THE EXPLANATION THAT CHANGES THE LAW: JUDICIAL SCRUTINY OF RETROSPECTIVE AMENDMENTS AND THE LIMITS OF LEGISLATIVE OVERRIDE

Nachiketa Nikunj Shah, Gujarat National Law University Gandhinagar, Gujarat

ABSTRACT

Legislatures often enact retrospective Explanations following court judgments that have highlighted uncertainty or problems with a provision. The Supreme Court has decided that the legislature's description of an amendment cannot bind the courts, that any new burden is presumed to be prospective, that a validating provision must cure the defect identified by the court, and that retrospective fiscal provisions can be reviewed for reasonableness. However, there is no consistent way to determine what an Explanation changes and whether that change can validly be applied retrospectively. This article suggests a five-stage approach: first, identifying the original legal position without reference to the Explanation; secondly, classifying the Explanation as an interpretative clarification, a substantive specification or a substantive extension; thirdly, considering whether retrospective operation causes prejudice; fourthly, considering the legislative background; and finally, considering constitutional validity. A four-factor test is suggested to decide whether an interpretation was reasonably available before the amendment. The framework is applied to Virtual Soft Systems, Gold Coin, Allied Motors, the Vodafone legislation and Gameskraft, and shows how the Court's reasoning has intertwined some of these issues. It does not create a new constitutional principle but provides a structure for applying existing principles.

Keywords: Retrospective Legislation; Clarificatory Explanation; Statutory Interpretation; Legislative Validation; Judicial Finality; Article 14; Article 265; Legal Certainty.

I. Introduction

Parliament and the State legislatures have the power to enact legislation retrospectively within their legislative competence.[1] One common application of this power follows an adverse judicial interpretation of a provision: a retrospective Explanation is inserted into the legislation and described as clarificatory. If it merely explains what the provision always meant, nothing has changed. If, however, it gives a materially different effect to past transactions, it is substantive legislation in disguise. On the face of the Finance Act the two appear alike, but for those who relied on the previous law they are very different.

There are clear principles which govern these situations. Validating legislation must cure the defect identified by the Court.[2] Provisions creating new obligations are presumed to be prospective.[3] The legislature may describe an amendment as clarificatory, but that description does not bind the Court.[4] Retrospective fiscal legislation is subject to review for reasonableness.[5] The problem lies in how to apply these principles. The cases do not explain how the previous position is to be determined where the authorities are silent, conflicting or binding. They tend to treat amendments as either clarificatory or substantive, although in many cases the Explanation selects between a number of possible interpretations of the provision. Sometimes the courts determine the nature of the amendment and whether it is constitutionally permissible in one step.

This article argues that the label attached to an Explanation should not determine its legal nature or whether it is constitutionally permissible. It makes three contributions. First, it proposes a counterfactual approach to determining the original legal position, by asking what the provision would mean without the Explanation. Secondly, it proposes graded levels of semantic departure: An Explanation may be an interpretative clarification, a substantive specification or a substantive extension, and a four-factor test is provided to distinguish specification from extension. Thirdly, it separates the process of determining what has changed from determining

[1]INDIA CONST. arts. 245, 246. References to the Income-tax Act, 1961 are to that Act as it stood at the relevant time; it has since been replaced by the Income-tax Act, 2025. Paragraph references are to the judgments as delivered by the Supreme Court of India; some law reports number paragraphs differently.

[2]Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality, (1969) 2 SCC 283 (India) (Constitution Bench), *as extracted in* NHPC Ltd. v. State of Himachal Pradesh, 2023 INSC 810, para 10.1(ii) (India); *NHPC*, 2023 INSC 810, para 15.

[3]Comm'r of Income Tax v. Vatika Township (P) Ltd., (2015) 1 SCC 1, paras 31–32 (India) (Constitution Bench).

[4]Sree Sankaracharya Univ. of Sanskrit v. Dr. Manu, 2023 LiveLaw (SC) 468, para 9.2 (India).

[5]R.C. Tobacco (P) Ltd. v. Union of India, (2005) 7 SCC 725 (India), *as extracted in* Jayam & Co. v. Assistant Comm'r, (2016) 15 SCC 125, para 14 (India).

whether there has been prejudice, examining the legislative context and assessing constitutional validity. This is the author's proposed framework and has not been adopted by the Supreme Court, although each stage uses principles the Court has acknowledged.

Part II outlines the current principles and identifies the problem. Part III sets out the framework. Part IV addresses two criticisms. Part V applies the framework to *Virtual Soft Systems*, *Gold Coin*, *Allied Motors*, the Vodafone legislation and *Gameskraft*. Part VI concludes.

