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## **An analysis of the constitutional validity of retrospective amendments in taxing statutes**

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### **Abstract**

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. Thus, the general expectation of people about law is current or existing law must only apply to the current activities. But this is not possible always; sometimes there will be need to make retrospective amendments in the interest of public. Last two decades have seen an array of retrospective amendments in taxing statute by the legislatures. These retrospective amendments have been justified by the legislatures by stating that they are made with the intention of correcting any errors or mistakes or for clarifying doubts or for curbing the economic offences of tax evasion and tax avoidance and for reducing the burden of procedural compliances. Now, there arises a question from where the power to make retrospective amendment in taxing statutes is granted to the legislature and whether such power is an absolute one. Generally, any amendment made to a statute must be consistent with the Constitution of India. Therefore, this paper tries to find out the constitutional validity of such retrospective amendment in taxing statutes through careful interpretation of the provisions of the Indian Constitution. It also discusses the procedure for making such retrospective amendments.

**Keywords:** constitutional validity, legislative competence, retrospective amendment, retrospective taxation

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### **Introduction**

The India Constitution is considered as the supreme law of the land. Every law made in India must be in conformity with the provisions of the Constitution <sup>[1]</sup>. The practice of making retrospective amendments to civil and tax laws, as opposed to criminal laws, is not new in India and such retrospective tax laws also have judicial sanctions. The Constitution of India permits retrospective amendments to taxing statutes with certain restrictions. Constitution of India gives power to the Union Parliament and State legislatures to make laws for the whole or part of India and whole or part of state respectively <sup>[2]</sup>. It also provides for the subject matters in which the Union and state legislatures have the power to make laws <sup>[3]</sup>. The power to make law includes the power to make any all relevant provision which is ancillary or incidental to it. Thus, under these articles the union and state legislatures are given plenary powers to legislate on different subject matters. This plenary power includes the power to amend the laws within its legislative competence. Thus, any law amended in India should be within its legislative competence as provided in the Constitution of India. At the same time, any law amended within its legislative competence must not be violative of the provisions of the Constitution, especially the Fundamental Rights. Therefore, any law which is amended in violation of the provisions of the Constitution is void ab initio and invalid. Thus, all the amendments made in a statute must be in accordance with the provisions of Constitution of India, 1950.

Generally, there are two types of amendments prospective and retrospective amendments. Prospective amendments are the ones which takes effect on the day of amendment or in a future date while the retrospective amendment takes effect from a past date. Our Indian Constitution has given green signal for making retrospective amendments in certain statutes but it has also

expressly opposed retrospective amendments in certain statutes like in Criminal laws <sup>[4]</sup>. The power to retrospectively amend is, however, an enabling power only. Therefore, it has to be exercised by the Legislature either by specific provision or by necessary implication. This idea has been laid down in several Supreme Court and High court judgments <sup>[5]</sup>. The researcher through this paper analysis the constitutional validity of retrospective amendments in taxing statutes with the help of relevant Articles in the Constitutional and judicial decisions on this matter.

### **Constitutional Provisions Relating to Retrospective Amendments in Taxing Statutes**

A good taxing system is the backbone of a country's economy, as it ensures consistent revenue, manages economic growth and fuels industrial activity. India has got the three-tier federal structure consisting of the Union Government, State Governments, and Local Bodies. Each of such Government is empowered with different responsibilities relating to various taxes and duties that are applicable in the country. The Constitution of India through its articles gives plenary power to the Parliament and state legislature to make retrospective amendments in taxing statutes. They are discussed below.

#### ***Limitation on the Governments taxing power***

Article 265 of Constitution of India imposes limitations on the taxing power of the states. It provides that no person shall levy or collect tax except by the authority of law. That is a tax cannot be levied or collected by an executive without an authority derived from a valid legislation. Thus, tax shall be collected or levied by an executive authority only if such imposition is backed by a valid

legislation or law. Therefore, the power to impose tax is derived from a valid law or legislation. Here, valid law means a law which is enacted within its legislative competence and subjected to the conditions laid down in Article 13 of the Constitution of India. Thus, a valid tax law must not contravene any provisions especially the fundamental rights guaranteed under the Constitution of India.

