

**Response to the Draft Report of the
Parthasarathi Shome Committee
on Retrospective Amendments Relating to Indirect Transfer**

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Introduction of retrospective amendments- Background

Explaining the circumstances under which the amendment had become necessary, the then Finance Minister had said that some companies or entities do their tax planning in such a way that they don't have to pay tax at all. Had the case been that they had to pay tax in one country and pay tax in another country as well, it would have been a case of double taxation and it would have been with it accordingly¹.

*"We are making three points quite clear — that India is a not a 'no tax' or 'low tax' or even a 'tax haven.' India is a country where all taxpayers, whether resident or non-resident, will be treated on a par. Secondly, India is a country where tax laws are that if you pay tax in one country, you need not pay tax in the other country of your business operation which is covered by the DTAA. But it cannot be a case that you pay no tax at all."*²

Constitutionality and precedents of retrospective amendments in India

The Constitution of India, 1950, Art. 245(1): Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

The Supreme Court has previously held that an ordinance having retrospective effect is not invalid since there is nothing in the Indian Constitution which prohibits the same³.

WHITE PAPER ON BLACK MONEY, MINISTRY OF FINANCE, MAY 2012

"The Vodafone tax case provides an instance of the misuse of corporate structure for avoiding the payment of taxes".

"Indian tax administration has always been of the view that foreign investors in India should pay taxes on their income either in India or the country of their residence, and does not endorse attempts to avoid taxes in both the countries by use of such opaque tax-avoidance structures. **The legislative measures included in the Finance Bill 2012 and the introduction of GAAR can create necessary deterrence against such structuring and thereby plug this loophole for tax evasion**"

¹ <http://www.thehindu.com/news/national/article3009809.ece>

² http://www.moneycontrol.com/news/business/india-not-tax-haven-pranabvodafone-controversy_686087.html

³ Tabrez Ahmad and Satya Ranjan Swain. Validity of Retrospective Amendments to Indian Taxation Statutes.

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There have been a number of cases that recognize the power of legislature to retrospectively amend a statute. Examples include:

1. Rai Ramanakrishna v. State of Bihar (1963 50 ITR 171), Assistant Collector of Central Excise,
2. Calcutta Division v. National Tobacco Co. of India Ltd., [1973] 1 S.C.R. 822;
3. Ujagar Prints v. Union of India [1989] 179 ITR 317 / [1989] 3 SCC 488 [1970] 1 S.C.R. 388

It has been pointed out that retrospective amendment has been unjust and immoral, even if legal. The Supreme Court itself has not entertained the argument about “just and reasonable” when the amendment is otherwise valid (Lohia Machines vs. UoI). There is no morality in law so long as it is not oppressive or confiscatory to such an extent that it violates the fundamental rights in the Constitution⁴. Surely, as both Parliament and Ministry of Finance have made clear, expecting foreign investors to pay taxes without turning to aggressive tax avoidance or tax planning structures isn’t really a violation of fundamental rights.

“This Parliament is competent to pass legislation which will have retrospective effect and no court and nobody can take away this authority of the Indian Parliament.”

- Mr. Yashwant Sinha,
Chairman, Parliamentary
Standing Committee on
Finance

Source: Lok Sabha Debates, May
7, 2012

Retrospective taxation across the world

Examples of retrospective tax law amendments, particularly if they are anti-avoidance, are not uncommon. In fact, the famous Westminster principle is the supremacy of the Parliament—the right to enact a law includes the right to enact a law retrospectively or retroactively⁵.

Most conspicuous in its absence from the ‘International Practices’ section of the report (i.e. the draft report by the Shome Committee), is the experience of UK with retrospective taxation. The UK had also in its Budget for 2012, presented on February 27, introduced retrospective provisions to check the avoidance of corporation tax (specifically with respect to Barclays). Amendment was also made in the UK's Finance Act, 2008, with retrospective effect from 1987 to prevent tax avoidance through entities based in the Isles of Man and Jersey. The Court of Appeal held: “If Section 58 were not made retrospective, the claimants would obtain a windfall at the expense of the general body of taxpayers. It would be unfair to the general body of

⁴ <http://www.business-standard.com/india/news/vodafone-retrospective-more-sinned-against-than-sinning/470574/>

⁵ <http://www.moneylife.in/article/retrospective-amendment-to-taxation-will-foreign-investors-be-scared-off/24316.html>

resident taxpayers not to have given Section 58 retrospective effect. The claimants entered into schemes with the intention of deliberately avoiding UK tax”.⁶

China, in December 2009, retrospectively introduced a new law (Circular 689) to tax sale of offshore holding companies having underlying Chinese interests by disregarding the intermediary entity in specific circumstances. The law seeks to capture abusive structures aimed at tax avoidance⁷.

Australia has also enacted retrospective laws, including those to overcome adverse rulings of courts.

Conclusion

As per the IT Act of India, even with the introduction of the retroactive law, cases can be re-opened only going back six years. It is expected to have an impact on Kraft Foods’ acquisition of Cadbury India, SABMiller’s purchase of Fosters and Sanofi Aventis’s takeover of Shantha Biotech, among others. It has been suggested that around Rs. 35,000 – Rs. 40,000 crore is at stake from deals similar to the Vodafone deal⁸.

If such high numbers are at stake due to tax avoidance practices, is it too harsh to expect that investors participate in India’s economy transparently, rather than through the world of tax havens and secrecy jurisdictions?

Recommendations by CBGA

- Retain retrospective amendments made to IT Act, 1961 as per Finance Act, 2012 passed by Parliament. We are in agreement with both the Ministry of Finance and Parliament that these are clarificatory amendments that are within the scope of Parliament to amend.
- Collect taxes due from Vodafone and similar deals that avoided paying taxes using complex tax avoidance structures and demonstrate that the government is serious about implementing the measures as detailed in the White Paper on Black Money, May 2012.
- Wooing investors by legitimizing tax avoidance structures goes against India’s stand at the G20 summit in Cannes in 2011 where Prime Minister Manmohan Singh remarked that G20 countries should seriously tackle tax evasion and illicit financial flows that are hurting developing countries’ tax base (Press Information Bureau, Prime Minister’s Office, November 2011).

⁶ <http://businesstoday.intoday.in/story/mukesh-butani-on-vodafone-tax-verdict/1/23680.html>

⁷ http://articles.economictimes.indiatimes.com/2012-04-13/news/31337558_1_tax-sale-tax-avoidance-retroactive-legislation

⁸ <http://business-standard.com/india/news/with-rs-40k-cr-tax-at-stake-finmin-firmi-t-amendments/472832/>