II. Existing Principles

A. Legislative Power, Validation and Judicial Finality

A distinction has been drawn between impermissible legislative interference with judicial power and a permissible retrospective change in the law.[6] A Constitution Bench held in *Prithvi Cotton Mills* that, to validate a levy declared invalid, the competent legislature must remove the defect which rendered the levy invalid, so that the decision could not have been given under the amended law. The limit is shown by *D. Cawasji & Co.*, decided by a three-judge bench. There, the High Court had held that sales tax could not be levied on excise duty and had ordered refunds; the State then increased the rate on arrack from 6.5 per cent to 45 per cent with effect from 1966. The Court held that the only object of the amendment was to nullify the judgment and retain the tax, that the defect had not been cured, and that such a retrospective levy "has to be justified on proper and cogent grounds"; the increase was struck down.[7] A two-judge bench in *Indian Aluminum* held that although the legislature cannot directly overrule a decision, it can render it ineffective by removing its basis.[8] The principles were restated in the two-judge decision in *NHPC*: the validating law must cure the defect, may be retrospective, must not be arbitrary, and cannot simply be used to circumvent an adverse decision.[9]

B. Explanations and the Binary Approach

In *Sundaram Pillai*, the majority of a three-judge bench held that the objects of an Explanation are "to explain the meaning and intendment of the Act itself", to clarify any "obscurity or

[6]Tirath Ram Rajendra Nath v. State of U.P., (1973) 3 SCC 585 (India), *as summarised in NHPC*, 2023 INSC 810, para 10.1(i).
[7]D. Cawasji & Co. v. State of Mysore, 1984 Supp SCC 490, [1985] 1 SCR 825, 841–42 (India).
[8]Indian Aluminum Co. v. State of Kerala, (1996) 7 SCC 637, para 56 (India) (principle [9]).
[9]*NHPC*, 2023 INSC 810, para 15.

vagueness in the main enactment", "to provide an additional support to the dominant object of the Act", and to fill a relevant gap. However, an Explanation "cannot … take away a statutory right".[10] In *Keshavlal Jethalal Shah*, a seven-judge bench held that an amendment could not be treated as explanatory because it did "not seek to explain any pre-existing legislation which was ambiguous or defective".[11] In *Zile Singh*, a three-judge bench held that the presumption against retrospectivity does not apply to declaratory statutes, and that whether a statute is declaratory depends on its substance and not its form.[12]

This principle has been applied in various fiscal cases. In *Sedco Forex*, a two-judge bench held that an Explanation giving an artificial meaning to "earned in India", deliberately made operative from a future date, could not be applied to past years.[13] In *Vatika Township*, a Constitution Bench held that the presumption against retrospectivity rests on fairness, since everyone is entitled to plan their affairs according to the existing law. The proviso fixing the rate of surcharge in block assessments was held to be substantive and prospective, because the rate could not be determined without it.[14] In *Martin Lottery*, a two-judge bench held that an Explanation introducing a new concept of taxation, although stated to be "for the removal of doubts", could not operate retrospectively; it expressly left the constitutional validity of the provision undecided.[15] In *Sree Sankaracharya*, a two-judge bench held that a curative or clarificatory provision can be retrospective where the existing law was vague or ambiguous; that a clarification cannot expand the original provision; that the label used does not bind the Court; and that a clarification must not impose an unanticipated burden or withdraw an anticipated benefit.[16] Most recently, in *Asia Sugar*, a two-judge bench held that a retrospective restriction of a sales-tax exemption was a change in the law, and that it was within the competence of the legislature. It noted that clear retrospective wording answers only the question of interpretation and does not prevent constitutional challenge.[17]

[10]S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591, [1985] 2 SCR 643, 668–69 (India) (Fazal Ali & Varadarajan, JJ.; Mukharji, J., dissenting).
[11]Keshavlal Jethalal Shah v. Mohanlal Bhagwandas, AIR 1968 SC 1336, [1968] 3 SCR 623 (India).
[12]Zile Singh v. State of Haryana, (2004) 8 SCC 1, paras 13–15 (India).
[13]Sedco Forex Int'l Drill Inc. v. Comm'r of Income Tax, (2005) 12 SCC 717 (India).
[14]*Vatika*, (2015) 1 SCC 1, paras 31–32, 38–39. The holding in paras 38–39 is the ratio; paras 31–32 state the principle the Court applied.
[15]Union of India v. Martin Lottery Agencies Ltd., (2009) 12 SCC 209, paras 24, 27, 36–37 (India). The remarks on Entries 92C and 97 of List I in para 24 are obiter, since validity was not decided (para 37).
[16]*Sree Sankaracharya*, 2023 LiveLaw (SC) 468, paras 9.2, 10.
[17]Asia Sugar & Chem. Co. v. State of Karnataka, 2026 INSC 693, paras 51, 65–66 (India).

