on the ethic that current law should govern current activities. And so, laws which are passed today cannot be made applicable to the events in the past. Hence, it becomes implicit from the above principles that retrospective interpretation of taxing statute is inherently unfair. Law passed today cannot apply to the events of the past.

### **PRINCIPLES IN FAVOUR OF RETROSPECTIVE OPERATION OF TAXING STATUTES**

It is implicit from the above paragraph that retrospective legislation is inherently unfair. But it is not unfair in all cases. Retrospective operations of taxing

statutes are protected and held valid by certain principles. Generally, any changes made to a procedural law shall be deemed to be retrospective in operation. The general principle of interpretation is that any procedural amendments made to a taxing statute are retrospective unless there is some good reason against it. This is because, no person shall have a vested right in terms of any procedure of law. Generally, a person who is accused of an offence has got a vested right to defend or prosecute the case but he does not have a vested right in how he is to be tried that is whether only by a particular court or by particular procedure. However, if there is any discrimination or violation of any fundamental rights prescribed in the Constitution then he has a right.<sup>[4]</sup>

An important principle of interpretation of a taxing statute is that the principle against retrospectivity does not apply to the legislations which affect only the procedural provisions. This is because no person is having a vested right in any course of procedure. Thus, alterations made in procedural provisions are always retrospective unless there is good reason why it should not be. However, the right to appeal etc.

The important principles of interpretation tax legislation which protects the validity of retrospective operation of taxing statutes are

1. While interpreting a taxing statute one has to look merely at what is actually said and there must be no room for intendment.
2. There is no equity in tax.

These principles were enunciated very succinctly by Justice. Rowlatt in the case of *Cape Brandy Syndicate v. IR*, [1921] 1 KB 64 which was later accepted and applied by the Indian Courts in various case viz; *Commissioner of Income Tax, Hyderabad-Deccan v. Vazir Sultan & Sons*, [AIR 1959 SC 814, (1959) Supp 2 SCR 375, (1959) 36 ITR 175]; *Calcutta Co. Ltd. v. Commissioner of Income Tax*, [AIR 1959 SC 1165, (1960) 1 SCR 185, (1959)37 ITR

1]; *Indian Molasses Co. (P.) Ltd. v. Commissioner of Income Tax*, [AIR 1959 SC 1049, (1959) Supp 2 SCR 964, (1959)37 ITR 66] and *Commissioner of Income Tax, Bengal v. Mahaliram Ramjidas*, [AIR 1940 PC 124, (1940) 8 ITR 442].

Chief Justice. Lord Alverstone, in the case, *The King v. Chandra Dharma*, ([1905] 2 KB 335) observed that statutes which make alterations in procedural matters are said to be retrospective in operation unless there appear any other special circumstances on the face of the statute in question. Justice. Channell, in the same case observed that a statute dealing only with procedural aspects applies to both past and future events and it is not necessary to expressly state that such statute is retrospective. The purpose of the statute is only to affect the procedure and it makes no difference whether the events giving rise to the proceedings occurred before or after the Act was passed.

### **INTERPRETATION OF CLARIFICATORY AND DECLARATORY AMENDMENTS OF TAXING STATUTES**

A number of retrospective amendments are being passed in the name of declaratory or clarificatory laws. Clarificatory Acts are generally passed to clarify any doubts or make clear any doubts in a provision of law which is already enacted. However, it is just an explanatory Act. In clarificatory or declaratory laws, the amendment is not made expressly retrospective, rather it will be statutorily mentioned as being a clarification that is by the use of the words “for the removal of doubts it is clarified” or any words similar to it. However, the mere legislative assertion that an amendment is clarificatory will not make the provision conclusive in nature. Hence, in clarificatory or declaratory laws, there will be no mention of the retrospective operation expressly. Thus, it is the court which has to adjudicate whether an act is clarificatory or substantive in nature as it is a matter of statutory interpretation.

