ANALYSIS OF RETROSPECTIVE AMENDMENTS UNDER THE INCOME TAX ACT, 1961

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INTRODUCTION

Retrospective amendment of statutes by the legislature is permissible in law, subject to Constitutional competence, and is often used by the legislature to change the basis of a judicial decision.

Amendments when given retrospective effect can either be beneficial or detrimental to the taxpayer. The ones which impose an unreasonable implication on the assessee or take away some benefit already given to the assessee, are not welcome by the taxpayers and usually become a subject matter of litigation.

IMPORTANT SECTIONS THAT UNDERWENT AMENDMENTS

Since the inception of the Act, various retrospective amendments have been made through different Finance Acts. However, this article would be covering only some of the major retrospective amendments that have been a subject of much interest in litigation.

PROVISION	ACT	WORDINGS	REASON FOR AMENDMENT	DATE OF APPLICATION
s.35DDA	FA, 2001	The section provides that the expenditure incurred by way of payment of any sum to an employee at the time of his voluntary retirement, in accordance with any scheme of voluntary retirement, would be allowable as deduction over a period of five years.	-	From April 1, 2002.
s.113	FA, 2002	To amend section 113 of the Income-tax Act to provide that the tax chargeable on the undisclosed income determined under Chapter XIV-B shall be increased by		From June 1, 2002.

		the amount of surcharge applicable in the previous year in which the search commenced or requisition was made.	-	
s.43B	FA, 2003	To delete the second proviso which restricted the deduction in respect of any sum payable by an employer by way of contribution to provident fund/superannuation fund or any other fund for the welfare of employees, unless it stood paid within the specified due date.	The legislative intent was to provide that, in case of deduction of payments made by the assessee as an employer by way of contribution to any provident fund or superannuation fund or any other fund for the welfare of the employees shall be allowed in computing the income of the year in which such sum is actually paid. In case the same is paid before the due date of filing the return of income for the previous year, the allowance will be made in the year in which the liability was incurred.	Retrospectively from April 1, 1988.
s.9(1)(v), (vi) &(vii)	FA, 2007	A source rule was provided in the said section through insertion of clauses (*v*), (*vi*), and (*vii*) for income from interest, royalty or fees for technical services. It was provided, *inter alia,* that in case of payments of interest, royalty or fees for technical services received from a resident payer, income would be deemed to accrue or arise in India, except where the interest or royalty or fees for technical services are relatable to a business or profession carried on by the resident payer	The legislative intent was to bring to tax interest, royalty and fees for technical services by way of creating a legal fiction in section 9, and give legal sanctity to the source rule.	Retrospectively from June 1, 1976

		outside India or for making or earning any income from any source outside India.		
s.9(1)(v), (vi) &(vii)	FA, 2010	Substitute the existing Explanation with a new Explanation to specifically state that the income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) of section 9 and shall be included in his total income, whether or not, (a) the non-resident has a residence or place of business or business connection in India; Or (b) the non-resident has rendered services in India.	To clarify that where income is deemed to accrue or arise in India under clauses (v), (vi) and (vii) of sub-section (1) of section 9, such income shall be included in the total income of the non-resident, regardless of whether the non-resident has a residence or place of business or business connection in India.	Retrospectively from June 1, 1976
s.9(1)(i)	FA, 2012	Amend section 9(1)(i) to clarify that the expression 'through' shall mean and include and shall be deemed to have always meant and included "by means of", "in consequence of" or "by reason of".	The legislative intent is to widen the application as it covers incomes, which are accruing or arising directly or indirectly, and clarifies that the source country has taxation right on the gains derived of offshore transactions where the value is attributable to the underlying assets.	Retrospectively from April 1, 1962.
s.9(1)(vi)	FA, 2012	To amend section 9(1)(vi) to clarify that the consideration for use or right to use of computer software is royalty by clarifying that transfer of all or any rights in respect of any right, property or information as mentioned in Explanation 2, includes and has always included transfer of all or any right for use or right to use a computer software (including	To clarify whether consideration for use of computer software is royalty or not; Whether the right, property or information has to be used directly by the payer or is to be located in India or control or possession of it has to be with the	Retrospectively from June 1, 1976

