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## **GAAR, RETROSPECTIVE AMENDMENTS, AND CROSS-BORDER TAX AVOIDANCE: INSIGHTS FROM THE VODAFONE CASE**

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### **ABSTRACT**

The problem of cross-border tax avoidance is a problem faced by the developing economies especially when multinationals employ offshore arrangements to avoid taxes in the home countries. The case of Vodafone International Holdings B.V. v. Union of India (2012) revealed the flaws in how the Indian tax system captures the transfer of the Indian assets formed as part of an indirect transfer. The Supreme Court decided in favour of Vodafone and made it clear under the tax avoidance does not amount to anything illegal until there is a statutory provision that explicitly binds it, which is the maintenance of legal certainty. The government replied by introducing the amendments in the retrospective which taxes offshore share transfers in which a significant amount of value is derived by Indian assets. Although aimed at safeguarding the revenue, such amendments undermined investor confidence and caused expensive international arbitration litigation. The General Anti-Avoidance Rule (GAAR) was introduced by India in 2017, is a prospect-based and principles based rule to cover impermissible avoidance arrangement. GAAR implements substance-over-form and purpose examination, including the procedure safety and specific threshold, which provide a level of predictability while discouraging the abusive transactions. GAAR encourages fairness, legal certainty, and sustainable compliance when compared to retroactive measures, and this reflects the significance of forward-looking, legislatively sound anti-avoidance rules in the balance between protecting the revenues and investor confidence.

**Keywords:** Cross-border tax avoidance, Vodafone case, retrospective amendment, GAAR, legal certainty

## 1. Introduction

Cross-border tax evasion has emerged as a serious issue for developing economies, where it's common practice for multinational enterprises to structure transactions through off-shore vehicles to avoid paying local taxes.<sup>1</sup> Until very recently, India's territorial tax regime (ITA) had only taxed capital assets located in India<sup>2</sup>, resulting in uncertainty for indirect transfer (sales of shares of foreign companies the value of which comes from Indian assets) for example, almost 40% of FDI in India (2001-2011) came through Mauritius<sup>3</sup>, taking advantage of such capital gains treaty. In context, *Vodafone Intl. Holdings B.V. vs. UOI*<sup>4</sup>, the transfer of USD 11 billion worth of Indian telecom assets to a Dutch company (Vodafone) is deemed not taxable under the law in force at the time, as the sale of its shares was offshore.<sup>5</sup> This decision opened loopholes in Section 9<sup>6</sup>, which led to the introduction of retrospective amendments followed by the General Anti-Avoidance Rules aimed at "clarifying" the tax laws, preventing contrived avoidance but risking unfairness and loss of certainty.

The study analyzes three questions: Firstly, how did the Supreme Court interpret cross-border avoidance in *Vodafone* without GAAR? (2) Why was it acceptable to retrospectively amend Section 9(1)(i) following the *Vodafone* case? (3) Does GAAR now offer a more effective and predictable anti avoidance framework than retroactive legislation?

The hypotheses are that *Vodafone* reaffirmed the rule that any form of tax avoidance is not penalised in the absence of specific procedural legal basis (H1); that the retroactive amendment touched upon tax certainty and investor confidence (H2); and that GAAR provides a clearer ex-ante instrument compared to ad-hoc retroactivity (H3).

An analysis of primary sources (the *Vodafone* judgment, amendments, official circulars), together with secondary commentary (expert reports, law reviews), is taken using a doctrinal

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<sup>1</sup> World losing half a trillion to abuse of tax, Annual Report Finds, TAX JUSTICE NETWORK, <https://taxjustice.net/press/world-losing-half-a-trillion-to-tax-abuse-largely-due-to-8-countries-blocking-un-tax-reform-annual-report-finds/> (last visited Oct. 12, 2025).

