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VALIDITY OF RETROSPECTIVE AMENDMENTS TO INDIAN TAXATION STATUTES

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Abstract: Economic growth is largely determined by the balance sheets of existing industries. And if economic development is our goal, tax reduction is the best and simplest way forward. The increasing and ‘unnecessary tax’ burden has to be scaled down to the demands of Industrialization, and retrospective tax legislation (to reduce the tax), in line with the criteria listed afore, is one way to go about it.

INTRODUCTION

The past few years have witnessed numerous retrospectively applicable amendments to tax law. And though their terms make them unequivocally enforceable, their validity remains enshrouded in ambiguity. The validity of such amendments is an issue of serious import and this paper is an attempt to grapple with the same.

Article 245(1) of the Constitution gives power to the Parliament to enact laws for the whole or any part of the territory of India, and the Legislature of a State to make laws for the whole or any part of the State. The power so broadly postulated enables the legislative to enact both prospective as well as retrospective law.¹ Though taxing statutes are no exception to this rule², the presumption, in the absence of a contrary intention, is always one of “prospectivity”. Amendments, however, when they are of an explanatory, declaratory, curative or clarificatory nature, whether or not expressly retrospective, are to be judicially construed as retrospective.³ The rationale of non-retrospectivity, it is submitted, is in its opposition to arbitrary infliction of taxes. Tax statutes are generally predicated on the principle, ‘*Nova constitutio futuris formam imponere debet non praeteritis*’ – every new enactment should affect the future and not the past.

RETROSPECTIVE AMENDMENTS

A statute is deemed to be retrospective when it takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty or attaches a new disability in respect to transactions or considerations already past.⁴

Amendments which contemplate the past or which are made to affect acts, facts or rights occurring before their coming into force are known as ‘retrospective amendments’. In *Darshan Singh v. Ram Pal Singh*⁵, the Supreme Court said retrospective statute means a statute which creates a new obligation on transactions or considerations already past or destroys or impairs vested rights. K.J.Aiyar⁶ states that the word ‘retrospective’ when used with reference to an enactment may mean (i) affecting an existing contract; or (ii) re-opening of a past, closed and completed

¹ Nongthombam Ibomcha Singh v. Leisangthem, AIR 1977 SC 682 (683); Nandu Mal Girdhari Law (M/s.) v. State of Uttar Pradesh, AIR 1992 SC 2084.

² Sanctus Drugs v. UOI 225 ITR 252.

³ CIT v. India Steamship 196 ITR 917.

⁴ See: Craies on Statute Law, 7th Edn., p. 387.

⁵ 1992 Supp (1) SCC 191.

⁶ Judicial Dictionary, 13th Edn., Butterworth, p. 857.

transaction; or (iii) affecting accrued rights and remedies; or (iv) affecting procedure. In *State of Jammu and Kashmir v. Shri Triloki Nath Khosa and Ors.*⁷, as also in *Chairman, Railway Board and Ors. v. C.R. Rangadhamaiah and Ors.*⁸, the Hon'ble Supreme Court held that provisions which operate to affect only future rights without affecting benefits or rights already accrued or enjoyed, till the deletion, is not retrospective in operation.

An amendment cannot be made retrospective from a date earlier than one on which the provision sought to be amended itself was brought on the statute book.⁹ Where legislation is introduced to overcome a judicial decision, the power cannot be used to subvert the decision without removing the statutory basis of the decision,¹⁰ and interestingly such power cannot be used simply for nullifying the judgment where no defect in the original law is marked¹¹. When retroactive legislation is enacted by the appropriate legislative authority, the same must be given effect to in all pending cases of appeal or reference.¹² In *CIT v. Hindustan Electro*¹³, the Supreme Court held that an assessee cannot be held liable for filing a wrong return if the relevant law is retrospectively amended subsequent to his filing. Further, if there is a right of appeal on the date of the initiation of assessment proceedings, such right remains unaffected by an amendment imposing conditions on the same unless there exist contrary statutory indication.¹⁴

VALIDITY OF RETROSPECTIVE AMENDMENTS

Since the Constitution of India is the supreme law, all other laws, including taxation laws, are subordinate to it and must be read and interpreted in the light of constitutional provisions.¹⁵ In the case of *Piare Dusadh v. The King Emperor*¹⁶, it was held that an ordinance having retrospective effect is not invalid as there is nothing in the Indian Constitution which prohibits the same. This legislative power, i.e. the power to introduce enactments for the first time or to amend enacted law with retrospective effect, is however subject to several judicially recognized limitations.¹⁷