		granting of a licence) irrespective of the medium through which such right is transferred. To amend section 9(1)(vi) to clarify that royalty includes and has always included consideration in respect of any right, property or information, whether or not: (a) the possession or control of such right, property or information is with the payer; (b) Such right, property or information is used directly by the payer; (c) the location of such right, property or information is in India.	payer.	
s.92CA	FA 2012	To amend the section 92CA of the Act retrospectively to empower Transfer Pricing Officer (TPO) to determine Arm's Length Price of an international transaction noticed by him in the course of proceedings before him, even if the said transaction was not referred to him by the Assessing Officer, provided that such international transaction was not reported by the taxpayer as per the requirement cast upon him under section 92E of the Act.	In absence of specific power, the determination of Arm's Length Price by the Transfer Pricing Officer would be open to challenge even though the basis of such an action is non-reporting of transaction by the taxpayer at first instance. The legislative intent was to empower the TPO.	Retrospectively from June 1, 2002.
s.40(a)(ia)	FA 2012	To amend section 40(a)(ia) to provide that where an assessee makes payment of the nature specified in the said section to a resident payee without deduction of tax and is not deemed to be an assessee in default under section 201(1) on	To rationalize the provisions of disallowance on account of non-deduction of tax from the payments made to a resident payee.	From April 1, 2013.

		account of payment of taxes by the payee, then, for the purpose of allowing deduction of such sum, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee		
s.40(a)(ia)	FA 2014	Amend the section, that in case of non-deduction or non-payment of TDS on payments made to residents as specified in section 40(*a*)(*ia*) of the Act, the disallowance shall be restricted to 30% of the amount of expenditure claimed.	Previously, the entire amount of expenditure on which tax was deductible is disallowed under section 40(*a*)(*ia*) for the purposes of computing income under the head "Profits and gains of business or profession". The disallowance of whole of the amount of expenditure results into undue hardship. In order to reduce the hardship, this amendment was made.	From April 1, 2015.
s.32(1)(iia)	FA 2015	To provide that, where an asset referred to in clause (*iia*) or the first proviso to clause (*iia*), as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business for a period of less than one hundred and eighty days in that previous year, and the deduction under this sub-section in respect of such asset is restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (*iia*)for that previous year, then, the deduction for the balance fifty	The legislative intent is to remove the discrimination in the matter of allowing additional depreciation on plant or machinery used for less than 180 days and used for 180 days or more	From April 1, 2016

		per cent of the amount calculated at the percentage prescribed for such asset under clause (*iia*) shall be allowed under this sub-section in the immediately succeeding previous year in respect of such asset.		
s.11	FA 2014	To amend section 11 to provide that, income for the purposes of application shall be determined without any deduction or allowance by way of depreciation or otherwise in respect of any asset, acquisition of which has been claimed as an application of income under these sections in the same or any other previous year.	While computing income under this section, notional deduction by way of depreciation is claimed and such amount remains to be applied for charitable purposes, thereby giving these trusts and institutions a double benefit. In order to ensure that double benefit is not claimed and such notional amount does not get excluded from the condition of application of income for charitable purpose, this clause was inserted.	From April 1, 2015
s.11	FA 2017	To insert a new Explanation to section 11, to provide that any amount credited or paid, out of income referred to in clause (a) or clause (b) of sub-section (1) of section 11, being contributions with specific direction that they shall form part of the corpus of the trust or institution, shall not be treated as application of income.	Since corpus donations from one exempt entity to another exempt entity, was considered to be application of income in the hands of the donor trust, and not considered as income of the recipient trust, these institutions started engaging in donations without actual application of income. To avoid this, this explanation was inserted.	From April 1, 2018.
s.23	FA 2017	To amend the said section so	The legislative intent	From April 1,

		as to provide that where the house property consisting of any building and land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period upto one year from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to be nil	was to help the real estate developers with business exigencies.	2018

