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Propriety of Retrospective Taxation

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ABSTRACT

The retrospective rule-making approach has few supporters and, in inverse proportion, those who may grouch. Guards of retrospective laws by and large do so on the premise that they are essential evil invoked in particular or constrained circumstances, such as closing tax escape clauses, dealing with terrorists, or indicting fallen dictators. Be that as it may, the reality of retrospective rule-making is far more pervasive than this, and its purposes range from 'corrective' enactment to 'interpretive legislation' to legal decision-making.

Legislators seemingly and arguably invoke retrospective legislation in economic laws like inter alia taxation etc. Assesses, predominantly corporate and high wealth network individuals, often curate schemes and formulas to avoid taxations and per contra. The government ought to make the law to allay any indiscernible debilitating loops. However, there is competing interest, and the government often has to introduce retrospective tax legislation as a prophylactic measure. In common parlance, people excoriate and questions the propriety of retrospective Taxation To derive necessary conclusions, we shall scrutinize retrospective taxation in the backdrop of constitutional spirit and rationality. Paper shall elucidate the facets of retrospective taxation and discernible ramifications. Paper shall take into account the ethical propriety and the constitutionality of retrospective laws in various jurisdictions. Paper shall also briefly allusion some of instances of retrospective taxation along with their justificatory accounts.

Keywords: *Retrospective Taxation, Tax Avoidance Planning, Tax Evasion.*

I. INTRODUCTION

Retrospective taxation laws may have far-reaching implications on *inter alia* investment, trade, financial planning, and capital movements. Legislators opt for retrospective tax laws for various purposes, like to overhaul an effect in public welfare, retrieve lost revenue in form of tax, but it also carries the risk of violation of ethical propriety, human rights, political and also raises various economic concerns. The possibility of retrospective tax law acts as a disincentive for tax avoidance while serving as an essential tool for the legislators to collect revenue lost to

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law and policy loopholes.

(A) Definition of Retrospectivity

The term retrospective is constituted by two words, the Latin word "retro-" means "back," or "behind" or "backward" and "specere" meaning "to look at." The terms retrospective, retroactive, and retro-operative are often used interchangeably and in many ways. There has been a history of tax collection through retrospective amendments. Often states resort to making tax reforms branded as retrospective because they eliminate the tax shelters and scour the tax benefits gathering beneath past laws on the investments made taking stock of those covers and benefits.

Further illustrating, *in normal course of event, when a dispute arising of an event that has taken place in the past when come to court for adjudication, the law/legislations applied by court to the facts in dispute are only those laws or regulations which were active/operative during the time of happening of that event and is called prospective legislation. whereas if a particular legislation although passed/enacted post happening of that event but is applied by court on facts of the dispute while its adjudication is referred as retrospective legislation. In other words, legislation is not telling the court to pretend as if the law was in existence in the past rather it is telling the court to apply the law as if it was in existence if any dispute on past event is brought before it in future.*⁴

In this way, retrospective legislation/amendments can be called modifying the forthcoming legal results of past events. J. SB Sinha presiding in Division Bench of Supreme Court in ***Government of India vs Indian Tobacco Association***⁵ observed that every law that takes away a right vested under the existing law is retrospective in nature. It can also be interpreted conversely, can be said that every law which imposes liability from back-date when it did not exist can also be regarded as retrospective legislation.

Driedger attempted to formulate the distinction between retrospective and retroactive. He contrasted both the term. He stated, "retroactive means acting in the past while retrospective means looking in the past."⁶ The Black law dictionary has defined the term retrospective as "*Retroactive adj. (17c) (of a statute, ruling, etc.) extending in scope or effect to matter that has occurred in the past. – also termed as retrospective. Cf. Prospective (1). – retroact, vb.*"

⁴ Andrew Palmer & Charles Sampford, Retrospective Legislation in Australia: Looking Back at 1980s, 22 FED. L. REV.217 (1994)