<sup>2</sup> Squire Patton Boggs, *The Curious Case of Extraterritorial Taxation in India* (Client Alert) (Jan 2017), <https://www.squirepattonboggs.com/~media/files/insights/publications/2017/01/the-curious-case-of-extraterritorial-taxation-in-india/extraterritorial-taxation-in-india-client-alert.pdf>

<sup>3</sup> Aiyana K. Willard et al., *Witchcraft, Envy, and Norm Enforcement in Mauritius*, 35 HUMAN NATURE 347–381 (2024), <https://link.springer.com/10.1007/s12110-024-09484-4> (last visited Oct 18, 2025)

<sup>4</sup> (2012) 6 SCC 613

<sup>5</sup> Squire Patton Boggs, *supra* note 2, at 1.

<sup>6</sup> Finance Act, 2012, No. 23, § 9.

approach to the subject. Core documents include Supreme Court reports, PIB/CBDT press releases as well as academic analyses, and Finance Act history.

## **2. The Vodafone Precedent: Rationale and Policy Implications**

### **2.1 Facts and Issue: Indirect transfer of Assets**

In 2007, Hutchison Essar Ltd. (HEL) - major Indian telecom operator was acquired by Dutch subsidiary of the British Vodafone Group - Vodafone International Holdings B.V. (VIH), for an approximate USD 11 billion deal. HEL's Indian shares were not purchased directly by VIH, but rather indirectly by virtue of it purchasing shares in CGP Investments (Holdings) Ltd., a Cayman Islands company, the holding value of which was derived primarily from the assets of HEL. India's tax authorities treated this situation as the taxable indirect transfer of Indian assets under ITA 1961 involving the application of Section 9(1)(i) (taxing CGs "accruing or arising in India") and Section 45. Regarding the offshore sale of shares, they reasoned that the massive infrastructure of HEL (situated in India) rendered the sale of shares likewise situated in India. VIH, on its part, inter alia submitted that the transaction was between two foreign entities (by Dutch law) and was therefore outside the taxing jurisdiction of India and that Article 13 of the DTAA between India and the Netherlands provided that direct transfer of Indian property could only be taxed by India. Both the Authority for Advance Rulings (2008) and Bombay High Court (2010) ruled in favour of the Revenue which led to the matter being taken to the Supreme Court.<sup>7</sup>

### **2.2 Supreme Court's Rationale: Form over the substance.**

On January 20, 2012, Vodafone was held for by a unanimous decision of a five-member Bench (Chief Justice Kapadia). The Court stated that Section 9(1)(i) could not be interpreted to include transfers of indirect transfers; to do so would amount to adding words to the statute. As Chief Justice Kapadia put it, reading into law something "which is not there" would mean taxing the deal. Court made the traditional private international law point that a stock in a foreign company is an asset situated at the place of the company's incorporation, not at the place of its business. Hence, had India not indulged in what can be termed as a "look-through" clause, foreign transfer of shares could not have been taxed in India by merely looking at the foreign

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<sup>7</sup> AN ANALYSIS OF THE SUPREME COURT JUDGMENT IN THE VODAFONE CASE | IBFD, <https://www.ibfd.org/shop/journal/analysis-supreme-court-judgment-vodafone-case> (last visited Oct 12, 2025)

structure overlying residue of Indian territory, and it bears mentioning that the Court was quiet about the use of the offshore structures. It acknowledged that there are certain circumstances where the use of SPVs by companies is justified for legitimate commercial and regulatory purposes.<sup>8</sup>

### 2.3 Implications for tax policy

Indeed, a positive signal to investors was noted by many commentators in line with a "Westminster orthodoxy" that is respectful of business form.<sup>9</sup> India's FDI inflows were good in 2011-12 (around USD 36 billion) and exemption of indirect share deal was cited as one of the reasons. On the other hand, the verdict showed a massive leak of revenue: tens of thousands of crores (tens of billions of rupees) of potential tax-based revenue is at stake in the decisions in the case, officials estimated. By 2012, around 40 percent of Indian FDI was channelled through Mauritius (a historic treaty partner).<sup>10</sup> Critics argued Vodafone left India helpless as capital gains on the truly India-derived wealth went untaxed, and fuelled a boom in "treaty shopping" using tax havens.