In case of a Declaratory Act, the rule that it should not be construed in such a way that it takes away previously vested rights does not apply. It is the court which must decide the way such acts must be interpreted. In other words, if the statute is declaratory in nature, then one cannot simply argue that the retrospective operation is invalid because the rights were vested with the taxpayers previously. Therefore, amendments where the words 'For the removal of doubts' or words which are having similar effect are used are deemed to be declaratory in nature and hence, they will be retrospectively effective disregarding the fact that a vested right is being taken away. Such a construction is legally and constitutionally valid though it is apparently unjust and vicious in its operation vis-a-vis any individual assessee.

In *Union of India v. M/S Martin Lottery Agencies Ltd* [(2009) 12 SCC 209], the Supreme Court held that mere words like "for the removal of doubts it is clarified" does not make the provision conclusive. It is a matter of statutory interpretation and the courts must only decide upon whether it is just clarificatory or a substantive change of law.

In *R. Rajagopal Reddy (dead) by Lrs. & Ors. v. Padmini Chandrasekharan (dead) by Lrs.* [(1995) 2SCC 630], it was held that declaratory laws declare and clarify the legislature's true intention in relation to an earlier existing transaction or enactment and it does not create new rights or obligations. If a statute is curative or merely declaratory of previous law, it is generally intended that it will apply retrospectively. A clarifying amendment of this type will have retrospective effect, so if the principal Act was in effect when the Constitution was ratified, the amending Act will also be in effect. If a new Act is enacted to explain an earlier Act, it serves no purpose unless it is construed retrospectively. An explanatory Act is usually passed to correct an obvious omission or to clarify the meaning of the previous Act.

## **JUDICIAL DECISIONS ON RETROSPECTIVE OPERATION OF AMENDMENTS IN TAXING STATUTES**

Where retrospective effect is not expressly or by necessary implication stated in a provision of an Act in that Act itself, then the Court is called upon to interpret the Act and determine whether the Actor the amendment made in the Act is only procedural or not. The general legal principle holds that procedural law always operates retrospectively and it shall govern all the pending proceedings whenever they are initiated. And no law which affects the existing rights or duties or imposes new liabilities or obligations, or creates new disabilities can be given a retrospective interpretation unless the law expressly states that it shall have retrospective effect in an unequivocal and unambiguous terms or the retrospectivity is inferred impliedly. The above principle has been highlighted in various tax cases. The most relevant cases are discussed briefly below.

### **Scope and ambit of retrospective interpretation of amendment in taxing statutes**

In the matter of *Hitendra Vishnu Thakur v. State of Maharashtra* [(1994) 4 SCC 602], the Supreme Court defined the scope and ambit of an amending Act as well as its retrospective application as below:

1. A statute which is affecting substantive rights must be presumed to be prospective in operation unless it is enacted retrospective either expressly or by necessary intention. On the other hand, a statute that affects procedure is presumed to be retrospective in application unless such a construction is textually impossible. Thus, a statute should not be given an enlarged scope and it should be strictly confined to the limit what it is clearly defined.
2. Law pertaining to forum and limitation is procedural in nature, whereas law pertaining to right of action and right of

appeal although remedial is substantive in nature.

3. In substantive law, every litigant has a vested right but in procedural law, no such right exists.
4. Generally speaking, a procedural statute should not be applied retrospectively if the effect would be creation of new disabilities or obligations, or the imposition of new duties, in relation to previously completed transactions but if there is an express provision to that effect then it shall be applied retrospectively.
5. Unless otherwise specified, either expressly or by necessary implication, a statute that not only changes the procedure but also creates new rights and responsibilities shall be considered as prospective in operation.

**No retrospective operation unless such intention is clearly expressed or necessarily implied**

The *Govinddas v. Income Tax Officer* [1977 AIR 552, 1976 SCR (3) 44], is a landmark case in this subject matter. In this case the Hon'ble Supreme Court held that except in matters of procedure, retrospective operation should not be given to a provision in order to impair an existing right, create a new obligation, or imposes a new liability unless it is specifically provided or necessarily required. In the event of a doubt, the Act should be presumed to be only prospective in operation. It further held that an Act may be given retrospective effect even for the periods prior to its enactment. But any assessment which is completed prior to the enactment of such Act cannot be disturbed by its retrospective application. At the same time, rights and liabilities that have become final cannot be altered by a new enactment unless expressly stated to be so.