Firstly, words used must expressly provide for retrospective operation as in the case of a taxing statute, the presumption is that of 'prospectivity'. Secondly, the retrospectivity must be reasonable and not excessive. Lastly, it is apposite when legislation is introduced to overcome a judicial decision, for as has been stated legislative power cannot be used to subvert a decision without first removing the statutory basis of the decision. In cases where the aforementioned criteria is not met the courts will usually intervene at the tax payers behest.

The general rule as stated by Halsbury in Vol. 36 of the Laws of England (3rd Ed.) and reiterated in several decisions of the Supreme Court as well as English Courts is that "all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective" and retrospective operation should not be given to a statute so

⁷ (1974)ILLJ121SC.

⁸ AIR1997SC3828.

⁹ Ritz v. UOI 184 ITR 599.

¹⁰ National Agricultural Co-Operative Marketing Federation of India Ltd. & Anr. v. Union Of India & Ors [2003]260ITR548(SC).

¹¹ Netley v. ACAgIT 257 ITR 532.

¹² Bennett Coleman v. CIT 49 ITR 264.

¹³ 243 ITR 48(SC).

¹⁴ CIT v. Bengal Cardboard 176 ITR 193.

¹⁵ CIT v. Harijan Nigam 226 ITR 696.

¹⁶ AIR 1944 FC 1.

¹⁷ Supra note 10.

as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. Following are some of the conditions and limitations enumerated below:

Protection to Public

Retrospective legislation may be held invalid on the ground that it is unreasonable, or beyond legislative competence, or violative of Constitutional provisions, or not in general public interest. If a statute is passed for protecting the public against some evil or abuse, it may be allowed to operate retrospectively, although by such operation it will deprive some person or persons of a vested right. In *Virendra Singh Hooda v. State of Haryana*¹⁸ the Supreme Court upheld this condition.

Expressly Provided

"Every statute, it has been said", observed LOPES, L.J., "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect."¹⁹ Close attention must be paid to the language of the statutory provision for determining the scope of retrospectivity intended by Parliament.²⁰

In *Govinddas and Ors. v. Income Tax Officer and Anr.*²¹, it was laid down that if the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. In this case the principal contention of the petitioners was that the provision in Section 171(6) and (7) the Income Tax Act, 1961 had no application where the assessment of a Hindu Undivided Family was made under the provisions of the Indian Income Tax Act, 1922. Section 25A of the 1922 Act did not impose any personal liability on the members for the tax assessed on the Hindu Undivided Family in case of partial partition. This contention was rejected by the High Court, but the Supreme Court said it is clear that Section 171(6) applies only to a situation where the assessment of a Hindu undivided family is completed under Section 143 or Section 144 of the new Act. It can have no application where the assessment of a Hindu undivided family is completed under the provisions of the old Act as retrospective operation is not warranted either by express language of the said provision or by necessary implication. Therefore, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability, save in matters of procedure.²²

Similarly, in *S.L. Srinivasa Jute Twine Mills P. Ltd. V. Union of India (UOI) and anr.* a writ petition was filed before the High Court, praying issuance of mandamus to declare that Act 10 of 1998 seeking to amend provisions of Section 16 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 shall not apply to the petitioners and they would continue to have the "infancy protection" for the period of 3 years starting from the date of establishment of the industry. The High Court dismissed the writ petitions and an appeal was made before the Supreme Court, which held that "Unless there were words in the statute sufficient to show the intention of

¹⁸ AIR 2005 SC 137(148).

¹⁹ Amireddi Raja Gopala Rao v. Amireddi Sitharamamma [1965]3SCR122).

²⁰ See also: Union of India v. Raghubir Singh [1989]178ITR548(SC).

²¹ [1976]103ITR123(SC).