C. The Gap

The leading commentary, and that which most closely relates to this issue, uses the same binary approach; this survey does not claim that no graded approach exists elsewhere. Justice G.P. Singh's treatise frames the question as whether a provision is declaratory or substantive.[18] Andharia considered whether the 2010 Explanation to section 9 was clarificatory.[19] The Expert Committee on the 2012 indirect-transfer amendments found that they were not clarificatory and suggested that their effects be restricted; as a policy committee, however, it did not provide any test for courts.[20] Soni reads *Vatika* as having two elements: all elements of the charge must be capable of being ascertained, and the conduct of the relevant institutions shows whether the position was settled.[21]

There are several problems with this approach. First, there is no uniform way of determining the original position where there was no binding authority, conflicting High Court authority or a binding decision. Secondly, the binary approach leaves no room for an amendment that chooses between several reasonable interpretations, so whether the amendment is retrospective depends on which box it falls into. Under the *Sree Sankaracharya* threshold all such amendments would be substantive, whereas in *Gold Coin* one was treated as clarificatory. Lastly, the nature of the amendment is sometimes decided together with its effects. In *Sree Sankaracharya*, the absence of an unforeseen burden is included in the definition of a clarification, whereas *Asia Sugar* separates the two.

This article separates three questions which are often confused: the meaning of the original provision, the effect of the Explanation on that meaning, and whether the change may be applied to the past. The specification category addresses the second problem identified above. The later stages give the classification practical and constitutional consequences, so that a

[18]G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION (11th ed. 2008), *quoted in* Comm'r of Income Tax v. Gold Coin Health Food (P) Ltd., (2008) 9 SCC 622, para 15 (India), *and Sree Sankaracharya*, 2023 LiveLaw (SC) 468, para 8.2.

[19]Prateek Andharia, *The Validity of Retrospective Amendments to the Income Tax Act: Section 9 of the Act and the Ishikawajima Harima Case*, 4 NUJS L. REV. 269 (2011).

[20]EXPERT COMM. ON RETROSPECTIVE AMENDMENTS RELATING TO INDIRECT TRANSFER, REPORT (2012) (India).

[21]Varun Soni, *Retrospective Taxation, the Four-Component Test, and What Gameskraft Left Unanswered – Part I*, INDIACORPLAW (Aug. 8, 2026), https://indiacorplaw.in/2026/08/08/retrospective-taxation-the-four-component-test-and-what-gameskraft-left-unanswered-part-i/; Varun Soni, *Retrospective Taxation, the Four-Component Test, and What Gameskraft Left Unanswered – Part II*, INDIACORPLAW (Aug. 9, 2026), https://indiacorplaw.in/2026/08/09/retrospective-taxation-the-four-component-test-and-what-gameskraft-left-unanswered-part-ii/.

substantive amendment is not treated as invalid merely because it is substantive, and a clarificatory label is not treated as permission to apply an amendment retrospectively.

III. The Five-Stage Framework

The framework is structured around five stages: Meaning, Change, Consequence, Context and Validity. Each stage asks a single question. The results of the earlier stages inform the later stages, but none of them predetermines another.

Stage 1: What did the original law say? Establishing the ordinary meaning using the text, scheme, previous case law and contemporary practice. This should result in a clear or clear range of meanings. Stage 2: What has changed? Comparing the effect of the original provision to that of the Explanation. This can be done using the four factors test. Categorizing the Explanation as clarificatory, particularizing or amending. Stage 3: What effect will retroactive application have upon those affected? Analyzing who will be affected and looking at the effect of each consequence. How far back will it go and whether they could reasonably have foreseen it. Whether any deals have been done and decisions have been made. This should provide a profile as to what prejudice will occur. Stage 4: Why and how was it enacted? Consider when the amendment happened, the Memorandum and Notes on Clauses. Was it in response to a judgement? Were there any transitional provisions? This will provide a contextual analysis. Stage 5: Could it be seen to have a retroactive effect? Looking at the legislative competence, finality of the judiciary. Articles 14, 265 and 20(1). This provides an independent constitutional conclusion.

A. Stage 1: Reconstruction of the Original Legal Position

Stage 1 asks what the provision meant at the time of the transaction. Four principles should be considered.

(i) The Explanation must not be used as evidence of the meaning of the original provision. Otherwise the law would be determined by the later amendment to the provision.

(ii) Evidence relating to the original meaning must be separated from evidence relating to why the legislature intervened. Circulars issued at the time and administrative practice provide evidence of the original meaning. The Memorandum, Notes on Clauses and other documents accompanying the amendment explain why there was an intervention and fall under Stage 4.