⁵ Government of India v/s Indian Tobacco Association 1(2005) 7 SCC 396

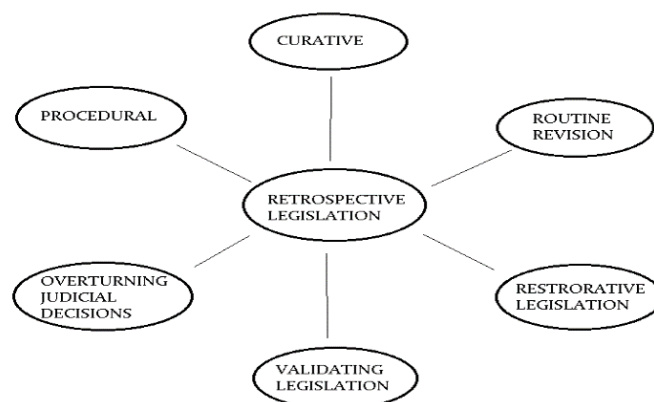
⁶ E A Driedger, "Statutes: Retroactive Retrospective Reflections" (1978) 56 Canadian Bar Rev 264 at 268-269 and 276.

Two Judge Bench of Supreme court in state **Bank staff union (Madras circle) v Union of India**⁷, had occasion, to take into account the concept of retroactive and retrospective and lay down that "*Judicial dictionary (13th Edn) by KJ Aiyar, Butterworth, p 857 states that the word retrospective, in terms of an enactment may means (i) affecting an existing contract; or (ii) reopening up of past, closed and completed transaction; or (iii) affecting accrued rights and remedies; or (iv) affecting the procedure. Words and phrases, Permanent Edn. Vol. 37-A, pp 224-225, defines a retrospective or retroactive law*".

Further, in **Jai Mahakali rolling mills v Union of India**⁸ the term retrospective was expounded by Hon'ble Supreme court and it observed that "retrospective means looking backward, contemplating what has become past now and amount to having reference to a statute or things existing before the statute in question. Retrospective law means a law which look backward or contemplates the past, one which is made to affect an act or a fact over an event occurring, or rights occurring, prior to it enforcement. Retroactive statute means a statute, which imposes a new obligation or liability for transaction or considerations or which destroy or impairs any vested rights."

Retrospective legislation in area of penal laws is prohibited in most countries. This kind of enactment is made in ranges of tax collection and financial regulations. Such legislation is brought to overhaul the loopholes which a party has utilized from the back date. Thus, can be said that state brought retrospective legislation to mend their failure to anticipate or detect possible loop susceptible to exploitation and recuperate the loss on account of the exploitation of loop through tax avoidance stratagem.

(B) Categorization of Retrospective Legislation



CATEGORIES OF RETROSPECTIVE LEGISLATION

⁷ State Bank's staff union (Madras circle) v union of India. (2005) 7 SCC 584

⁸ Jai Mahakali rolling mills v Union of India (2007) 12 SCC 198

Andrew Palmer & Charles Sampford, made an attempt to categorizes Retrospective legislations. According to them,

1. **Curative Statutes:** The Government presents enactment to actualize certain policies or administrative objects. Some of the times, the enactment comes up short to completely actualize those objects, and the government chooses to present retrospective enactment to guarantee, not as it were that the objectives are accomplished for the longer term, but too that the enactment accomplishes its objectives from the start by retrospectively curing defects. [Through the term "reliance" they refer to a situation where a person made a decision or made any investment relying upon the existing set of laws and legal system and then state through legislation tamper with that existing set of laws.

2. **Routine Revision:** The primary sub-category they have made is "routine revision," which shows up to raise no dependence issues. This type of amendment seeks to adjust typographical mistakes, changes resulting in past correction, and schedule upgrading of statute law.

3. **Restorative Legislation:** The third sub-category they have made is called "restorative legislation": this is often where the imperfection is inadvertent to have permitted an administrative scheme to lapse and a person may have reasonably relied upon the expectation that the scheme would be continuing. This is often most clearly the case where the impact of the lacuna is that a risk to tax or some other charge emerges, or the right to some government payment ceases. In such cases, the government has either gotten to be entitled to the revenue which it has never planned shall be payable or has ceased to be obliged to create an installment which the assembly was continuously expecting that it ought to make. Thus, in passing restorative enactment, the government will be swearing off income to which it has ended up lawfully entitled or causing expenditure which it was not obliged by law to make; but it'll moreover be acting to guarantee that people's desires around these things are regarded.

4. **Validating Legislation:** The third sub-category they have made is called "validating legislation": usually where somebody, ordinarily the executive arm of government, has acted upon in an incorrectly interpreted view of the law, which in turn the retrospective statute is expecting to validate or favor.