INTERPRETATION OF THE COURTS:

It is the duty of the Courts to evaluate the operation of a retrospective amendment of law. We have classified the treatment of retrospective amendments by Courts as follows:

A. RETROSPECTIVE OPERATION CANNOT BE GIVEN TO A PROSPECTIVE AMENDMENT

i) CIT .v. Vatika Township Pvt. Limited [2014] 367 ITR 466 (SC)
ii) Ansal Housing and Construction Ltd., .v. ACIT (2016) 389 ITR 373, Delhi HC

B. RETROSPECTIVITY STRUCK DOWN

i) Vodafone International Holdings .v. UOI (2012) 6 SCC 613 (SC)

C. RETROSPECTIVE OPERATION AGREED TO BE GIVEN TO THE AMENDMENT

i) Sony Ericsson Mobile Communications India Pvt. Limited .v. CIT (2015) 374 ITR 118 (Delhi)

D. PROSPECTIVE AMENDMENT CAN BE HELD AS RETROSPECTIVE IN OPERATION

i) CIT .v. Alom Extrusions Ltd. [2009] 319 ITR 306 (SC)
ii) CIT .v. Ansal Land Mark Township (P) Ltd. (ITA 160/2015 dated 28.05.2015, Delhi High Court)

E. RETROSPECTIVITY CANNOT BE UPHELD IF THERE IS AN IMPOSSIBILTY OF PERFORMANCE

i) CIT .v. NGC Networks India Pvt. Limited. (ITA No.397/2015 dated 29th January 2018)
ii) CIT .v. M/s Revathi Equipment Ltd. [2008] 298 ITR 67 (Mad)

CLASSIFICATIONS IN DETAIL:

A. RETROSPECTIVE OPERATION CANNOT BE GIVEN TO A PROSPECTIVE AMENDMENT:

- **CIT .v. Vatika Township Pvt. Limited [2014] 367 ITR 466 (SC)**

FACTS:

- Search and seizure operations carried out on the taxpayer u/s 132 of the IT Act, and accordingly notice u/s 158BC was issued.
- Relevant block period : April 1, 1989 – February 10, 2000
- Relevant AYs: 1984 – 2003.
- Assessment completed with no levy of surcharge
- On the insertion of s.113, the CIT opined that surcharge should have been retrospectively levied u/s 113 for the block period April 1, 1989 – February 10, 2000
- Assessee preferred an appeal before the ITAT and the tribunal allowed the same stating that s.113 was not declaratory/clarificatory, and therefore not retrospective in nature
- HC also dismissed revenue's appeal and held that, insertion to s.113 (FA 2002) was prospective in nature and cannot be made applicable in the instant case.
- Revenue preferred an appeal to the SC.

SC's RULING:

1. ON GENERAL PRINCIPLES OF RETROSPECTIVITY :

- Unless explicitly stated, a piece of legislation is presumed not to be intended to have a retrospective operation.
- This rule is based on the principle ***"lex prospicit non respicit",*** which means that the law looks forward and not backward.
- Further, retrospective legislation was contrary to the general principle that 'legislation introduced for the first time need not change the character of past transactions carried out upon the faith of the then existing law'.
- Legislations which modified accrued rights or imposed disabilities were to be treated as prospective in nature unless they were accounting for an obvious omission or explaining a former legislation.
- The principle of 'fairness' must be the basis for every legal rule, especially when construing a statute that conferred a benefit without inflicting a corresponding detriment.
- In the instant case, the proviso is not beneficial but onerous to the assessee, and therefore, under the normal rule of presumption, it did not have a retrospective effect.

2. **NO RETROSPECTIVE EFFECT CAN BE GIVEN AS THE PROVISO IS NOT CURATIVE IN NATURE**

- In the absence of clear words indicating that the amending Act was declaratory/curative, retrospective effect could not be resorted to, particularly when the pre-amended provisions were clear and unambiguous.
- Further, in the absence of a particular date to levy the surcharge in relation to the varying rates to be applied, the proviso to s.113 was not clarificatory.
- Any ambiguity must be resolved in favour of the assessee, and therefore the lack of clarity regarding the rates and date, would not make the proviso retrospective.
- Any amendment to a taxing statute is intended to remove any hardship caused to taxpayers and not to the tax department.
- Further, the amendment explicitly stated that the insertion to s.113 would be prospective in nature.

