

Interpreting Taxing Statutes # 14E – Retrospectivity

An enactment is not intended to have a retrospective operation.

All laws which affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations unless the legislative intent is clear and compulsive. If the language is not clear then the Court has to decide whether in the light of the surrounding circumstances retrospective effect should be given to it or not.¹

Retrospective enactment alters the legal consequences of things that happened before it came into force. ² An enactment is presumed not to be intended to have a retrospective operation, unless the contrary intention appears. The strength of the presumption varies from case to case, depending on the degree of unfairness that would result from giving the enactment retrospective effect. The greater the unfairness the clearer the language required to rebut the presumption. The strength of the presumption against retrospectivity is likely to be particularly strong in the context of penal provisions given the presumption against doubtful penalisation. The principles that apply when determining whether an Act is retrospective apply equally to delegated legislation. The question of whether delegated legislation is capable of having retrospective effect depends on the scope of the enabling power. Similar considerations apply to the non-legislative delegated powers.

¹ Punjab Tin Supply Co. v Central Government (1984) 1 SCC 206

² Bennion 2019 p 181 Sec 5.12

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**Changes in the law should not take effect retrospectively, except in relation to procedural matters.**

It is a principle of legal policy that changes in the law should not take effect retrospectively, except in relation to procedural matters. There is a general presumption that changes to procedure apply to pending as well as future proceedings. Where an amending enactment is clearly intended to be retrospective it will apply to pending actions, including appeals from decision taken before passing of the amending Act.

The essential idea of a legal system is that current law should govern current activities. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. We believe that the nature of law is such that' . . . those who have arranged their affairs . . . in reliance on a decision which has stood for many years should not find that their plans have been retrospectively upset'.<sup>3</sup> The principle is sometimes expressed in the maxim *lex prospicit non respicit* (law looks forward not back). As Willes J said in *Phillips v Eyre* retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.'<sup>4</sup> Despite the general principle, there is no doubt that Parliament does have power to produce a retrospective effect. Moreover, this approach is sometimes justifiable, particularly when things have gone wrong. As Fuller explained: 'It is when things go wrong that the retroactive statute often

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<sup>3</sup> Bennion 2019 p 181

<sup>4</sup> Bennion 2019 p 181

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becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces.’⁵ Although it is often convenient to describe legislation as retrospective or not retrospective, retrospectivity is better viewed as a question of degree which will vary according to the context. The degree of retrospectivity is one of the relevant factors when considering whether the general presumption against retrospectivity is rebutted.⁶ A distinction is sometimes drawn between changes to the law as it has effect in relation to past events and changes to the law that alter existing rights or obligations or other matters but only in the future. It is the latter class that throws up the most difficulties, which is only to be expected: since it is less surprising that Parliament should want to change the law for the future in relation to existing rights and obligations the question of construction is more finely balanced.⁷ Examples of legislation changing the law as it has effect in relation to past events include legislation to legitimize things done in the purported exercise of a power before it comes into force and legislation to reverse an unexpected decision by the courts. This kind of legislation will often be expressed to have effect from a time before it comes into force.⁸ An example of legislation which does not change the law in relation to past events but which alters rights and obligations that arose in the past is a provision that has the effect of varying the terms of a contract or lease entered into before commencement.⁹ This mere fact that legislation is framed by reference to legal relationships or things that happened before the

⁵ Bennion 2019 p 181

⁶ Bennion 2019 p 181

⁷ Bennion 2019 p 181-182

⁸ Bennion 2019 p 182

⁹ Bennion 2019 p 182

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legislation came into force is not generally thought, of itself, to make the legislation retrospective, and certainly not in an objectionable way. A change in the law is not objectionable merely because it takes note that a past event has happened, and bases new legal consequences upon it. <sup>10</sup> Changes in the law even if resulting from prospective legislation or judicial decisions, will frequently and properly affect legal relationships which were established before the changes occurred. Changes in family law, for example, are not applicable only to families which subsequently come into existence, but affect existing families, even although the changes may not have been foreseeable at the time when individuals married or had children. Similarly, a person who buys a house, or a company that employs staff, cannot expect the law governing the rights and responsibilities of homeowners or employers to remain unchanged throughout the period of ownership or employment “If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever”.<sup>11</sup> Difficulties in determining whether an enactment is retrospective are particularly acute in the case of enactments that turn on events occurring over a period. If the enactment comes into force during the period is it retrospective or not? Little guidance can be given beyond saying that it is necessary to look at the substance of the matter. And, as mentioned above, it is necessary to bear in mind that an enactment is not retrospective merely because ‘a part of the requisites for its action is drawn from time antecedent to its passing’.<sup>12</sup>

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<sup>10</sup> Bennion 2019 p 182

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Unless the contrary intention appears, an enactment an enactment is presumed not to be intended to have a retrospective operation. The strength of the presumption varies from case to case, depending on the degree of unfairness that would result from giving the enactment retrospective effect. The greater the unfairness the clearer the language required to rebut the presumption. Special considerations apply to procedural changes.¹³ The basis of the presumption is ‘not more than simple fairness’.¹⁴ The degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say.¹⁵ The presumption against retrospectivity will rarely be the only aid to construction that applies in a particular case. If forms part of a wider body of interpretative criteria and others may compete with it or support it.¹⁶ The principle against doubtful penalization is particularly relevant in this context.¹⁷ There has been some