5. **Overturing Judicial Decisions:** The ultimate sub-category they have made is called "overturing judicial decisions". This can be where the executive's action founded on reliance on an incorrect interpretation of the law has been effectively challenged within the courts. The enactment aims to allow statutory validation to the executive's initially incorrect view (but not

ordinarily to approve the particularly impugned actions).

6. **Procedural:** Concurring to them [Andrew Palmer and Charles Sampford], there are still a few statutes which don't drop into any of the above categories. A few of these remaining statutes can be depicted as procedural: the reality that courts treat retrospective procedural statutes in an unexpected way from non-procedural statutes gives an avocation for receiving this as a leftover category.⁹ To truly understand the significance and draw backs of retrospective taxation, we must understand what taxation is.

II. ETHICAL PROPRIETY OF RETROSPECTIVE TAXATION

A sound and fair tax policy is an intrinsic feature for any prosperous society. It curates avenues to source the fund for operating consecrated institutions of a noble welfare state. Isaacs J. in *R v Barger*¹⁰ said that, it is observationally certain that each well structurally standardized and civilized society has had collected taxes from their subjects. This revenue within the frame of tax assessment is utilized to overhaul the social benchmarks. Be that as it may, he is also cautions that control is susceptible to mishandle, either in hands of a person despot, or of a sectional oligarchy and may use the control of authority even beneath the shapes of cutting-edge parliamentary framework. He eluded this power as vital and said that without this power no government is conceivable. The power to tax is an inherent feature vested with the state. The manner in which a government exercises this prerogative goes on to play a consequential role in determining the success and prosperity of a nation. It's analogy could be double edged sword which have has the power to annihilate as well as keep and preserve livelihood additionally to make and lead towards realization of a standardized society.

(A) Reasonable Tax Assessment and Retrospective Taxation

Unjustifiable tax assessment has far-reaching ramifications for the conduct of tax directors, tax professionals, the judiciary, and the social community. It is often more so given the dominance of the country's self-assessment framework of income tax assessment that depends on a high degree of morals and trust. So now the question that emerges would be, what may be called as reasonable tax collection?

Adam Smith, an economist and a philosopher who attempted to draw a mechanism that should govern a rational system of taxation and strike a delicate balance between two competing interest wherein as citizen attempt with utmost possible ability to save and avoid tax payment

⁹ Andrew Palmer & Charles Sampford, *Retrospective Legislation in Australia: Looking Back at 1980s*, 22 *FED. L. REV.* 217 (1994), p. 236

¹⁰ [1908] HCA 43; 6 CLR 41; 14 ALR 374

as it requisitioned them payment from their hard-earned income and other one the government who seek to generate enough revenue for the state. Adam smith, who is also known as father of economics, in his book “The wealth of Nations” set out four general principles, known as four canons of taxation¹¹.

1. **Canon of Fairness:** Speaks that every subject of a state must contribute and support the government, in proportion their possible ability, for the protection they enjoy under the state and government. It says that every person must contribute proportionately to enhance the revenue of the state.
2. **Canon of Certainty:** It further imposes obligation upon the state that the tax that they levy upon their subject ought to be certain, ascertained with respect to time and manner of payment and specified amount must not be arbitrary *per se*.
3. **Canon of Convenience:** It imposes obligation upon the state that tax which is levied and manner in which it is supposed to be paid and time for payment must square with the convenience of the people.
4. **Canon of Efficiency:** Fourthly, it says that the tax that is levied on the people must be decided while keeping two necessary factor in mind, that is, it must take out fund from the pocket of general public as low as possible while at the same time it must keep in mind the requirement of revenue which must not become deficit.

While the well-established **Westminster doctrine**¹² states that a person is entitled to make any lawful arrangement of his affairs that he sees fit in order to reduce liability to tax, it shall also be considered that the facts and circumstances of this particular case involved individual arrangement and tax planning of little to no consequence to the revenue. The same doctrine does not necessarily imply elusive large scale tax avoidance beyond legislative intent as mentioned in the **Ramsay principle**¹³ companies that had made substantial capital gains had entered into complex and self-cancelling series of transactions that had generated artificial capital losses, for the purpose of avoiding capital gains tax. The House of Lords concluded that where a transaction has pre-arranged artificial steps that serve no commercial purpose other than to save tax, the proper approach is to tax the effect of the transaction as a whole.