Held in favour of the assessee.

- **Ansal Housing and Construction Ltd., .v. ACIT (2016) 389 ITR 373, Delhi HC.**

FACTS:

- Assessee held commercial and residential flats and spaces for being sold to prospective buyers as its stock-in-trade for business purposes and were in self-possession till their sale.
- Unsold inventory of built-up residential houses/flats were subject to the provisions of s.22 read with s.23 and accordingly the notional annual letting value was taxable in the hands of the assessee under the head "Income from House Property"

HC's RULING:

- The insertion of sub-section (5) to s.23 by the FA 2017, would take effect only from April 1, 2018, even though the assesee's factual situation squarely applies to the said proviso.
- The language used in the proviso does not indicate that it has inserted as a clarification or by way of abundant caution.
- The amendment therefore clearly applies prospectively and the properties held as stock-in-trade would be taxable.

Held in favour of the assessee.

B. RETROSPECTIVITY STRUCK DOWN

- **Vodafone Int. Holdings .v. UOI (2012) 6 SCC 613 (SC)**

FACTS:

- HTIL – situated in Hong Kong – holds 100% share in CGP
- CGP – situated in Cayman island – holds 67% shares in HEL
- HEL – situated India – formed by merger of HTIL and CGP
- VIH – situated in Netherland – subsidiary of Vodafone group
- VIH acquired HEL from HTIL through CGP, and therefore had zero tax liability.
- Relevant AYs : 2002-03 & 2003-04
- Indian revenue authorities alleged that VIH had failed to deduct tax on the payment of consideration made to HTIL, and subsequently issued a notice to them.
- VIH did not respond to the notice and instead filed a writ petition to the Bombay High Court, challenging the jurisdiction of the Income Tax Department.
- The Bombay HC upheld the matter in favour of the Indian Revenue Authorities
- Subsequently, VIH file a special leave petition before the Supreme Court.
- SC disposed the case with a direction to the tax authorities to decide the preliminary issue of jurisdiction.
- After going through the share purchase agreement, the tax authorities found that the intention of the parties was ultimately to transfer the controlling interest in HEL, which was situated in India, and passed an order holding that they had jurisdiction to proceed against VIH for failure to deduct tax.
- VIH approached the Bombay HC again, but they dismissed its writ petition filed against the tax authorities.
- VIH filed an SLP and the Supreme Court reversed the decision of the Bombay High Court.

SC's RULING:

- The Indian authorities had no jurisdiction to tax the foreign transactions, as sale of shares was in Cayman Island.
- Transfer of shares in CGP does not amount to transfer of capital asset situated in India, as per s.9(1)(i).
- Transfer of "controlling interest" is not covered under the definition of "Capital Assets" u/s 2(14)
- As the capital asset is not taxable in India, no question of deducting tax at source arises.
- Accordingly, the retrospective applicability of the amendments made to these provisions was struck down and the decision was made in favour of VIH.

Held in favour of the assessee.

C. RETROSPECTIVE OPERATION AGREED TO BE GIVEN TO THE AMENDMENT

- **Sony Ericsson Mobile communications India Pvt. Limited .v. CIT (2015) 374 ITR 118 (Delhi)**

FACTS:

- Assessee challenged the retrospective applicability sub-section (2B) of s.92CA

- Relevant AYs: 2006-07, 2007-08 & 2008-09.
- It was argued by the assessee that the AO had made no specific reference of the international transaction relating to AMP expenses nor seek the previous approval of the Commissioner, and therefore, the valuation of the contract price and computation of the arm's length price, consequent assessments, etc. are without jurisdiction and authority of law

HC's RULING:

- The insertion of sub-section (2B) by the FA 2012 is squarely applicable to this case and negates the challenge of the assessee.
- The constitutional validity of the above provision is not the concern here and the only thing required to be done here is to interpret the said provision and apply the retrospective amendment if it is applicable.
- Under (2B), a TPO to who reference has been made under sub-section (1) is entitled to apply the provisions of the Chapter in respect of international transaction for which the assessee has not furnished a report under s.92E.
- Thus, where an assessee has failed or not furnished a report u/s 92E, a specific reference for the said transaction is not required. It is sufficient if the arm's length pricing issue of any international transaction has not been referred to the TPO.
- After the insertion of sub-section (2B), w.e.f June 1, 2002, we have to give full effect to the said provision and not negate or curtail the retrospective effect
- A retrospective amendment has a deeming effect and also consequences. The said effect cannot be unwritten or erased.
- Once the legislative language is clear and express, we are only required to give effect to the said retrospective amendment.

Held in favour of the Revenue and against the assessee.

D. <u>PROSPECTIVE AMENDMENT CAN BE HELD AS RETROSPECTIVE IN OPERATION</u>

- **<u>CIT .v. Alom Extrusions Ltd.</u> [2009] 319 ITR 306 (SC)**

FACTS:

- Prior to Finance Act, 2003, the second proviso to Section 43-B of the Income Tax Act, 1961, restricted the deduction in respect of any sum payable by an employer by way of contribution to provident fund/superannuation fund or any other fund for the welfare of employees, unless it stood paid within the specified due date.
- The second proviso implied that, if the contribution stood paid after the date for filing of the return, it stood disallowed.

- This resulted in great hardship to the employers and they consequently approached the Government.
- Consequently, through the Finance Act, 2003, the second proviso stood deleted w.e.f April 1, 2004.
- According to the department, the omission of the second proviso giving relief to the employer-assessee, only w.e.f April 1, 2004, whereas, according to the assessee-employer, it operated retrospectively from April 1, 1988.

SC's RULING:

- When a proviso is inserted to remedy unintended consequences and to make the section workable, a proviso which supplies an obvious omission in the section and which proviso is required to be read into the section to give the section a reasonable interpretation, it could be read retrospective in operation, particularly to give effect to the section as a whole.
- The hardship and the invidious discrimination which would be caused to the assessee, if the amendment was to be given prospective effect are pointed out.
- Held that, in the instant case, the assessee would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas, a defaulter who fails to pay the contribution to the welfare fund right up to April 1, 2004, and who pays after April 1, 2004, would get the benefit of deduction under s.43B, and therefore, it should be given retrospective effect.
- Therefore, the said amendment was to be curative in nature, and should apply retrospectively.

Held in favour of the assessee.

- Cit .v. Ansal Land Mark Township (P) Ltd. (ITA 160/2015 dated 28.05.2015, Delhi High Court)

FACTS:

- Assessee made payment to Ansal Properties and Infrastructure Ltd., which payment, according to the Revenue, ought to have been made only after deducting tax at source u/s 194J of the Act, for the AYs 2008-09 & 2009-10.
- Before the ITAT, it was urged by the assessee that the of insertion of the second proviso to section 40(a)(ia), which reads as, *"where an assessee makes payment of the nature specified in the said section to a resident payee without deduction of tax and is not deemed to be an assessee in default u/s 201(1), then, for the purpose of allowing deduction of such sum, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee"* w.e.f April 1, 2013, has to be given retrospective effect.
- Tribunal upheld the assessee's plea.
- Department appealed to the High Court.

HC’s RULIING:

- Following the decision of the Agra ITAT in Rajiv Kumar Agarwal .v. ACIT (ITA No.338/Agra/2013), it has concluded that the said proviso is declaratory and curative, and therefore, has to be given retrospective effect from April 1, 2005.

Held in favour of the assessee.

