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A Dual Setback – What India Inc Needs to Learn?

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Retrospective amendments as the name suggests are made applicable from a previous specified date. Such amendments are made to undo certain decisions taken by judicial authorities to remove the lacunas & loopholes in law. By retrospectively amending statues, the legislature often repeals an existing law or widens the tax bracket/opens up newer avenues of taxation. Thus, retrospective amendments have always been a matter of controversy.

Every retrospective amendment needs to be understood with the rationale of the legislature behind the introduction of such amendment. The Hon'ble Supreme Court in the case of National Agricultural Co-operative Marketing Federation of India[1] observed that *"the power to amend the law with retrospective effect is subject to several judicial reorganized limitations, one of which is that the retrospectivity just be reasonable and not excessive or harsh, otherwise it runs the risk of being struck down as unconstitutional".*

[1] National Agricultural Co-operative Marketing Federation Of India & Ors V/s Union of India – Supreme Court

Also, it is pertinent to note that any amendment in law which deprives the taxpayer of his rightful claim, the same cannot be said to have been made in public interest & is violative of Article 14 and 19(1)(g) of the Constitution of India. An amendment so made should be enunciate principles of 'fairness'.

The Controversy - Vodafone Group Plc and Cairn Plc vis-a-vis retrospective amendments

On account of retrospective amendments in law, India has received a twin setback in a period of three months – first in the case of Vodafone, when the Permanent Court of Arbitration of Hague ruled that the retrospective demand of INR 22,100 crores imposed on Vodafone in 2007 was *'in breach of guarantee of fair & equitable treatment'* and the second very recently in the case of Cairn Plc. where India has been ordered to pay damages on the retrospective capital gains of INR 24,500 crores imposed on the oil major in it's business reorganization in India in 2006 – 2007. The Permanent Court of Hague has once again in this case held that India's demand was '*in breach of fair treatment under the UK – India Bilateral Investment Treaty'.*

Against the decision of the International Arbitration Court, India has now preferred an appeal in Singapore.

Both the aforesaid cases arose due to the retrospective amendment of s. 9 & s. 12 of the Income Tax Act (hereinafter referred to as 'ITA') w.e.f 1961 wherein it was held that indirect transfer of shares shall be taxable in India.

This move by the Government to retrospectively amend the Finance Act 2012 received criticism from investors worldwide who held that such retrospective amendment was 'perverse' in nature. Following this amendment, there were several controversies on the fairness of imposing taxes retrospectively.

When, in 2014, the new Government came into existence it criticized the retrospective amendment to legislation circumventing the decision of the Supreme Court, however, no remedial action was taken to rectify the same. Infact, during the Budget Speech of 2014 it was stated that "*The Government will not ordinarily bring about any change retrospectively which creates a fresh liability….. All fresh cases arising out of retrospective amendments of 2012 in respect of indirect transfers and coming to the notice of the Assessing Officers will be scrutinized by a High Level Committee to be constituted by the CBDT in all such cases."*

The then Finance Minister, late Arun Jaitley had said that the sovereign right of the government to undertake retrospective legislation was unquestionable, but "*this power has to be exercised with extreme caution & judiciousness keeping in mind the impact of each such measure on the economy and the overall investment climate".*

Why are retrospective amendments undesirable?

1. A retrospective amendment adversely impacts the environment in which businesses operate & and re not very lucrative for foreign investors looking at investing in India.
2. Retrospective amendments are often made to *'cure a defect'* in legislation. However, when such retrospective amendments are made care should be taken to ensure that such amendments do not impact businesses adversely. Most businesses plan their taxes & their structures in line with the law applicable at that time. However such retrospective amendments create undue harassment & taxpayers are subject to unnecessary and unending legal battles.
3. The amendment in law may simply impose an additional burden in the form of unwarranted tax demands on taxpayers. This creates a hostile environment for doing business in the minds of the taxpayers.

Conclusion

On one hand when India is already reeling under the impact of the unending pandemic and the several consequences of the lockdown, the additional damages & costs which India needs to bear due to the decision of the International Arbitration Court only further creates a dent in the economy.

While, Hon'ble Prime Minister Shri Narendra Modi is bringing in and implementing policies to stop 'tax terrorism' and projecting India as the next manufacturing hub & taking several measures to drive foreign investment into India, the cavity caused by the retrospective amendments in the past is creating a hostile business environment.

It's time that the Government now takes steadfast steps to strategically cure defects in legislation which would be fair to the masses at large and not focus on merely increasing revenues of the Government.