Similar principle was apparently amplified in the General Anti Avoidance Rules (GAAR) which was first introduced in India via Finance Act 2012. It went for the substance rather than

¹¹ Url: <https://www.marxists.org/reference/archive/smith-adam/works/wealth-of-nations/index.htm> ; last visited: 23rd February 2021. “An inquiry into the Nature and causes of The Wealth of Nation by Adam Smith”

¹² IRC v Duke of Westminster [1936] AC1 (HL)

¹³ *W T Ramsay Ltd v IRC* [1981] AC 300 (HL)

the form of arrangements to identify impermissible tax avoidance.

Inequitable tax policies have grave distributional consequences and may cause distrust among people, encourage and pose disincentives for them to pay taxes. It may further down scale the moral of society. That been said, simply labelling tax avoidance schemes as inequitable tax policy is just as unfair to the state at large. Deriving certainty and fairness on the very unfair notion of not having tax avoidance schemes retrospectively fixed is illegitimate which leads us to the following.

1. Doctrine of Legitimate Expectations

Retrospective laws vitiate the Principles of rules of law. Andrew Palmer and Charles Sampford, in their paper said¹⁴, the foremost vital contention against retrospective enactment is that they contravene the desires of citizens shaped in dependence on existing state of law. They cited Munzer's article "The Theory of retrospective legislation"¹⁵ and laid down that "only those expectation which are both rational and legitimate have strong claim for protection". And they called the expectation of not having retrospective legislation as irrational¹⁶. They call such expectation as rather a wishful thinking but rational expectation. They further said that those who question retrospective enactment on account of it being "out of line" are basically making claim for procedural justice.¹⁷ Therefore taking unfair advantage of susceptibilities in tax laws and expecting no retrospective legislation despite loss to government revenue would be illegitimate.

Retrospective taxation is brought more than often to cure gap in system susceptible to exploitation and to turn down the scheme conjured by, mostly wealthy person to avoid tax. It is introduced from back date to treat the scheme which might plague the society and disincentive those who might be imagining to use similar type of scheme with believe that he will able to escape the wrath of law unscathed even if discovered later. This type of legislation uplift the spirit of those people who have honestly paid their taxes as otherwise they would have felt blockheaded for not conjuring similar schemes and this will have negative impact for future.

(B) Contentions against Retrospective Laws

Numerous contentions have been raised against the utilization of retrospective laws, both in

¹⁴ Andrew Palmer & Charles Sampford, Retrospective Legislation in Australia: Looking Back at 1980s, 22 FED. L. REV.217 (1994)

¹⁵ SR Munzer, "The Theory of Retrospective legislation" (1982) 61 taxes L rev 425

¹⁶ *Ibid* p.230

¹⁷ *Ibid* p.232

common and in particular cases. They are said to be out of line, undemocratic, untrustworthy and opposite to human rights, individual independence, the rule of law and the Constitution. A few indeed say that they are not law at all. Few run common contentions in support of retrospective enactment, but advocates of specific illustrations of retrospective enactment actually raise numerous contentions in support of their self-chosen course. One of the foremost common is the rather half-hearted view that it may be a "necessary evil". Other more positive contentions are that it may secure vital institutions or keep up certainty, which is the foremost financially proficient transition approach. We are going to be recommending that one of them, the dependence contention, is at the heart of all the great contentions against retrospective law-making. However, it does not hold generally that it now and then gives reasons in support of retrospective rule-making. Retrospective tax assessment as curative legislation may be considered vital to avoid people from accepting benefits which it was never aiming they ought to get. It has been said multiple times in this paper; this endeavour of retrospective legislation by government will disincentivise the unscrupulous and inconspicuous felonies and encourage the honest tax payer while doing justice to those who pay their tax honestly.

1. Investment Climate Disruption

One of the most recurring contentions against retrospective tax amendments is the disruption of the investment climate within the economy. Retrospective Tax amendments are said to create panic among investors and make foreign investment flee from the jurisdiction giving it exotic names like tax terrorism etc. However, it must be pointed out that tax regime is only one of the multiple factors driving foreign investment and economic growth. Tax regimes, unless oppressively intended, are very unlikely to inhibit market forces. Besides, more often than not, passing such laws becomes a centre of political attention, resulting in a quest for vote banks, which arises as an opportunity for opposition governments to criticize ruling ones.