Internationally, Vodafone had pointed the finger to the shortcomings of then-prevailing laws. It made India push for renegotiation of DTAAAs (e.g. with Mauritius and Singapore) to incorporate anti-abuse clauses as well as it was earlier to the OECD-G20 BEPS Action Plan initiatives on combating treaty abuse. The judgment emphasized that in the absence of express anti-avoidance clauses it is not possible for the courts to re-engineer deals for tax and legislative intervention was required. In effect, Vodafone affirmed the first hypothesis, which was that judicial recourse was limited, and taxation of such indirect transfers awaits the express provision of law, thus allowing for legal certainty.

## 3. Retrospective Addition to Section 9(1)(i): Rationale and Consequence

### 3.1 Rationale: Finance Act 2012

Faced with the Vodafone decision, the government of India moved quickly. The Finance Act 2012 added two new explanations in Section 9 (1) (i) with retrospective effect from 1 April

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<sup>8</sup> Ibid.

<sup>9</sup> <https://www.isas.nus.edu.sg/papers/retrospective-tax-withdrawn-the-indian-government-bites-the-bullet/> (last visited Oct 12, 2025)

<sup>10</sup> MAURITIUS ROUTE WIKIPEDIA, [https://en.wikipedia.org/w/index.php?title=Mauritius\\_route&oldid=1304982663](https://en.wikipedia.org/w/index.php?title=Mauritius_route&oldid=1304982663) (last visited Oct 12, 2025)

1962. These charge indirect transfers as taxable whenever shares (or interest) of a foreign company obtain "substantially" (50%) of their value from assets in India. In practice, this meant that any sale of shares of foreign holding company would be taxed, if Indian subsidiaries contributed at least one-half of the value of assets, irrespective of the offshore form of the transaction.<sup>11</sup>

The accompanying Press Note described the change simply as clarifying "legislative intent" that India should tax transfers of interests in Indian assets to fill the loophole highlighted by Vodafone. Finance Minister Mukherjee justified it in Parliament as an equity measure to prevent "tax arbitrage" by taking Indian capital gain out of India to prevent taxation.<sup>12</sup>

Economically, the reasoning was to be able to preserve the tax base. The government estimated that in the absence of change, indirect deals such as Vodafone can cost India INR 40,000 crores per year. Some comparisons were made with China's recent decision to tax indirect transfers of Chinese assets in 2008. The amendments were expressly declared to be "clarificatory" to circumvent constitutional prohibition on retrospective taxes; nonetheless the effect of the amendments was to bring decades of foreign share sales into India's tax net.<sup>13</sup> The government also justified grandfathering vividness - that is, Parliament left out short-term trades and purely tax minimization devices, but critics doubted the distinction.

### 3.2 Nature: Retrospectivity "Clarification"

Technically, the amendment of 2012 was passed as an "explanation" - a clarifying note - rather than a new levy. However, it was applied in an even-handed way to all relevant transactions since 1962, long beyond any confusion as to legislative intent existing at the time. This move strained constitutional safeguards: According to Article 265, 'taxes to be levied by law'; and Article 14 forbids arbitrary states action. Critics noted that it is well within Parliament's powers to enact retrospective fiscal laws, provided they clearly state such, and yet that designation will not assuage all of the concerns. The amendment was challenged on grounds that it violated the

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<sup>11</sup> Expert Committee on Retrospective Amendments Relating to Indirect Transfer, Draft Report of the Expert Committee on Retrospective Amendments Relating to Indirect Transfer (2012) (India, Dept. of Revenue, Ministry of Finance) at 31.