²² See also: Reid v. Reid (1886) 31 Ch D 402; Delhi Cloth Mills & General Co. Ltd. v. CIT, Delhi MANU/PR/0050/1927; Keshvan Madhavan Memon v. State of Bombay MANU/SC/0020/1951 : 1951CriLJ680); Magic Wash Industries (P) Ltd. v. Assistant Provident Fund Commissioner, Panaji and Anr. 1999 Lab.I.C. 2197; S. Gadgil v. Lal & Co. [1964]53ITR231(SC); J.P. Jani, ITO v. Induprasad Devshanker Bhatti [1969]72ITR595(SC).

the legislature to affect existing rights, it was deemed to be prospective only.” This being the legal position, the judgment of the High Court was indefensible and thus set aside.

REASONABLE

Amendments having retrospective application must be reasonable and not excessive or harsh, otherwise they run the risk of being struck down as unconstitutional.²³

In *Rai Ramkrishna v. State of Bihar*²⁴ the court said that where legislative competency is determined it extends to both prospective operation and retrospective operation. Further, legislative power includes the subsidiary or the auxiliary power to validate law which is found to be invalid. In this case, the appellants challenged the validity of the Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961. The Act contains certain provisions, which validate certain provisions of The Bihar Finance Act, 1950 that were struck down by the court. The petition was dismissed by the High Court and an appeal was made to the Hon’ble Supreme Court. It was held that if the essential features of a taxing statute are within the competence of the legislature its character is not necessarily changed merely by its retrospective operation. The restriction imposed on the fundamental rights of the Appellants under Art. 19(1)(f) and (g) was reasonable within the meaning of Art. 19(5) and (6) and Art. 304(b). However the Court quashed the imposition of retrospective tax because it found the imposition against equity and held that if the retrospective feature of a law is unreasonable, arbitrary and burdensome the statute cannot be sustained.

There are many arguments for retrospective amendments as there are against it. The Hon’ble High court of Delhi²⁵ in the case of *Home Solutions Retail India Ltd. & Others vs. UOI* struck down levying of tax by observing that the renting of immovable property for use in the course of furtherance of business or commerce does not involve any value addition and therefore, cannot be regarded as service. In view of this judgment, commercial tenants have stopped reimbursing the tax element. Subsequently, the definition of taxable service ‘Renting of immovable property’²⁶ was amended with retrospective effect by the Finance Bill 2010 to provide explicitly that the activity of ‘renting’ itself is a taxable service. The amendment has nullified the decision of the Hon’ble High Court. Besides pending cases before the Hon’ble Supreme Court on the question of validity, the landlord will now have to pay service tax w.e.f. 01-05-07 even if they have not collected it from the tenant under the protection of judiciary. For those landlords where the tenancy is still continuing, they may try to enforce the collection from the existing tenant. But what of the landlords whose tenants have already vacated the premises and are not traceable?

Time Barred Assessments Cannot be Reopened

In *National Agricultural Co-Operative Marketing Federation of India Ltd. & Anr. v. Union Of India & Ors.*, the issue raised by the appellants related to the construction and constitutional validity of section 80P(2)(a)(iii) of the Income Tax Act, 1961. The Finance (No. 2) Act, 1967, section 81 re-enacted as section 80P of the 1961 Act, provided deduction for the marketing of the agricultural produce “of” its members. Now the Supreme Court in earlier decisions interpreted “of” as “*produce by members*” and later as “*belonging to members*”. Subsequently Parliament retrospectively amended section 80P(2)(a)(iii) and substituted “of” with the phrase “grown by”.

²³ See also: *Jawaharmal v. State of Rajashtan*, [1966]1SCR890; *Supreme Court Employees Welfare Association v. Union of India*, MANU/SC/0305/1986.

²⁴ AIR 1963 SC 1667.

²⁵ Order dated 18.04.2009.

²⁶ Section 65 (105) (zzzz).

The retrospective substitution was included from 1-4-1968, the date when the section was introduced in the statute, thereby validating the provision. That said the 1998 amendment, however, cannot be construed as authorizing revenue authorities to reopen assessments when such reopening is already barred by limitation. The ratio of the case can be read as – on retrospective amendment of provision(s), time barred assessments cannot be reopened.

Violation of Art 14 of the Constitution of India

The power to tax is an incident of Sovereignty²⁷ and in the case of *State of Tamil Nadu v. M/s. Arooran Sugars Ltd.*²⁸, the Hon'ble Supreme Court said the power of the Legislature to amend, delete or to enact a statute prospectively or retrospectively cannot be questioned and challenged unless the Court is of the view that such exercise is in violation of Article 14 of the Constitution.