Shortly after Australian election in 1983, with the chosen government of Hawke, the contemporary finance Minister, made the following articulation;

"I now affirm that government will, as necessary, employ retrospective legislation to ensure that tax sought to be avoided under any blatant tax avoidance scheme that comes to light during our term of office will be collected, irrespective of when the scheme was entered into"¹⁸

While the opposite was said by Indian Finance Minister Late Arun Jaitley on 18 July 2014 that

¹⁸ Andrew Palmer & Charles Sampford, *Retrospective Legislation in Australia: Looking Back at 1980s*, 22 *FED. L. REV.* 217 (1994) ; quoted as taken from; "Retrospective legislation against tax avoidance" press release of 28th April 1983., reprinted in (1983) *Taxation in Australia* 1006 at 1006-1007

his government will not resort to retrospective tax criticizing the previous government for the same.¹⁹

III. CONSTITUTIONALITY OF RETROSPECTIVE TAXATION

Democracy is an intrinsic feature of a constitutional framework. The Constitution of a state always has its root to the inherent values of a nation. The Spirit of the Constitution says law shall be supreme and above everyone. Constitution *inter alia* emphatically speaks rights and liberty necessary for living a healthy life for its citizens. It is a documental manifestation of what a nation ought to be. Underlying spirit of Constitution is relatively similar for the Constitution of every state. Every Constitution is a documental manifestation of the will of the nation. The underlying principle of the Constitution is to direct the government to lay rules, law and regulation that operate in favor and uplift its citizens. It encourages and directs the government to work in welfare of its residents.

Constitutions of some states, with clear and explicit terms, forbid retrospective legislation in all form. Constitution of Missouri forbids legislation of law in all form, including revenue related laws which may have retrospective operation.²⁰ Also, the constitutions of some states are silent on this power or they are not as such written constitutions like of United Kingdom. In such states, it is left with the discretionary prerogative of the legislative assembly to legislate whatever they deem necessary and beneficial for the state. Thus, retrospective taxation is not as such in violation of Constitution unless it debar such measure and also it is not in violation of the spirit of constitutionalism unless it devours the honest and bona fide savings of general public.

Mostly constitutionality of retrospective taxation is left for the Constitutional Courts or the Supreme Courts, across different jurisdictions, to adjudicate upon as instances arise. However it is by no means expressly unconstitutional or undemocratic.

(A) Testing Retrospective Taxation against Human Rights and Democracy

Apart from allegation of violating the underlying spirit of Constitution by retrospective taxation, it is not an uncommon practice to call retrospective taxation as "undemocratic" for legislators to have passed retrospective legislation. The arguments against retrospective legislation unequivocally entail accounts like an overarching infringement on human rights, human independence, and people's capacity to arrange their lives. They are quintessential

¹⁹ Deccan Herald 2014 *India won't resort to burden of retrospective tax: Jaitley* 06/01/2021 <<https://www.deccanherald.com/national/india-wont-resort-to-burden-of-retrospective-tax-jaitley-405094.html>>

²⁰ *Smith v Dirckx* (1920) 283 Mo 188, 233 S. W. 104, 11 A, L. R. 510

features of liberal and ethical values rather than democratic.

1. Arguably, Universal declaration on Human Right [UDHR] is silent on only one right and it is protection from retrospective legislation and especially tax laws. Constitutions of states inter *alia* United states²¹ and India, safeguard its resident from Criminal retrospective laws. Not every country has written Constitution prohibiting state from implementing retrospective legislation.

The argument that retrospective taxation denigrates the democratic values is irrelevant as majority enjoys the rule making power and they represent and execute the will of majority. There is no relation or nexus *per se* between imposition of retrospective taxation and democracy. Thus, it is unfair and unreasonable to condemn retrospective taxation premised on democratic values.

(B) Testing Retrospective Taxation against Punitive Nature of Tax Laws

Many people may also argue that taxation is a penal law as it is a punitive measure. Penal laws are those laws that are imposed by state to maintain the law-and-order situation in a society. State, in protecting individual liberty and safety imposes the penal law and punishes the felony on behalf of the victim. When someone fails to pay the duty-bound tax they secure a better economic position in society at the cost of state's revenue. Those who breach such laws commit a crime not against an individual but against the entire state and in turn the collective interests of the people stand vitiated. State punishes such delinquent to safeguard the interest of society as a whole. The victim here is not an individual or specific group, rather entire state. Thus, it is distinguishable from penal laws.

