RETROSPECTIVE TAXATION

Professor Nigam Nuggehalli
Dean, School of Law
BML Munjal University

Issues in retrospective taxation

- Is retrospective taxation constitutionally permissible?
- If so, what is the extent to which it is permissible?
- Comparative analysis
- Retrospective taxation and BITs
- Conclusion

What is retrospective taxation?

- CIOT UK Definition
- Retrospective legislation: When we refer to retrospective legislation, we mean legislation that is retrospective in the full sense of the term, in that the legislation imposes (or increases) a tax charge on income earned, gains realised or transactions concluded at a time before the legislation was announced

What is retroactive taxation?

- CIOT UK Definition
- Retroactive legislation: Here legislation imposes a tax charge on income arising or a gain realised after the date when the legislation enters into force, but that income or gain arises from transactions entered into (or at least commenced) before the legislation

Is there anything wrong with retrospective taxation?

- Prospective tax can have the same effect (Saul Levmore, The case for retroactive taxation’, Journal of Legal Studies (June 1993)
- Judicial decisions can also be retrospective

Why is retrospective taxation problematic? (American and UK perspectives)

- Argument from due process
- Argument from equality
- Argument from expropriation

American case law

- Welch v Henry, 305 US 134
- Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens.
- Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute.

UK case law

- Huitson v HMRC
- Parliament was…entitled…to legislate with retrospective effect, particularly in order to ensure a "fair balance" between the interests of the great body of resident taxpayers who paid income tax on their income from a trade or profession in the normal way, and the taxpayers, like the claimant, who had sought to exploit, by artificial arrangements, the DTA…

Indian case law

- R.C. Tobacco Pvt. Ltd. v. Union of India, (2005) 7 SCC 725
- A law cannot be held to be unreasonable merely because it operates retrospectively
- The unreasonability must lie in some other additional factors

Indian case law

- R.C. Tobacco Pvt. Ltd. v. Union of India, (2005) 7 SCC 725
- The retrospective operation of a fiscal statute would have to be found to be unduly oppressive and confiscatory before it can be held to be unreasonable as to violate constitutional norms
- Where taxing statute is plainly discriminatory or provides no procedural machinery for assessment and levy of tax or that is confiscatory, Courts will be justified in striking down the impugned statute as unconstitutional
- The other factors being period of retrospectivity and degree of unforeseen or unforeseeable financial burden imposed for the past period
- Length of time is not by itself decisive to affect retrospectivity.

Vodafone tax arbitration

- Permanent Court of Arbitration at The Hague unanimously decided that India’s imposition of a retrospective tax on Vodafone was in violation of the India-Netherlands Bilateral Investment Treaty (BIT) that required the Indian Government to treat its investors fairly and equitably.
- The Indian Government enacted a retrospective legislation specifically designed to override a Supreme Court decision.
- **Does the post Vodafone retrospective legislation go beyond the vanilla variety retrospective tax legislation?**