<sup>12</sup> Expert Committee on Retrospective Amendments 4 (2012) (India, Dept. of Revenue, Ministry of Finance), [https://incometaxindia.gov.in/lists/press%20releases/attachments/21/draft\\_report.pdf](https://incometaxindia.gov.in/lists/press%20releases/attachments/21/draft_report.pdf).

<sup>13</sup> Aftab Ahmed et al., India to scrap retrospective tax law in olive branch to global firms, REUTERS, Aug. 6, 2021, <https://www.reuters.com/world/india/india-proposes-refunds-retrospective-tax-disputes-2021-08-05/> (last visited Oct 12, 2025)

notion of legal certainty and fair play concerning deals which were closed under the old law. For instance, whether or not tax can now be claimed on transactions that were legally valid when made, the Bombay High Court and others considered. In legislative reviews, some of the experts, including Shome Committee, observed that the sweeping retrospective change was leading to "apprehensions about the certainty, predictability and stability of tax laws in India"<sup>14</sup>.

They recommended limiting retrospective effect in order to avoid undue hardship (such as not charging interest/penalty on reassessed amounts). The debate revealed some tension, because while it was designed to address a revenue "mishap", the retroactive amendment created a pall on India's taxation regime.

### 3.3 Criticism: Undoing Sureties and Equity

The retrospective amendment was heavily criticised. Legal scholars argued that it contravened Article 14 by arbitrarily making a distinction between direct and indirect transfers of shares against rational ground. They also warned it violated Article 265 by tax on transactions were beyond the legislative intent at the time. Many investors considered it to be a breach of legitimate expectations. The 2012 parliamentary committee said that the investment climate suffered a "serious setback" and confidence was "hit" by the spectre of retrospective taxes and imminent GAAR<sup>15</sup>. Indeed, India's global "Ease of Doing Business" rank declined in 2014-2016 in part due to perceptions of tax unpredictability. Business surveys around 2013 found majority of foreign executives wary of Indian tax policy, citing retrospective laws as deterrent.

Following tax cases were instances of fallout: Vodafone itself and Cairn Energy Ltd. were each hit with demands of over INR 10,000 crore for share transfers prior to amendment. Both called on BIT protections. Cairn won international arbitration (Hague PCA), and recovered about USD 1.2 billion as damages in 2020. Vodafone vs India - another example where a tribunal in Hague held that India had violated India-Netherlands BIT through retroactive change. Domestically, fighting retro claims took resources away from both companies and others. government's eventual 2021 decision to nullify tax demands on certain cases (if companies withdrew claims) underlined the disruptive effect of the amendment.<sup>16</sup> In net, H2 is borne out- The retroactive overhaul did gain India one-time revenue (estimated at around INR 4,000

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<sup>14</sup> Ibid.

<sup>16</sup> CAIRN ENERGY V INDIA: A LESSON IN BIT RIGHTS AND ENFORCEMENT LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=5fc468b6-42cc-4ce6-8392-03d44419a063> (last visited Oct 12, 2025)

crore), at the cost of India's credibility and expensive arbitration losses (Cairn and Vodafone together over USD 2 billion awarded).

#### **4. GAAR Introduction**

##### **4.1 Chapter X-A, effective since 2017**

It was high time for India's long-standing demand of an anti-abuse rule of general application parallel to global developments in base-erosion and profit sharing "BEPS", that GAAR came into picture. Its provisions first appeared in drafts of the ultimate Direct Taxes Code (2010) and are finally and formally contained in Chapter X-A of the Income Tax Act 2012. However, under the political pressures, it was deferred from being enforced; it was reissued and modified and only notified in April 2017 (effective from AY 2018-19).<sup>17</sup>

GAAR is a principles-based regime, unlike a narrow technical fix. What this does is allow tax agents to ignore "impermissible avoidance arrangements" (IAAs) that do not have a significant substance. GAAR was aimed at being a prospective safeguard only against such contrived deals without relying on retroactively applying rules. The enactors of this argue that it brings India at par with the international best practices (as recommended in OECD BEPS Actions) and ensures that even a tax arrangement which is legal on paper will not be given respect if its main purpose is to avoid tax and it meets certain abusive criteria.<sup>18</sup>