(C) Constitutional Limitations to Retrospectivity of Tax Statutes

Over the years, the Supreme Court of India had clearly established that it would not strike down laws merely because of their retrospective nature. The Court would only strike down the law if it violated any Fundamental Constitutional right to practice any profession or carry on any occupation, trade or business, or right to owning property beyond reasonable restrictions.²²

(D) Assessment & Control

Scrutinizing tax assessment in India is done by the Income Tax department which falls under the Central Board of Direct Taxes (CBDT). The same in turn falls under the Ministry of Finance

²¹ Article 1,[section 9 clause III prohibits Federal and Section 10 clause 1 prohibits state] from enactment of ex post facto law. In *calder v Bull* 3 US (3Dall) 386 (1798), United states Supreme court has construed that the US constitution imposes prohibition on enactment of retrospective law only on criminal laws

²² Salve, H., 2015. Retrospective Taxation—the Indian Experience.

headed by the Finance Minister. The Finance Ministry presents the Finance Bill each year which generally dictates and amends the Direct Tax regime in the country. The Income Tax Department functions on its mandate to raise revenue for the state.

(E) Testing Retrospective Taxation against the Spirit of Constitution

Retrospective taxation can be called as to violating the underlying spirit of constitutionalism as it violates the peoples' basic right to design their future plan effectively. Imposing liability on any person to pay an unplanned amount to the government on account of some unascertained liabilities of past is akin to unpredicted but inevitably disastrous liability. However, *per contra*, if some left to get away with huge chunk of money hoarded through unethical and inconspicuous schemes, it will set a very wrong example and send a very wrong message. It may exhibit the government and state as weak and vacillating management, and further encourage others as well. Added to that, it may be injustice to those who honestly pay their taxes. In order to strike a balance between two competing interest, it is necessary to permit imposition of retrospective taxation to encourage and incentivize honest tax payment. However, this must not become abusive. It must not frustrate the honest expectation of general people. It must be ensured and distinguished that bona fide tax planning of a person must not be compromised. Any policy must not devour the legal and bona fide savings of any person as this would be against the spirit of the Constitution rather than the state securing its share of revenue.

IV. CONCLUSION

1. The feeling of commitment to pay tax is continuously vulnerable to the allurements of drawing any such scheme to dodge the same. When the opportunity to dodge tax is offered to somebody, they react with merriment. The method of reasoning for retrospective tax collection, at the very least, would be the raising of income for government purposes and to guarantee that the burden for tax collection is spread more reasonably. On many occasions even court gives entirely different interpretation to a provision in taxation law and that also can be regarded as to have applied retrospectively.

2. Hence, the instability in tax collection law caused by potential retrospectivity gives direction to citizens to direct clear of endeavors to discover and abuse unintended tax avoidance clauses. Nevertheless, the incongruity remains in the uncertainty that makes the law more successful in accomplishing its purposes of collecting revenue, redistributing income and giving a level playing field in which the tax costs on distinctive activities are comparable.

3. Let's have a glance at stances of several other major countries with considerable economies.

(A) Stances on Retrospective Taxation

Country	Stance on Retrospective Taxation
United States	"The decided cases are in harmony with the doctrine that a tax can be retroactive only when it does not thereby attach consequences to an act which the taxpayer could not reasonably have foreseen, but this doctrine leaves considerable room for interpretation as to what consequences should have been anticipated by the taxpayer from a particular act." ²³
United Kingdom	Retrospective taxation is not against the European Convention on Human Rights, it rather seeks balance of interests between governments and taxpayers. As mentioned in the British Tax Review Article "The cases are very clear that retrospective tax legislation is not, per se, a breach of the Convention. However, any such legislation is subject to scrutiny to ensure conformity with the Convention. In particular, it follows from the cases that there must be good reasons for the government concerned in introducing retrospective legislation, and those reasons must respect a fair balance between the interest of the taxpayer and the general interest of the community. The legislation must also not be disproportionate in the sense of imposing an excessive burden on the taxpayers to whom the legislation applies" ²⁴
Australia	Retrospective tax enactments such as the Income Tax Assessment Amendment Act 1978 or the Taxation (Unpaid Company Tax) Assessment Act 1982 by Australian government were brought into operation to counter tax avoidance schemes which were hurting the revenue.
Germany	The German Constitutional Court (Bundesverfassungsgericht) released a ruling ²⁵ dated December 17, 2013 on a tax law that had retroactive effect. True retroactive effect and pseudo-retrospective effect must be distinguished under German law. When a legislator

²³ Ralph R. Neuhoff, Retrospective Tax Laws, 21 ST. LOUISL. REV. 011 (1935).