In *Chhotabhai Jethabhai Patel and Company v. Union of India* [6]. The court held that the law imposing taxes should be a valid law and it should not be prohibited by any provisions of the constitution

### **Legislature's power to make taxation laws**

Constitution of India provides that a tax shall be levied or collected only through a proper and valid law which must be enacted by the legislature [7]. The Constitution of India gives power to the Central Government and State Government to make laws for imposing taxes that is both direct and indirect taxes accordingly. As per this Article 246 [8] the Parliament and state legislatures are given authority to make laws on the subject matters enumerated in the Seventh Schedule. The Seventh Schedule consists of three lists namely the Union List, State List and the Concurrent List. These lists contain subject matters relating to tax also.

#### **1. Union List or List-I**

It consists of 97 entries on which the Central Government has the exclusive power to make laws. Each entry mentions different subject matters including matters relating to the levy and collection of different kinds of taxes. Out of these entries 13 entries that is, from Entry 82 to 92B and 97 deals with the tax matters on which the Central Government is given exclusive power of taxation. The following entries give the Parliament the exclusive power to make laws relating to the levy and collection of Income tax.

**Entry 82:** Taxes on income from sources other than agricultural income.

**Entry 85:** Corporate income tax.

**Entry 86:** Taxes on the capital value of assets, excluding agricultural land, of individuals and corporates and taxes on corporate capital.

#### **2. State List or List-II**

It consists of 66 entries on which the State Government has the exclusive power to make laws. Each entry mentions different subject matters including matters relating to the levy and collection of different kinds of taxes. Out of these entries 15 entries that is, from Entry 46 to 63 deals with the tax matters on which the State Government is given exclusive power of taxation.

#### **3. Concurrent List or List-III**

It consists of 47 entries on which both the Central and State Government has the concurrent power to make laws. It contains 2 entries Entry 35 and 43 which deal with the subject matter of tax. Thus, both the Parliament and State legislatures has got the power to make law in these subject matters concurrently. However, if there is any conflict between the laws made by the State and the Union, the law passed by the Union will prevail over the state made law.

### **Fundamental Rights (Article 12 to 35) [9].**

Every law made by the Parliament and the State legislatures in India ought to be consistent with the Article 13 of the Constitution

of India. It states that no law should be made or amended either prospectively or retrospectively in violative of the fundamental rights guaranteed under Part III of the Constitution of India. Part III consists of Articles 12 to 35 which deal about six Fundamental Rights granted to every person or the Citizens of India respectively. Article 13 (2) of the Constitution clearly points out that the Parliament or the state legislatures or the local authorities or any other authorities shall not make any law in such a way that it takes away or abridges the rights conferred by Part III dealing with Fundamental Rights. It further states that any law made in contravention of this provision shall be declared void to the extent of the contravention. Consequently, if any amending or validating law infringing any of the Constitutional rights is enacted then it is also liable to be struck down on this ground.

Article 14 of the Constitution of India provides right to equality to all people irrespective of their citizenship. It ensures that Equals are being treated equally [10]. That is people situated similarly must be governed with same law and different laws shall be applied to differently situated people. All persons irrespective of their Citizenship must be regarded as equal before the eyes of law and equal protection of laws should be given to them without any unreasonable classification and discrimination. This Article does not prevent a reasonable classification founded on an intelligible differentia, but such differential must be made for achieving the object of the Act [11].

Article 19 of the Constitution of India guarantees the right to freedom only to its citizens. It guarantees six types of freedoms to Indian Citizens only. One of such freedoms is freedom to carry on any business or profession or trade [12]. Here the citizens must be given right to carry on any profession or business without any unreasonable restriction and discrimination.

Article 20(1) of the Constitution of India guarantees protection against ex post facto laws that is against retrospective operation of penal legislations. This Article consists of two parts. According to the first part of this article, a person should not be convicted for an act which was not declared as an offence at the time of committing it. Thus, a person must be convicted only for violating a law which was in force when the act charged is committed. The second part states that a convicted person cannot be given a greater penalty than what he might have incurred at the time of committing the offence. Under this Article protection is given only to the conviction or sentence and not for trial.