In every case the introduction or deletion of a provision with retrospective effect does not per se amount to violation of Article 14. However in case of taxation, if retrospective amendments are validated, the State, by necessary implication, assumes a superior footing thereby resulting in violation of the equality principle as guaranteed under the Indian Constitution.

Violation of the Principles of Legality

A definite limitation on State power is the historic meaning of the principle of legality²⁹. This principle is antithetical to the widely expressed positive law sentiment of – *any* command of Sovereign – and is cardinal to penal and taxation law. In tax law, it works as *limitation on penalization by the State's officials, effected by the prescription and application of specific rules.*³⁰

Article 20(1) of the Constitution imposes two limitations on retrospective application of penal laws. Making of an act an offence for the first time and then making the law retrospective, and secondly, the infliction of a penalty greater than that which might have been inflicted under the law which was in force when the act was committed is prohibited. The protection to both citizens and the non citizens, under the Constitution, from the retroactivity of law is an established fact in respect per se penal provisions but often the question arises: what about civil laws having penal liabilities? The *principle of legality* or the “rule of law”, fundamental to criminal law, also applies to taxation laws as they too have charging provisions or provisions for liabilities. In confirmation of this principle it is bad form that what was not taxable when transacted should subsequently be taxable, that what was taxable by a certain percentage when transacted should be later altered with an increased percentage, or that provisions should be applicable to an assessee's disadvantage.

CONCLUSION

Though violation of Article 14 of the Constitution and violation of Principles of Legality goes against, but the judicial interpretation left no scope to counter the validity. Moreover the absence of any Constitutional restrictions and limitations can be argued in favour of validity. For the progression of an economy sound health of industrial undertakings is imperative. Deficient and incompatible legal approaches cramp businesses and are not conducive to fair and effective administration of business. While the granting of loans and other financial assistance is the conventional manner of being sympathetic towards non-performing units, the waiving or reduction of tax by

²⁷ New Delhi Municipal Comm v. State of Punjab AIR 1997 SC 2847.

²⁸ AIR 1997 SC 1815.

²⁹ Goodhart, *Rule of Law and Absolute Sovereignty*, 106 U. Pa. L. Rev. 943 (1953) c.f. Hall, Jerome, *General Principles of Criminal Law*, 2nd edn., the Bobbs-Merrill Company. Inc., New York, p. 27.

³⁰ Permanent Court of International Justice, Series A/B, No. 65 at 53, 56 (Advisory Opinion, 1935).

retrospective application of an amendment is by far a better way. It is also profitable for the exchequer for the government saves more money by non-collection of tax than giving grants.

Economic growth is largely determined by the balance sheets of existing industries. And if economic development is our goal, tax reduction is the best and simplest way forward. The increasing and 'unnecessary tax' burden has to be scaled down to the demands of Industrialization, and retrospective tax legislation (to reduce the tax), in line with the criteria listed afore, is one way to go about it.

FIGHTING CHRONIC POVERTY, INEQUALITY AND RURAL DEVELOPMENT IN GHANA: ISSUES FOR CONSIDERATION

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Abstract: This paper contains discussions on the concept of poverty and how various writers and agencies or organisations define it. The discussions focus on the delineation of the poverty line, and author attempts to contribute to the discussions on poverty by acknowledging that essentially, poverty is dynamic and its reflections in inequality poses a danger to long term survival of society.

INTRODUCTION

Poverty implies that households or individuals are poor in some absolute sense. According to Gillis, Perkins, Roemer and Snodgrass (1987), in order to distinguish between poor and non-poor households, we can identify poverty through its manifestations like starvation, severe malnutrition, illiteracy substandard clothing, and housing. However, poverty can also be defined socially as those who live below a minimum acceptable standard in a given time and place. In a similar manner a World Bank Group (1997), defines poverty as a lack of access to or command over the basic requirements for a minimally acceptable standard of living (US\$1/day as stipulated by the United Nations). A further elaboration is provided by Shah (2006) who states that nearly 3 billion people in the world live on less than \$2 a day, and the gross domestic product (GDP) of the 48 poorest nations is less than the wealth of the world's 3 richest people combined. Additionally, nearly a billion people entered the 21st century unable to read or write, while less than one percent of what the world spent every year on weapons was enough to put every child into school by year 2000 and yet it did not happen. Indeed some people examine poverty from the angle of individual circumstances and conclude that a person is poor if he or she has insufficient food or lacks access to some combination of basic education, skills, experience, intelligence, adequate health services, clean water, safe sanitation systems, freedom and security. According to the Maxwell School of Syracuse University (2006) factors like handicaps, age, discrimination, and sex are also contributory to poverty.