##### **4.2 Material and Particle Components: IAA, Commercial Substance, Purpose Test**

Impermissible Avoidance Arrangement (IAA) under Section 96 (a) While prima facie test is to be met to assess an arrangement as an IAA (b) Arrangement meets one taint limb: creates non-arm's length rights/obligations, results in abuse/misuse of law, lacks commercial substance, implemented through unusual steps<sup>19</sup>; In practice, this is the flip side of the OECD principal purpose test and the substance over form philosophy. The legislation also creates a rebuttable presumption that where a step of an arrangement's primary purpose is to avert tax, the whole

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<sup>17</sup> BASICS ON GENERAL ANTI AVOIDANCE RULE (GAAR) IN INDIA - INDIANECONOMY.NET INDIAN ECONOMY, <https://indianeconomy.com/splclassroom/basics-on-general-anti-avoidance-rules-gaar-in-india/> (last visited Oct 12, 2025)

<sup>18</sup> OECD, BEPS PROJECT EXPLANATORY STATEMENT: 2015 FINAL REPORTS (OECD) (2016), [https://www.oecd.org/en/publications/beps-project-explanatory-statement\\_9789264263437-en.html](https://www.oecd.org/en/publications/beps-project-explanatory-statement_9789264263437-en.html) (last visited Oct 12, 2025)

<sup>19</sup> Taxmacs, Chapter X-A: General Anti-Avoidance Rule (2018), <https://taxmacs.com/wp-content/uploads/2018/05/10a.-Chapter-XA-General-anti-avoidance-rule.pdf>

arrangement is presumed to be impermissible<sup>20</sup>. Commercial substance<sup>21</sup> is strictly defined; an arrangement is deemed to lack substance where its "substance or effect" differs substantially from its form, or involves round-tripping, offsetting elements, or disguises value or ownership of monetary funds.

For instance, financing a transaction through "accommodating party" whose sole purpose is to funnel benefits back to the investor is caught. Crucially however, simple features are not determinative: e.g. factors such as the duration of arrangement or the payment of taxes are only relevant (and not necessarily determinative) under Section 97 (4). Thus GAAR is aimed at arrangements that are essentially artificial or tax motivated in substantive manner.

S. 99-100 permit the tax broker to recharacterize or disregard an IAA, and treat its legal form as if it were never created (e.g. combining steps or considering income to accumulate differently). In effect, GAAR supersedes not only the domestic law but also tax treaties (according to Section 90(2A)), thus no refuge in a treaty can be found, if GAAR is applicable. However, several safeguards and thresholds were put in place so that misuse could not occur. Notably, rules contain a cap in terms of money, GAAR is not invoked unless the resultant tax benefit is more than 3 crore.<sup>22</sup> Routine or small transactions therefore are exempt. The law also provides for specific exceptions (e.g. certain investments by FPIs) and provides for two-tiered review process - any GAAR order shall need to be approved by committee (called the Approving Panel) headed by a High Court judge.<sup>23</sup>

#### 4.3 Procedural safeguards and Exemptions

GAAR's procedure is elaborate in order to see the fairness. Before, tax officer can apply GAAR, the case is to be reviewed by the Principal Commissioner/Commissioner of Income Tax, who then needs to refer the case to a three-member Approving Panel (AP) including judicial members.<sup>24</sup> The Panel listens to the taxpayer, reviews evidence of good faith purpose, and it is only then that a written approval (or rejection) of the GAAR invocation is made. two-step check

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<sup>20</sup> Income-tax Act 1961, s 96 (India).

<sup>21</sup> Income-tax Act 1961, s 97 (India).