²⁴ Philip Baker, Retrospective Tax Legislation and European Convention on Human Rights, B.T.R. 005 (2005)

²⁵ BVerfG, Order of the First Senate of 17 December 2013 - 1 BvL 5/08 -, paras. 1-134, http://www.bverfg.de/e/ls20131217_1bv1000508en.html

	<p>changes the legislation before the end of a relevant tax cycle, it is termed "pseudo retroactive" and is permissible. The tax cycle ends at the end of the fiscal year in terms of salary and corporate tax. It's debatable if such amendments are really pseudo retroactive, but the German Constitutional Court has long held this stance. A retroactive adjustment to the tax law is normally not allowed in situations where the tax year has already ended, and is referred to as "true retroactive." The Constitutional Court has now decided that the current law's ambiguous language does not warrant retroactively enacting a new law because such wording can be interpreted by the courts. Enacting a new law retroactively does not give the legislature the authority to decide how a law should be interpreted. However, it has the opportunity to amend the law in the future and clarify the substance.</p>
Belgium	<p>In Belgium the Constitutional Court may test whether laws, orders or decrees are compatible with their Constitution. The Belgian Constitution does not include an arrangement that forces impediments to the retroactivity of statutes. In its case law, the Constitutional Court applies the broader concept of legal certainty from which the principle of non-retroactivity is determined. Since legal certainty isn't expressly inserted in the Constitution either, the Constitutional Court establishes its decisions on the infringement of Articles 10 and 11 of the Belgian Constitution, which provide for the principle of equality. Only the Constitutional Court has the authority to recognize general principles of law and to test laws, orders and statutes against these principles. Within the past, the Supreme Court has moreover recognized general principles of law, but since the foundation of a separate Constitutional Court, this is often not permissible. This applies all the more for progressively lower courts.</p>
Canada	<p>The dominant view is that there are no Constitutional confinements on retroactive tax assessment in Canada. Canada does have a written Constitution, including the Canadian Charter of Rights and Freedoms (the 'Charter'). Enactment that is conflicting with the Constitution is, to the extent of the irregularity, of no drive or effect. However, nothing</p>

	within the Constitution expressly prohibits or limits retroactive enactment, spare within the zone of criminal law.
France	The French Constitution (Conseil constitutionnel) has continuously recognized a few constitutional restrictions to the usage of retroactive tax statutes. The trouble is that there's no principle within the Constitution explicitly denying the retroactivity of law (apart from penal law), and particularly not in tax issues where retroactive enactment is regularly utilized. ²⁶
Italy	There is no principle within the Italian Constitution forcing a limitation on the retroactivity of tax statutes as there is in criminal law (Article 25 of the Italian Constitution). However, the Constitutional Court viably maintains the ability-to-pay principle (Article 53 of the Italian Constitution) and in specific its 'actuality' in some cases as a limitation. ²⁷
Netherlands	The Netherlands courts set only few limits on the use of retroactivity of acts of parliament. The main reason is that the courts have few possibilities to test retroactivity of acts of parliament owing to constitutional constraints. ²⁸

4. In 1978, The Fraser government in Australia presented Income tax amendment bill 1978 to execute a tax law retrospectively and at that time it was portrayed as dropping of "bombshell" and was intensely scrutinized by each corner of the world. But we must take stock of accounts for presentation of such retrospective tax collection laws. The Fraser government conceded that tax evasion was casting the burden of tax collection excessively on the shoulders of conventional wage workers and compensation workers and hence undermining the reasonableness and value of tax framework as well as enormously inconvenient impact on the revenue²⁹. Even then the government was reluctant to recoup tax retrospectively and was

²⁶ Gribnau, J.L.M., & Pauwels, M.R.T. Retroactivity of Tax Legislation 231 (EATLP International Tax Series; No. 9). EATLP/IBFD

²⁷ Gribnau, J.L.M., & Pauwels, M.R.T. Retroactivity of Tax Legislation 313 (EATLP International Tax Series; No. 9). EATLP/IBFD

²⁸ Gribnau, J.L.M., & Pauwels, M.R.T. Retroactivity of Tax Legislation 334 (EATLP International Tax Series; No. 9). EATLP/IBFD

²⁹ Cited in journal, *ibid* at p 254; they cited "Treasurer Howard's Second Reading Speech on the Income Tax Assessment Amendment Bill 1978, H Repts Deb 1978, Vol 108 at 1244-1245:"

avoided until not become indispensable. However, it did so only in relation to Curran scheme case³⁰. Though the retrospective legislation may seem unjust and unreasonable but one must look into the effect and repercussion of such scheme on the state's revenue loss. Through the issuing of bonus shares, a real benefit on an investment in shares may well be changed over into a loss, for tax purposes, of any size the taxpayer craved. Risk to pay tax may in this way be disposed of for a long time in advance.