However, this article applies only to the penalty provisions which are in criminal nature in a taxing statute. Thus, no restriction is made in respect of retrospective amendments made to procedural provisions and punishments or penalties which are in civil nature. Hence, in a taxing statute, every provision other than criminal penalty provision can be amended retrospectively.

### **Procedure for Making Retrospective Amendments in Taxing Statutes**

The procedure for making amendments to a non-taxing statute is different from making amendments to a taxing statute. Unlike the amendments made to normal statutes amendments to taxing statutes are made by passing a separate Act called as Finance Act. A Finance Act is a fiscal legislation which is enacted by the parliament to give effect to the fiscal proposals proposed by the Central Government. It is enacted once in every year. The Finance Act will contain necessary amendments in the direct taxes like income tax, wealth tax, Income tax slab rates and in

indirect taxes like excise duties, custom duties and Goods and Service Tax etc. It may also contain provisions relating to the amendments to be made in other acts for the Government to affect its fiscal policy. Thus, any provision relating to tax and financial matters are amended through Finance Act only. Thus, amendments in Income-tax Act are made through the Finance Acts only. Income-tax Act has undergone amendments several times since the time it was originally enacted through the Union Budget.

Every year during the Parliament's Budget Session, the Finance Minister of the Government of India introduces the Budget which will include matters relating to tax proposals of the government like new tax slab rates or any amendments in taxing statutes etc and other financial matters also. The bill which contains these financial matters and tax matters will be considered generally as a Financial Bill. If the Financial Bill relates to the subject matter mentioned in Article 110<sup>[13]</sup> then it will be considered as a money bill. That is if it contains only relating to matters of imposition, alteration of new tax etc only. In case of a money bill special procedure as provided in the Constitution will be followed<sup>[14]</sup>. But the Financial Bills will contain matters including taxation and also other matters relating to finances. The procedure in case of a Financial Bill is provided in Article 117 of the Indian Constitution. The point in which the money bill differs from the Financial Bill is in Money Bills the Rajya Sabha has no role or say unlike Financial Bills.

The Finance Bill containing matters relating to tax will first be introduced in Lok Sabha and these bills should be introduced only on the recommendation of the president. Then it must be passed by both the houses of the Parliament and get the assent of the President. Once it gets President's assent it becomes the Finance Act. The provisions of such Finance Act are then incorporated to the existing Income-tax Act and other taxation laws and to laws in which taxation provisions applies. If there are any new provisions which are proposed to be inserted then such provisions will be inserted and if existing provisions are to be substituted or amended then that will be carried out. Here the amendment includes both prospective and retrospective amendments. Thus, under this procedure amendments are being made with retrospective effect.

### **Constitutional Validity of Retrospective Amendments in Taxing Statutes**

The power given under the Constitution to the Union and State legislatures to make laws in the specified subject matters enumerated in the seventh schedule includes the power to make retrospective amendments also. That is the power to retrospectively amend a provision of an Act is always available to the union or state legislatures. This power is a plenary power over the fields delineated for them and it is subject to constitutional constraints and judicial review. Thus, the power to make law includes the power to make any amendments in them which includes amendments to taxing statutes and, in all matters, relating to tax. Therefore, even the tax laws can be given retrospective effect. However, Constitution is imposing two limitations on the amending power of the Union and state legislatures. Firstly, by way of legislative competence that is it prescribes a list of subject matters on which the Union and state legislatures are having exclusive or concurrent powers to make or amend a law. This list of subject matters is divided into three

lists viz., the Union list, the State list and the Concurrent list. The Union Parliament is given the exclusive power to enact or amend laws relating to the subject matters in List –I, the State legislatures are given the exclusive power to enact or amend laws relating to the subject matters in List –II and both the Union and states are concurrently given the power to enact or amend laws relating to the subject matters in List –III<sup>[15]</sup>. Secondly, by way of Fundamental Rights that is no law shall be made or amended in violation of the Part III of Constitution of India.

Thus, the legislative power conferred upon the appropriate legislatures to enact or amend an already existing law in respect of the subject matters covered in the three lists can be exercised both prospectively and retrospectively. Therefore, when the legislature is having the power to make a valid law, it can give the relevant material provision prospective or retrospective effect. However, this power is not an absolute one. Although, the legislature is having power to pass a retrospective law, it would be relevant to consider the effect of such retrospective amendment both in respect of legislative competence and the reasonableness of such amendment.