<sup>22</sup> APPLICABILITY OF GAAR - FUNDAMENTAL REQUIREMENTS,  
<https://www.rashminsanghvi.com/downloads/taxation/international-taxation/article-GAAR-applicability-CTC.html> (last visited Oct 12, 2025)

<sup>23</sup> Ibid.

<sup>24</sup> FCS Deepak Pratap Singh, 'GAAR: General Anti-Avoidance Rules' (CAclubindia, 6 April 2020) <https://www.caclubindia.com/articles/general-anti-avoidance-rules-gaar--40948.asp> accessed 11 October 2025.

in order to avoid capricious enforcement. For instance GAAR cannot be applied to an arrangement already scrutinised and accepted by competent court, AAR or Panel itself in previous year under similar facts. Further, arrangement conducted to meet the limitation of benefits clause of a treaty shall not be subject to GAAR.<sup>25</sup>

These safeguards are similar to those in other jurisdictions. For example, UK GAAR has "double reasonableness" and an advisory panel; Canada's GAAR also involves a misuse/abuse analysis. India's system is also explicitly prospective: all of its GAAR provisions (Chapter X-A) only apply to assessments from FY2017-18 onward. Taxpayers have advance clarity on the scope of GAAR through enabling rules.<sup>26</sup>

#### 4.4 Retrospective measures vs. GAAR

GAAR reflects a positive, forward looking, case-by-case remedy to avoidance, as opposed to the retrospective amending after the fact of an obligation.<sup>27</sup> By being ex ante and codified, GAAR has a very significant ability to increase predictability, the criteria for taxation and the panel are known beforehand, whereas retrospective law imposed unknown liabilities on taxpayers for the future<sup>28</sup>. Moreover, GAAR's adaptability enables it to operate in cases of unforeseen schemes without consequently requiring new legislation for each new scheme. It brings India in line with international norms: Many countries in the Organisation for Economic Co-operation and Development (e.g. UK, Canada, Australia) use similar rules-GAAR-like rules-for the prevention of contrived transactions.<sup>29</sup> Example: When implementing GAAR in practice, Indian tax authorities have used the provision selectively; e.g. under the recent ITAT rulings GAAR was brought to bear on round trip offshore transfers of shares (Ayodhya Rami Reddy Alla v. PCIT<sup>30</sup>) and thrown out dubious international restructurings (Shell India v. ACIT,

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<sup>25</sup> Ibid.

<sup>26</sup> CLARIFICATIONS ON IMPLEMENTATION OF GAAR PROVISIONS UNDER THE INCOME TAX ACT, 1961, <https://www.pib.gov.in/www.pib.gov.in/Pressreleaseshare.aspx?PRID=1481279> (last visited Oct 9, 2025)

<sup>27</sup> GAAR deferred for 2 years: Jaitley, THE HINDU, Feb. 28, 2015, <https://www.thehindu.com/business/budget/GAAR-deferred-for-2-years-Jaitley/article60516758.ece> (last visited Oct 9, 2025)

<sup>28</sup> GAAR FROM APRIL 1; TO BE INVOKED IN FAIR, RATIONAL MANNER, SAYS TAX DEPARTMENT NDTV PROFIT, <https://www.ndtvprofit.com/business/gaar-from-april-1-to-be-invoked-in-fair-rational-manner-says-tax-department> (last visited Oct 9, 2025)

<sup>29</sup> IN TAX CLARITY BID TO FOREIGN ENTITIES, GENERAL ANTI-AVOIDANCE RULE TO BECOME APPLICABLE FROM 2017-18: CBDT THE NEW INDIAN EXPRESS, <https://www.newindianexpress.com/business/2017/Jan/27/in-tax-clarity-bid-to-foreign-entities-general-anti-avoidance-rule-to-become-applicable-from-2017-1-1564096.html> (last visited Oct 9, 2025)

<sup>30</sup> The Magazine Committee of Government Law College, Mumbai, <https://glcmag.com/2025/06/03/ayodhya-rami-reddy-alla-vs-principal-commissioner-of-income-tax-pcit/> (last visited Oct 9, 2025)

2018).