In *Central Board of Direct Taxes, represented by its Chairman v. V.S. Malhotra*, the court held that the presumption in case of interpretation of tax laws is that the laws operate prospectively

only and that they would have retrospective effect only if the legislature enacting such law has clearly indicated its intention that it should be operated retrospectively. It was also held that if there is any doubt as to whether the law should be given retrospective effect or not due to the unclear words in the law then the controversy should be resolved in favor of prospective operation only. This is particularly so where the relevant enactment attaches a new disability or disqualification in respect of past transactions.

In the case of *CIT v. Vatika Township (P.) Ltd.* [(2014) 49 taxmann.com 249], the Hon'ble Supreme Court has laid down the general principles governing retrospective operation of laws. It stressed that except where a contrary intention appears, an Act is presumed not to be intended to have a retrospective effect. The Supreme Court also reiterated that the faith in the nature of the law is founded on the substratum that every person is entitled to arrange his affairs based on the existing law and should not find that his plans have been upset by enacting a law with retrospective effect. The court further specified that if a law is made in such a manner to benefit some persons but without causing any detriment to any other person or public generally and such benefit is the main object with which the law is made by the legislators, the such laws can be give purposive construction and be given retrospective effect. This is the justification for treating the procedural provisions as retrospective.

**No retrospective operation beyond the words of the legislation**

In *J.P. Jani, Income Tax Officer v. Induprasad Devshanker Bhatt* [AIR 1969 SC 778, (1969) 1 SCR 714, (1969)72 ITR 595], the Hon'ble Supreme Court has made reference to the rule of interpretation enunciated by Justice. Lindley in *Lauri v. Renaud* ([1892] 3 Ch. 402). The rule adapted by the court is that a statute shall not be construed so as to give it a greater

retrospective operation than what its language actually lends necessary. This rule was also quoted by Maxwell in his book Interpretation of Statutes.

### **No retrospective operation in case of settled or time barred remedies unless otherwise expressly stated**

In *S.C. Prashar v. Vasantsen Dwarkadas* [AIR 1963 SC 1356, (1963) 1 SCR 29, (1963) 49 ITR 1], the court held that in the case of assessments for which the remedy has already become time barred, then any right for reopening the remedy created by the amended or new Act which was came into force after the expiry of such period of limitation cannot be invoked. Similar rulings were given in the following cases also: *Agarwal Bros. v. Income Tax Officer* [(1971) 79 ITR 101], *Kudilal Govindram Saksaria v. Commissioner of Income Tax* [(1964) 54 ITR 653 (Bombay)], *CM. Rajgharia v. Income Tax Officer* (1975) 98 ITR 486 (Pat.), etc.

In *Ahmedabad Mfg. & Calico Printing Co. Ltd v. S.G.Mehta, Income Tax Officer* [AIR 1963 SC 1436, (1963) Supp 2 SCR 92, (1963) 48 ITR 154], the Courts held that if the remedy is given to a taxpayer and the time for claiming it has already become time barred, then any right for reopening such remedy created by the amended or new Act which was entered into force after the expiry of such period of limitation cannot be invoked unless there is an express provision to that effect. The same proposition shall apply even for the remedies available to the taxpayer, such as a right of appeal.

In *Hukumchand Mills Ltd. v. State of Madhya Pradesh* [AIR 1964 SC 1329, (1964) 6 SCR 857, (1964) 52 ITR 583], the Hon'ble Supreme Court held that a right of appeal which is accruing on the date of commencement of proceedings cannot be restricted or conditioned by subsequent retrospective amendments to the law. However, if the right of appeal which is available to the assessee at the time when the order which is sought to be appealed

against was passed, then such right cannot be denied on the ground that there was no such right of appeal when the relevant proceedings was originally commenced by giving it a retrospective effect.