### ***Constitutional restrictions or limitations for making a valid retrospective tax law***

The legislatures are given plenary powers to make laws and amendments in taxing statutes under the Indian Constitution. This does not mean that they are absolute powers. There are always some restrictions and limitations which must be kept in mind while making any kind of amendment to taxing statutes since it is will have a direct impact upon the economy of the country. And while enacting a retrospective tax legislation imposing retrospective tax double caution has to be taken keeping in mind the restrictions. Only then such retrospective law shall be held constitutionally valid or else it will be struck down as unconstitutional. The Constitution of India has provided two limitations while enacting new laws or amendments in general which will apply to retrospective tax laws also. The restrictions or limitations which must be kept in mind while enacting a retrospective tax law are:

1. It must be within the legislative competence of the Parliament or the State legislature<sup>[16]</sup>.
2. It must be reasonable and consistent with Article 13(2) of the Constitution of India<sup>[17]</sup>.

### ***Legislative competence***

The Union and State legislatures are having the plenary power to make new tax laws and this power includes the power to amend an already existing law by giving them a retrospective effect. That is the legislatures are given the power to levy taxes prospectively or retrospectively by enacting a new law or by an amendment. This power is derived from Article 246 which allows the legislatures to enact a new tax law or amend an already tax laws in respect of different tax related entries covered in the three lists of the Seventh Schedule. Thus, the parliament and state legislatures are allowed to make laws only on the tax matters within their ambit as given in the seventh schedule. This is called as the legislative competency of the legislatures. This power includes the power to make retrospective amendments also but then such retrospective amendments should also be made within its legislative competency. Hence, the legislatures can amend laws only within its demarked subject matters given in the

respective lists of seventh schedule. For example, the Income-tax Act comes under the entries in the Union List. Thus, Parliament is only having the exclusive power to make amendments in the Income-tax Act, as per the Entry 82, 85 and 86 of List-I. This power includes the power to make prospective and retrospective amendments also. Therefore, any amendment made to that Act must be within the Parliaments legislative competence.

#### ***Reasonableness and conformity with Article 13(2)***

Any law made in India after the Indian Constitution coming into effect must not be violative of the Fundamental Rights guaranteed under the Constitution of India.<sup>[18]</sup> The Fundamental Rights are given under Part III of the Indian Constitution. There are certain rights which are guaranteed only to the citizens and other rights which are given to all persons including foreigners. For example, right to equality under Article 14 is given to all persons while the right to freedoms is available only for the Indian Citizens. Article 14 specifies that a law must treat equals equally and it should not be arbitrary or discriminatory. However, reasonable classification is allowed. Any law or amendment made in breach of this provision is liable to be struck down as unconstitutional. Thus, no law made or amendment must be arbitrary, unreasonable classification or discriminatory. Therefore, any retrospective tax law which is arbitrary or with unreasonable classification or discriminatory is held to be invalid and unconstitutional and liable to be struck down.

Article 19 talks about right to freedoms. It is available only for the citizens of India. However, these freedoms are not absolute. There are reasonable restrictions such as for public interest, sovereignty and integrity of India, morality etc. No law should be made which causes unreasonable restrictions upon the right to freedom of the individuals. Any law which abridges or takes away any freedom of an Indian citizen is declared to be invalid and unconstitutional. There is always confusion whether imposing taxes is an unreasonable restriction on the right to carry on business or profession as tax is a burden upon the business. The law in this regard is apparent. Constitution clearly states that a tax can be imposed by an executive only by the authority of law that is only after getting authority from a written law<sup>[19]</sup> and Constitution also gives the legislatures the authority to enact laws imposing tax.<sup>[20]</sup> Thus, imposing tax is only a reasonable restriction upon the right to freedom. However, no tax shall be levied in such a way that it causes unreasonable restriction upon the right to carry on any business or profession. The same rule applies to retrospective amendments too. Even though the power to impose tax is derived from the authority of law, it should not cause unreasonable restriction. One of the fundamental freedoms is the right to carry on any trade, business or profession.<sup>[21]</sup> This right is also not absolute it is subject to reasonable restrictions like public interest etc.<sup>[22]</sup> However, what constitutes a reasonable restriction and what is not is not final and conclusive. It is the court which has the power to interpret and find after looking into the facts and circumstance of each case the reasonableness of the restrictions imposed. Thus, any retrospective tax amendment which is causing unreasonable restriction upon the rights of an Indian citizen is liable to be struck down as invalid. Therefore, it is the duty of the court to find out whether a retrospective tax law is reasonable within the meaning of Art. 19 (6) or not and to declare the law invalid if in its opinion the restrictions are not reasonable<sup>[23]</sup>. The Income-tax Act contains provisions that are