In sum, GAAR seems to vindicate H3: it offers a transparent, rule-based framework that makes clear on advance tax risk as opposed to spot fixes of retrospective fixes. Its elaborate procedural safeguards and international consonance help build trust, while at the same time allowing the tax authority to limit gross abuse.<sup>31</sup> (Of course, the complexity of GAAR requires robust administration and clear guidelines so that it will not be arbitrarily applied. In addition, other improvements could be incorporated into these improvements - digitizing AP procedures, for instance, and grounding the GAAR on the harmonized outcomes of the OECD's work on BEPS.

## **5. Comparative Policy Analysis and Assessment (CPAA)**

### **5.1 Legal Certainty: Retrospective Negates while GAAR favours.**

The contrast between the retrospective amendments and GAAR exemplifies the opposite of paradigms. The changes made in 2012 were the perfect example of legal uncertainty: ex post legislation overturned settled deals, trampling on the principle of certainty which has been so famously cited in Vodafone.<sup>32</sup> This unpredictability went even to the point of precipitating bilateral treaty claims.<sup>33</sup> Stakeholders can then count on the application of GAAR (they know, for example, that treaty law still applies unless LoB-exceptions do not). As a rule of thumb, the experience of India indicates that the ex post taxation in India plays a significant role in discouraging investment while a well calibrated ex ante GAAR maintains the order while announcing the potential consequences beforehand.

### **5.2 Investor Confidence: GAAR Brings Back What Retro Took Away**

Retrospective taxation left many foreign investors fearful. The chaos over the tax treatment of high profile cases (Vodafone; Cairn) and the fear of unforeseen tax bills were part of the narrative, creating the impression that no deal was secure from the retroactive treatment of

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<sup>31</sup> INDIA'S GAAR: ANTI-TAX AVOIDANCE RULES, RISKS & COMPLIANCE INDIA BRIEFING NEWS, <https://www.india-briefing.com/news/indias-gaar-explained-anti-tax-avoidance-rules-risks-and-compliance-strategies-39244.html/> (last visited Oct 9, 2025)

<sup>32</sup> INDIA LAW JOURNAL, <https://www.indialawjournal.org/archives/volume9/issue-1/article8.html> (last visited Oct 9, 2025)

<sup>33</sup> Retro tax no more; refunds to Cairn, Vodafone demands likely: 10 things to know mint, <https://www.livemint.com/news/india/retro-tax-no-more-refunds-to-cairn-vodafone-demands-likely-10-things-to-know-11628169118393.html> (last visited Oct 9, 2025)

historical events.<sup>34</sup> This drove up "country risk" premium for India; as discerned by government panel in 2012, woes with investment climate were largely attributed to fears around retroactive tax rules. GAAR, in contrast, was implemented carefully with a delay, a variety of exemptions and clarifications. For example, in order to give certainty that GAAR would not control an individual taxpayer's choice between legitimate structures regulated by law or well-established treaty benefits, CBDT clearly stated that GAAR would not override structural choice.<sup>35</sup>

In a word: the retrospective measures informed investors that they are fair game even with ancient transactions; GAAR that they are fair game with forward planning by these rules. This shift aligns with H3. Surveys in the industry have since indicated that there is a better mood since retro threats have become distant. It must be mentioned though that GAAR, in and of itself, can be a cause of high-level of aggressive planning. The trade-off is however voluntary and prospective: firms have the freedom to not take potentially risky contrivances instead of being scared of expropriation of historic returns. In a way, GAAR aims at restoring the equilibrium of tax justice without compromising trust - a method that is friendlier to long-term investment than the change of direction of surprise catch-all taxes.