E. RETROSPECTIVITY CANNOT BE UPHED IF THERE IS AN IMPOSSIBILTY OF PERFORMANCE

- **CIT vs. NGC Networks India Pvt. Limited (ITA No.397/2015 dated 29th January 2018)**

FACTS:

- Assessee made payment which was subject to tax deduction at source u/s 194C during the assessment year 2009-10.
- The amendment by introduction of explanation 6 to s.9(1)(vi), took place in 2012 with retrospective effect from 1976, and this could not have been contemplated by the assessee when he made such payments.
- Further, the revenue disallowed the expenditure u/s 40(a)(i).
- Contended that the meaning of royalty as defied therein, is that as provided in explanation 2 and not explanation 6 to s.9(1)(vi).

HC’s RULING:

- Applying the legal maxim ***“lex non cogit ad impossibilia”***, the court held that a party cannot be called upon to perform an impossible act, that is, to comply with a provision not in force at the relevant time but introduced later by retrospective amendment.
- Further, disallowance u/s 40(a)(i) can be made only if the royalty falls under Explanation 2 to s.9(1)(vi), and not explanation 6 to s.9(1)(vi).

Held in favour of the assessee.

- CIT .v. M/s Revathi Equipment Ltd. [2008] 298 ITR 67 (Mad)

FACTS:

- The assessee is a company incorporated under the Companies Act, 1956.
- The relevant assessment year is 2001-2002 and the corresponding accounting year ended on 31.03.2001.
- Assessee’s Return of Income was scrutinized u/s 143(3) and the Assessing Officer levied interest under sections 234B & 234C, as the assessee had failed to pay the advance tax.

- The assessee was under the impression that the payments under Voluntary Retirement Scheme (VRS) are allowable deductions on the basis of the Madras High Court's judgment in the case of C.I.T. Vs. George Oakes Ltd. (197 ITR 288) and in the case of C.I.T. Vs. Simpson & Co. Ltd. (230 ITR 794), in spite of the fact that a new provision u/s 35DDA was introduced for the first time by the Finance Act, 2001 and the same was made effective from 1.04.2001.
- It was contended by the Revenue that, s.35DDA was introduced by the Finance Act, 2001 w.e.f 1.04.2001, and hence, the assessee was not entitled to full deduction of VRS payments, and hence liable to pay advance tax.
- Assessee filed an appeal to the CIT and the said appeal was dismissed.
- Assessee again filed an appeal before the ITAT and the Tribunal held that the levy of interest under section 234B and 234C was not warranted.
- Hence, the present appeal is made by the Revenue before the Madras High Court.

HC's RULING:

- Before the introduction of s.35DDA, the legal dictum was very clear that the assessee could claim expenditure incurred on account of payment for VRS by the assessee in view of the binding decisions of this Court in the abovementioned cases.
- In both the decisions, it was clearly laid down that payments made to employees under VRS were in the nature of new business expenditure and were deductible u/s 37.
- Therefore, till the introduction of s.35DDA, the assessee could have estimated the income legitimately after reducing the expenditure incurred on VRS.
- Further the Court pointed out that the assessee could not visualize such liability and deduct such expenditure because, the said provision u/s 35DDA was introduced w.e.f 1.04.2001, i.e, the same assessment year.
- It was held that in such situations, the legal dictum ***"lex non cogit ad impossibilia"*** would be attracted, meaning, the "law cannot compel you to do the impossible."
- Accordingly, the Court held that the findings holding of the Tribunal was valid and dismissed the case of the Revenue.
  Held in favour of the Assessee.

CONCLUSION

Taxpayers plan their business affairs in advance and expect certainty in taxation, based on the existing laws of the relevant assessment years. When amendments are given retrospective operation, it upsets the financial structure based on which the assessee had planned his business. Therefore, any retrospective amendment which is to the detriment of the assessee is usually not welcome by the taxpayers.

To sum up, there is no straight jacket formula to decide the applicability of retrospective operations of amendments. The Courts analyze each case based on its merits and decide the

applicability of retrospectivity accordingly. In our opinion, any retrospective amendment in law should be made only to correct some apparent anomalies or mistakes and not cause any unreasonable burden to the assessee.