applicable exclusively for Indian taxpayers and foreign taxpayers and general provisions which apply for both. Therefore, the amendments made in them must not impair any fundamental right granted to any person or the citizens of India. Thus, any retrospective amendment made to Income-tax Act which is causing unreasonable restriction or discrimination to any person shall be challenged as violative of fundamental rights and it can be declare void or invalid and can be struck down by the Judiciary. Thus, even if there is no dispute on the legislature's power to make retrospective legislation, it would be open to the person affected by such retrospective laws to contend that the retrospective amendment creates a situation which could be described as an unreasonable restriction on him which violates his right to carry on business or the right to hold and dispose property and is violative of fundamental rights guaranteed under the Constitution and thus held invalid. For example, if a retrospective amendment is made to the Income-tax Act in such a way that it is causing an unreasonable restriction upon the taxpayer's right to carry on his lawful business or if such amendment results in unreasonable classification or discriminatory then such an amendment is regarded as violative of the fundamental rights guaranteed under the Constitution and hence it is liable to be struck down as ultra vires the Constitution or declared to be invalid or void.

#### **Grounds for challenging retrospective tax amendments**

Article 32 of the India Constitutions is considered as the heart and soul of the Indian Constitution. This is because it is an enforcement provision which guarantees Constitutional remedies. It provides the right to remedies in case of breach of fundamental rights guaranteed under the constitution. Thus, any person affected due to the violation of his or her fundamental rights can move to Supreme Court for enforcing his rights. Thus, any taxpayer or an assessee or any affected person whose fundamental rights are infringed due to the retrospective amendment of tax laws or retrospective taxation shall challenge the constitutional validity of such provision before the Hon'ble Supreme Court of India. As per Article 226, the constitutional validity of retrospective tax laws can also be put to challenge before the High courts. Thus, any party affected by any provision which is retrospectively amended can challenge against such retrospective amendment by contending that-

1. Such retrospective operation of the provision completely alters the character of the tax levied and it is not within its legislatively competence.
2. Such retrospective amendment has imposed unreasonable restriction and that they are liable to be struck down as violative of the fundamental rights guaranteed under the Constitution of India.

Thus, under either of the grounds above, the affected parties can challenge against a retrospective tax amendment.

#### **Validating laws and their validity**

A Validating law can be regarded as a disguise of a retrospective legislation. This is because; the validating laws will often have retrospective operation. Validating laws are laws generally made by the legislatures for correcting an error in a previously invalidated tax law. Thus, in relation to tax, a validating law is a law that validates the recovery or demand of tax notwithstanding

a court's decision to the contrary. The constitutional validity of the validating laws that seek to override judicial verdicts relating to tax is one of the major issues in the Indian tax jurisprudence. A validating law cannot be regarded as invalid simply because of the reason that the retrospective operation of such law affects the rights which were vested with the taxpayers previously. Thus, when a tax enactment is struck down as invalid or unconstitutional due to certain anomalies or defects in it then the legislature is having the competence to cure the defect by passing a validating law with effect from the date in which the invalidated law was passed thereby validating all the past actions taken under the original invalidated law. Thus, validating laws enacted within its constitutional legitimacy are regarded as constitutionally valid. However, if any law is retrospectively amended by the legislature in such a way that it overrules the decision of the court without changing the law based on which the decision was given then such retrospective law will be considered as a misuse of the legislature's power to amend laws and intrusion on the judiciary's power of judicial review and such retrospective amendments are held to be unconstitutional. These retrospective amendments cannot be called as validating laws as a validating law must cure some mistake or error in the invalidated law. Thus, if any retrospective legislation does not change or alter the law declared invalid by the court but if it just declares through the retrospective legislation that the earlier judicial decision is invalid and not binding, then such retrospective law is liable to be struck down as unconstitutional. This type of enactment is called as legislative overruling and it is void and invalid. However, if the law has been altered and the defect is cured then there is no question of the Legislature overruling the Court. It is a validating law and it is valid if it is made within the constitutional competency.