### **5.3 Policy and Revenue Balance: Sustainable vs. Reactionary.**

On the fiscal level, the retrospective changes were, as a one-time revenue spurt as they were, an invitation to endless counterclaims (Cairn, Vodafone) that would end up costing India significantly more in arbitral awards and payments than had been raised in taxes.<sup>36</sup> Further, the backlash may have stifled some fair investment against the long-run revenue base. GAAR on the other hand has been structured as a set of guardrails and not a fund-raising gimmick. Its revenue additions are protective - discouraging the abuse of future taxable sales - and not retroactive taxation of the past sales.

Policy implications: The Indian experience has some definite lessons. To begin with, the anti-avoidance law should not interfere with the need of taxpayers to be certain and final. Rules should be preferably prospective, when retroactive, they should be small-scale (e.g. restricted

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<sup>34</sup> S. Vasudevan and Tanmay Bhatnagar, Rollback of retro tax: Too late and little to heal the wounds?, THE TIMES OF INDIA, , <https://timesofindia.indiatimes.com/blogs/voices/rollback-of-retro-tax-too-late-and-little-to-heal-the-wounds/> (last visited Oct 19, 2025)

<sup>35</sup> Govt brings bill to axe retro tax imposed on Vodafone, Cairn, THE TIMES OF INDIA, Aug. 6, 2021, <https://timesofindia.indiatimes.com/business/india-business/govt-brings-bill-to-axe-retro-tax-imposed-on-vodafone-cairn/articleshow/85087178.cms> (last visited Oct 9, 2025)

<sup>36</sup> Punj, *supra* note 33.

to unsettled cases, with safeguards). Second, a well-constructed general rule, such as GAAR or other general rules, will be able to identify aggressive tax planning, but will not intimidate the honest investors.

The elaborate GAAR architecture (thresholds, panels, the substance over the form focus) mirrors similar structures in jurisdictions like the UK and Canada, indicating a convergence in best practices.<sup>37</sup> Third, enabling infrastructure (for instance, robust treaty anti-abuse provisions (LoB clauses)<sup>38</sup>, better information-sharing structures, and improved pricing guidelines) will complement the GAAR process.

## 6. Recommendations:

To improve India's anti-avoidance regime while maintaining certainty, the following measures are recommended:

- Streamlining Approving Panels: Digital case management and published decisions may enhance transparency and consistency regarding the application of GAAR in India.
- Clarifying Base Erosion Rules: Recommending various forms of BEPS Action 7 measures (particularly across treaty limitation) to pre-empt treaty shopping while also creating consistency with the principles triggering domestic GAAR.
- Strengthening Domestic Tax Administration: Building the capacity of field officers in assessing GAAR trigger events that are discretionary in nature reduces arbitrary exercise of discretion.
- Protecting Smaller Investors: Higher money thresholds or safe harbors (as prior means) to limit GAAR application only to those with actual large-scale avoidance.
- Periodic Review of Anti-Avoidance Laws: A consultative mechanism similar to the Shome Committee mechanism used to ascertain and recommend adjustments and

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<sup>37</sup> HMRC, Tax avoidance: general anti-abuse rule guidance (22 Jan 2014; last updated 16 July 2021) part B12–B13, at pages 11–12

<sup>38</sup> India–Mauritius Tax Treaty, Article 27A, Limitation on Benefits Clause, at 10 (as amended by Protocol, Mar. 7, 2024), available at <https://www.incometaxindia.gov.in/pages/international-taxation/dtaa.aspx>.

timing of adjustments to avoid unintended consequences in anti-avoidance laws.

## **7. Conclusion**

The Vodafone saga indicates that the rule-of-law and legislative roadmap are both crucial to sustainable anti-avoidance laws.

The Supreme Court's demand for certainty (H1) set the stage for reforms; the error involving the retro-active tax in 2012 (H2) showed the need for predictability; while GAAR is a calibrated mechanism (H3) that, with proper implementation, can secure tax equity without sacrificing investor confidence. India continues to wrestle with the tension of securing needed revenues in a dependable legal context - a tension that is illustrated in graphics by Vodafone, the backlash, and GAAR.