¹³ Bennion 2019 p 184 Sec 5.13

¹⁴ Bennion 2019 p 184

¹⁵ Bennion 2019 p 184

¹⁶ Bennion 2019 p 185

¹⁷ Bennion 2019 p 185

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suggestion that the presumption against retrospectivity has no application to tax avoidance provisions.<sup>18</sup> In the context of more modern authorities this is probably best understood simply as an example of the courts concluding that the presumption against retrospectivity is rebutted, having taken into account the purpose of the legislation and any unfairness that might result.<sup>19</sup> If a retrospective construction would confer a benefit on some person without inflicting a corresponding detriment on some other person, or on the public generally, the presumption against retrospectivity is likely to be particularly weak and easily rebutted. If to confer such benefits appears to have been the legislator's object, then the presumption that an enactment should be given a purposive construction will carry great weight.<sup>20</sup> There is, of course, no room for the presumption against retrospectivity where legislation is expressly retrospective.<sup>21</sup> If it is clear that legislation is intended to have *some* retrospective effect, the necessary corollary to the presumption against retrospectivity is that it should not be given greater retrospective effect than is necessary to achieve the legislative intention.<sup>22</sup>

### **Changes to procedure apply to pending as well as future proceedings.**

There is a general presumption that changes to procedure apply to pending as well as future proceedings.<sup>23</sup> In the absence of contrary intention, procedural changes apply to pending as well as future proceedings. This is because a procedural change is

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<sup>18</sup> Bennion 2019 p 185

<sup>19</sup> Bennion 2019 p 185

<sup>20</sup> Bennion 2019 p 185

<sup>21</sup> Bennion 2019 p 186

<sup>22</sup> Bennion 2019 p 186

<sup>23</sup> Bennion 2019 p 186 Sec 5.14

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expected to improve matters for everyone concerned (to at least to improve matters for some, without inflicting detriment on anyone else who uses ordinary care, vigilance and promptness).^24 ‘The object of all procedural rules is to enable justice to be done between the parties consistently with the public interest.’^25 If the procedural rules are defective, the legal apparatus works less efficiently and the public interest suffers. If legislation is introduced to remedy the defective rule and no one suffers thereby, it is sensible to apply it to pending proceedings.^26 This principle is variously described as a free-standing presumption or an exception to the presumption against retrospectivity.^27

The strength of the presumption against retrospectivity is likely to be particularly strong in the context of penal provisions.

The strength of the presumption against retrospectivity is likely to be particularly strong in the context of penal provisions given the presumption against doubtful penalisation.^28 Where the general presumption against retrospectivity applies, the fact that one of the possible constructions would impose retrospective law necessarily makes that construction doubtful. If the construction would also penalize the person, that is a second factor against it as the principle against doubtful penalization is engaged.^29

Where an amending enactment is clearly intended to be retrospective it will apply to pending actions, including appeals

²⁴ Bennion 2019 p 186

²⁵ Bennion 2019 p 187

²⁶ Bennion 2019 p 187

²⁷ Bennion 2019 p 187

²⁸ Bennion 2019 p 188 Sec 5.15

²⁹ Bennion 2019 p 188

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from decision taken before passing of the amending Act.<sup>30</sup> The presumption against retrospectivity means that, in the absence of a contrary intention, the substantive rights of the parties to any civil legal proceedings will usually fall to be determined by the law as it existed when the action commenced.<sup>31</sup> But where an amending enactments is clearly intended to be retrospective it will apply to pending actions, including appeals. This is in conformity with the principles that courts frown on attempts to construe an enactment in such a way as to frustrate or stultify legal proceedings under the Act and are reluctant to require litigants to embark on futile or unnecessary legal proceedings.<sup>32</sup>

**The principles that apply when determining whether an Act is retrospective apply equally to delegated legislation.**

The principles that apply when determining whether an Act is retrospective apply equally to delegated legislation. The question of whether delegated legislation is capable of having retrospective effect depends on the scope of the enabling power. Similar considerations apply to the non-legislative delegated powers.<sup>33</sup> Since the principles that apply when determining whether an Act is retrospective are based on public policy, it follows that they apply equally to delegated legislation. In the context of delegated legislation, however, consideration also needs to be given to the enabling power under which it is made. Retrospective delegated legislation requires ‘clear provision’ in the enabling Act.<sup>34</sup> Delegated powers may relate to executive as well as legislative functions. Here similar principles apply, and it

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<sup>30</sup> Bennion 2019 p 189 Sec 5.16

<sup>31</sup> Bennion 2019 p 189

<sup>32</sup> Bennion 2019 p 189

<sup>33</sup> Bennion 2019 p 190 Sec 5.17

<sup>34</sup> Bennion 2019 p 190



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is necessary to determine the intention underlying the conferring of the power.³⁵ Where an enactment gives power to make an executive instrument having retrospective effect, such an instrument does not bind persons other than those to whom it directly applies.³⁶

Supreme court in the case of K. Govindan and Sons v/s CIT [2001] 114 Taxman 94/247 ITR 192 (SC) explained that the explanation is retrospective or prospective depending upon how it is read as clarificatory or amendatory provisions. Supreme Court in case of CIT v/s Podar Cement (P) Ltd. [1997] 92 Taxman 541/226 ITR 625 laid down the principle that amendment brought in the Act to overcome the divergence of opinion amongst the High Court is clarificatory and declaratory in nature and consequently retrospective. In case of Brij Mohan Das Laxman Das v/s CIT AIR 1997 SC 1651, Supreme Court held that amendment made in a circumstance where there are contrary views of the High Courts and there is no Supreme Court ruling, then Explanation inserted by the Parliament to clarify the legal position and to settle the controversy is clarificatory in nature.

³⁵ Bennion 2019 p 190

³⁶ Bennion 2019 p 191