### **Retrospective operation of limitation provisions**

In *CIT v. Sadhu Ram* [(1981) 127 ITR 517 (SC)], the court held that the law of limitation is a part of procedural law and thus it can be given retrospective effect unless the relevant provision states otherwise. This case dealt about the amendment made to section 275(b)<sup>[5]</sup> through the Amendment Act of 1970.<sup>[6]</sup> This section provides for the time limit within which penalty order must be imposed. The amendment provided a time limit of two years from the end of the financial year in which the proceedings of assessment were concluded but before the amendment the time limit was within two years from the date on which the relevant proceedings are completed. It was held by the court that this is an amendment relating to limitation which is a procedural aspect and thus it shall have retrospective effect and hence the penalty proceedings which were initiated even before the amendment of section 275(b), shall be determined only according to the amended provision.

### **No retrospective operation in case of penalty provisions imposing criminal liabilities**

In the case of *CIT v. M/s. Yahoo India Pvt. Ltd* [(2013) 33 taxmann 32 (Bom.)], the Hon'ble Bombay High Court held that the word penalty used in Article 20 refers only to the penalty which is having a criminal liability. Thus, any penalty provision which imposes criminal liability cannot be retrospectively amended. Thus, retrospective operation shall not be given in case of penalty provisions imposing criminal liabilities.

The Madras High Court in *Associated Industries v. First Income Tax Officer* [(1982)134 ITR 565], held that a

penal provision in a taxing statute shall not be amended retrospectively. This is based on the principle that a person should be punished only for an act which is considered as an offence based on the law in force at that point of time. And the punishment should also be the one which prevailed at the time of committing such offence. Reference was made to Article 20(1)<sup>[7]</sup> which prohibits the ex post facto laws. Generally, retrospective operation of penal provisions in a taxing statute is held to be invalid and unconstitutional. However, if a taxing statute states that a procedure relating to the penal provision must be given retrospective effect, then it becomes valid and is not violative of Article 20(1). This Article gives protection only to Criminal statutes and for the penal provisions involving criminal liability in taxing statutes.

In the case of Deputy Commissioner of Income Tax v. Baroda Cricket Association [2019 SCC OnLine ITAT 10215], the Income Tax Appellate Tribunal pointed out that Article 20(1) of the Indian Constitution provides protection against ex post facto laws. Thus, when a taxpayer complies with the law as it existed prior to the retrospective change and files a return in accordance with the law as it existed at that time then imposition of penalty with retrospective effect through amendment cannot be justified and it is unreasonable and also violative of Article 20 of the Indian Constitution.

#### **No retrospective operation in case of jurisdictional provision unless otherwise expressly stated**

In CIT v. Mela Ram Jagdish Raj & Co., [(1981)132 ITR 897 (Punj. & Har.)] the Punjab and Haryana High court held that the provisions of taxing law which deals with jurisdiction are not merely procedural and hence, they cannot be given retrospective effect. The jurisdiction of a law is a matter of vested right and thus it shall not be given retrospective effect unless there is an

express or implied provision showing such intention.

#### **CONCLUSION**

The researcher concludes this paper by stating that an amendment in taxing statutes must be given prospective operation only unless it is expressly or by necessary implication provides otherwise. The simple reason for operating a taxing statute prospectively is for giving an opportunity to the taxpayer for arranging his economic affairs in such a way that he pays lesser tax. So, he must have some knowledge about the tax liabilities which he could incur if he makes such an investment or enter into transaction. However, if an amendment relates to procedural matters in a taxing statute, then it can be given retrospective effect. As a matter of general policy, retrospective taxation or retrospective changes in substantial parts of the tax law need to be avoided as far as possible. This is because of creating uncertainty in tax laws and the fear of new and onerous retrospective burdens being cast on the taxpayer. Thus, any procedural amendments made to a taxing statute are retrospective unless there is some good reason against it. This is because, no person shall have a vested right in terms of any procedure of law. However, a substantive provision in a taxing statute must not be given retrospective operation unless such intention is clearly expressed or necessarily implied. Likewise, no retrospective operation must be given in case of a settled or time barred remedies unless otherwise expressly stated

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