(B) Necessary Evil

1. An account put forth by Fraser government in Australia for bringing retrospective enactment for treating Curran scheme and comparatively, in an entirely different manner from the other schemes focused on Tax Assessment Amendment Act 1978 was the "magnitude" of the avoidance. Same Account was advanced for presentation of bottom-of-harbour tax assessment enactment in Australia. The contemporary Treasurer uncovered the reality that these schemes had caused revenue loss of hundreds of millions of dollars was vital to overhaul.

2. The account emerged on whether the degree of tax evasion included in a specific scheme gives a sound and acceptable premise for differential treatment retrospective enactment. Andrew Palmer & Charles Sampford, highlighted two features to bolster its contention. To begin with retrospective enactment could be an exceptionally limited instrument. On the off chance that it is to be utilized as it were when there were billions of dollars at stake, it implies that when scheme planned for exceptionally little scale, revenue loss is inadequate to legitimize retrospectivity. Besides, seeing retrospectivity as a fundamental evil concedes and fortifies the legitimacy of the contentions against retrospective rule-making. If the contention is that "we will act because, and only because, revenue loss is reaching crisis proportions", at that point the contention shows up to be one of sheer convenience and a contention from convenience will continuously have trouble in standing up against a contention purportedly based on principle. It makes it appear that those against the enactment are the individuals of principle and those for it are relinquishing principle simply to balance the budget.

³⁰ In Curran's case itself, the taxpayer purchased 200 shares in a private company for \$186,000 (the figures have been rounded for convenience). As the principal shareholder he then caused a dividend of \$191,000 to be paid in the form of 191,000 bonus shares. These dividends were not assessable as income because of s 44(2) of the Income Tax Assessment Act 1936 (Cth), which gives recognition to the fact that a bonus issue of shares does not constitute a realisation of income but rather a further sub-division of the shareholder's interest, ie before the bonus issue the shareholder had 200 shares worth a total of \$186,000 and after the issue he had 191,200 shares worth a total of \$186,000. The taxpayer then sold the 191,200 shares for \$188,000, meaning that he had made a profit on the entire transaction of \$2000. He claimed, however, that in determining his profit or loss figure, he should be allowed to deduct not only the cost of purchasing the original shares, but the par value of the bonus shares, namely \$191,000. He claimed, in other words, that the bonus shares which had cost him nothing should for tax purposes be deemed to have cost him \$191,000. The High Court (Barwick CJ, Menzies and Gibbs JJ, Stephen J dissenting) agreed. The transaction therefore gave rise to a tax loss of \$189,000.

Usually profoundly amusing, given the inspirations of the individuals, whose avoidance plans are the subject of the foremost questionable retrospective enactment, would be disastrous to be allowed a strategic distance from the responsibilities that are usually taken for granted³¹.

Another discernible account in bolster of retrospective enactment presented for categorically recovering revenue lost to tax evasion schemes would be to secure the working of *inter alia* crucial state's institutions like justice dispense system, tax collection, government policies or the economy in its entirety. Arguably, if the tainted wealth accumulated through underhanded schemes is being passively overlooked it might encourage and boost other for conjuring such schemes and may have overarching ramifications. Out of fear to recoupment of avoided tax through retrospective legislation, people will pay the incumbent tax without indulging in any tax avoidance scheme. It will carve out a wrong impression and severely distort the economy if any person with such a scheme is let go with the benefits gained. Credibly, state can't may unable to address every possible economic damages pre-emptively and may required to source redressal through retrospective legislation to prevent long lasting and remote ramifications. Retrospective taxation is necessary evil to deal with unscrupulous swindler.

³¹ Andrew Palmer & Charles Sampford, *Retrospective Legislation in Australia: Looking Back at 1980s*, 22 FED. L. REV.217 (1994) at p.260