But these absolute standards aside, there is the psychological aspect of poverty-those who feel deprived of what are enjoyed by others in their societies. Poverty then becomes a relative concept in which the circumstances of individuals are compared with the circumstances of other members of their society (village, town, country). In undertaking this comparison income need not be the sole criterion. It can however, be treated as a resource that enables the satisfaction of basic needs. Other criteria like freedom and opportunities for advancement should also come into play.

The relative concept is important because the absolute poverty approach to the definition and description, involves conceptual difficulties since there is no single subsistence level which can be used as a basis for the poverty line. When we talk about basic needs for instance, it becomes obvious that the basic needs of residents in temperate climates will differ from the needs of those in the tropics. Physiology alone for instance cannot be used to determine some basic needs, because an individual's activity level can influence his or her food needs.

The definition and description of poverty also involves some dynamism. The establishment of a poverty line has to consider the particular society and time period (Atkinson, 1975). So the standards of poverty must be set against the continually moving average standards of each com-

munity. Basic needs and wants are by inference the product of historical development³¹ and depend to an extent on the degree of civilization in the society. In essence there is no single definition of poverty. We can perhaps understand the complexities better when we try to make cross-cultural, or inter-country comparisons. The absence of facilities, parks, playgrounds etc. may symbolize a level of poverty just as the lack of money is only one fact out of the complex of deprivations which make up the experience of poverty. As a contribution to the definition and description of poverty Sen (1999) identifies five dimensions, namely political space, economic space, social space, transparency, and protective security. According to him, deficits along these five dimensions limit the ability of the people to develop their capabilities and function effectively and this implies poverty. Thus poverty, apart from being a lack of income, education and access to health, also broadly implies a lack of voice, lack of empowerment, and a lack of good governance.

Yet another dimension of the discussions on poverty focuses on what are referred to as acute causes (Michigan State University, 2006). In this respect poverty is attributed to warfare, as in Darfur, Iraq and the Gaza strip, which destroys infrastructure and social services, agricultural cycles, droughts and flooding and natural disasters such as hurricanes or typhoons and earthquakes. This dimension of the debate also draws attention to entrenched factors like colonialism, centralization of power, corruption, warfare (diversion of scarce resources as in Eritrea and Ethiopia), environmental degradation and social inequality.

This paper attempts to contribute to the discussions on poverty by acknowledging that essentially, poverty is dynamic and its antecedence in inequality poses a danger to long term survival of society. The argument is that in most countries including Ghana, poverty is reflected by high inequality which in turn acts as an obstacle in reducing poverty by reducing the effect of economic growth on poverty reduction. Thus a reduction in inequality can enhance broad participation in sustainable development because people will have a sense of belongingness, share in a common future, and focus on sustainable long term goals rather than on the distractions that short term distributional issues present. Relying mostly on secondary sources, it examines chronic poverty from the angle of the rural-urban divide, gender dimension, and situates the discussions within the Ghanaian context. In this direction the paper briefly examines the disparities, their implications and the policy framework for addressing poverty. The political economy of poverty reduction and rural development is also discussed, with suggestions for policy making and action programs.

CHRONIC POVERTY

In spite of the distinction between absolute and relative poverty and the dynamics involved it is possible to observe a level of living of people in some communities in say Accra-Ghana, Sao Paulo-Brazil, Mumbai-India and other sprawling third world cities which when compared with the level of living of their fellow citizens elsewhere in the respective cities suggests some lack of basic amenities that can then be summarized as poverty. The standard of living of such citizens appears to be stagnant, regardless of the changes that are occurring in their wider communities. Such people can be described as chronically poor. For these people the deprivations seem endless. Poverty is persistent, inveterate, and has almost become part of their being. The status is transferred intergenerationally, and everywhere one looks, life is full of misery. The manifestations of poverty are seen in the presence of dirty standing waters, absence of sewage facilities,

³¹ These are attributed to Karl Marx and mentioned in Atkinson