In *Ujagar Prints Etc. v. Union of India & Ors. Etc.* [24], the Hon'ble Supreme Court observed that a competent legislature is always having the power to validate a law that has been declared invalid by a court, provided the deficiencies and the vitiating factors identified in the declaratory judgment are removed and cured. A validating law can also be made with retrospective effect. It further held that as a result of enforcing the validating law the earlier judgment which annulled the impugned law will become irrelevant and unenforceable. However, this invalidation of the earlier judgment of the court by the legislature by passing a validating law with retrospective effect cannot be called as an impermissible legislative overruling of the judicial decision. This is because what the legislature does is just enacting a valid law with retrospective effect which in consequence makes the previous judgments irrelevant. However, it is necessary that such validating law enacted by the legislature ought to cure the defects in the earlier invalidated statute.

In *Sri Prithvi Cotton Mills Ltd. & Anr. v. Broach Borough Municipality & Ors.* [25] the Supreme Court held that no person can obtain any vested right from a defect in a law and seek a windfall from the legislature's mistakes. Thus, no benefit shall be obtained from an invalid law which was struck down. The Supreme Court in various cases has stipulated guidelines regarding how a retrospective amendment has to be made for validating an invalidated act which was struck down by a judicial decision. They are

1. A validating act or retrospective amendment must be made within its legislative competence
2. It must not be violative of fundamental rights and

3. It should not be done with the main intention of nullifying a judicial decision.

Thus, not all retrospective amendments made to invalidate the judgments can be declared void. Thus, the legislature can alter the basis on which a decision was given to make an invalid law a valid one. But it should not be done purposefully for overturning a judicial decision in violation of the constitutional restrictions.

In, the case of *Tirath Ram Rajindra Nath v. State of Uttar Pradesh* [26], the Hon'ble Supreme Court held that the nullification of a judicial decision by a retrospective law does not make the law invalid if it is reasonable and made within its legislative competence. The court pointed out the difference between the intrusion on the judicial power and nullification or invalidation of the effect of a judicial decision by changing the law retrospectively. It specified that the former is outside the competence of the Legislature and thus void but the latter is within its permissible limits and therefore valid.

In *Madan Mohan Pathak v. Union of India* [27], the Hon'ble Supreme Court reiterated that it is an established law that the legislature can nullify or invalidate the basis of a decision by enacting a validating law but it cannot in any manner override the decision of the court. In fact, a validating legislation has no bearing on the legality of a judicial decision that may have reached finality as per the pre-amended law. Thus, it can be understood that if the legislature has altered or amended the law and the amended law is not same as the law which was declared invalid then such an amendment shall not be regarded as a statutory overruling of a decision. It is only a validating law and it is a valid one.

### Conclusion

Thus, it is very clear that the Constitution of India gives the Parliament and the state legislatures the power to make retrospective amendments in taxing statutes. There is no dispute regarding this power. The only thing is how diligently these powers are being utilised by the legislatures. This is always a question which has to be decided by the courts based upon the facts and circumstances. Thus, it can be inferred from this chapter that for retrospective amendment to be constitutionally valid it must be reasonable and not arbitrary and must not be violative of the fundamental rights guaranteed under the Indian Constitution. Thus, Legislatures are competent to make retrospective tax laws affecting a vested right but it should not be violative of the provisions of the Constitution. The Constitution of India however bars retrospective applicability of laws only in case of statutes which are having criminal liability. Although, the penalty provisions in taxing statutes are penal in nature they are having only civil liability and not a criminal liability. Thus, retrospective amendments shall be made to penalty provisions which are in the nature of civil liability only.

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