(iii) The court must identify the binding authority applicable to the persons, transactions and jurisdiction concerned. A Supreme Court construction applies across the whole of India. A construction by the High Court of a particular jurisdiction, not displaced by the Supreme Court, binds all authorities and persons within that jurisdiction; other High Courts provide only persuasive authority. The baseline for central legislation may therefore vary between jurisdictions.

(iv) Where High Courts have disagreed and the Supreme Court has not ruled, the court should record the interpretations reasonably available at the time. It should not assume that, because the disagreement was later resolved, the losing interpretation was unreasonable at the time.

This produces either a definitive meaning of the provision or a defined range of reasonable interpretations. A later court may find that only one interpretation is correct; that finding is distinct from the question whether another interpretation was reasonably available before the amendment.

B. Stage 2: Semantic Deviation

Stage 2 asks what the Explanation does to the law. It may not alter the words of the main provision but may create a deeming fiction or a new connecting factor; it may also alter the words without affecting any outcome. There are three categories.

Interpretative clarification: The Explanation makes explicit a meaning already established by the original provision, taking into account its context and the applicable binding authority.

Substantive specification: The Explanation selects one interpretation from the range of reasonable interpretations available under the original provision. It does not create a requirement, obligation or principle that could not reasonably have been derived from the original provision.

Substantive extension: The Explanation creates a new requirement, obligation, condition, outcome or principle that could not reasonably have been derived from the original provision.

The question is whether a court, interpreting the original provision without the Explanation and bound by the authority identified at Stage 1, could reasonably have adopted the Explanation's interpretation. If binding authority had fixed a contrary meaning, the court could not have done

so; the Explanation will then generally be an extension, unless the legislature has provided a genuinely new legal basis. If there was no binding authority, the following four factors determine whether the interpretation was reasonably available.

(1) *Textual plausibility.* Could the interpretation be reached through the natural meaning of the words in the original provision, or by resolving a genuine ambiguity? If it requires words to be read into the provision or the natural meaning to be ignored, it was not reasonably available.

(2) *Structural coherence.* Does the interpretation fit the surrounding provisions and the overall scheme of the Act? Would it render any other provision redundant or create an outcome the scheme excludes elsewhere? If it is possible only by ignoring a related provision, it is not a reasonable interpretation.

(3) *Pre-amendment institutional footprint.* Is there evidence that the provision was interpreted this way before the dispute arose or, at least, before the amendment, such as a High Court decision, a committee or Law Commission report, or an administrative circular? This factor supports factors (1) and (2). It cannot make available an interpretation that the wording or structure excludes, but its absence is significant where the Revenue claims that an interpretation was always obvious.

(4) *Operation without a deeming fiction.* Does the interpretation operate on the existing wording, or can it be reached only through a deeming fiction? If only through a deeming fiction, there is a strong presumption that the Explanation is an extension, consistently with *Sedco Forex*.[22] The presumption is not automatic, because a deeming provision sometimes states an outcome that the original wording already produced; but the party arguing for clarification must show this.

Factors (1) and (2) determine whether the interpretation was available, factor (3) supports, and factor (4) filters. If all four are met, the interpretation was reasonably available, and the Explanation is a specification (or a clarification, if the opposing interpretations were not reasonable). If the interpretation fails factor (1) or (2), or relies on a deeming fiction without a convincing answer, the Explanation is an extension. Common signs of an extension are a new element of the charge, a deeming fiction, a new category of activity, the narrowing of an

[22] *Sedco Forex*, (2005) 12 SCC 717.

exemption and the reversal of binding authority.[23]

Avoiding hindsight. The test must be applied as at the time of the transaction. Once an Explanation has been enacted, its interpretation often seems natural and the opposing interpretation strange. There is a danger that the court will reason from the logic of the Explanation, assume that the provision was always ambiguous, and so turn an extension into a specification or a specification into a clarification. To avoid this, the court must set out the opposing interpretations using only the original wording. Institutional material produced after the dispute arose, such as departmental positions in show cause notices or litigation, carries less weight under factor (3), because it is argument rather than contemporaneous interpretation; statements against the interest of the authority that made them are the exception. The court should also ask whether a careful adviser, reading the original provision at the time, would have recognized the Explanation's interpretation as one a court might adopt. If it can be seen only by working backwards from the Explanation, it was not a reasonable interpretation.

The three categories can be summarized as follows: An interpretive clarification simply means that the provision was understood to mean that. It can be seen from the text and backed up by binding authority. There was no reasonable alternative interpretation. It does not create any new legal obligation but if there is any prejudice this must be noted in stage 3. A substantive specification means that one of the reasonable interpretations has been chosen. This will often be the case where there was disagreement between the High Courts or there were multiple reasonable interpretations. The interpretation will satisfy all 4 factors. It may or may not operate retrospectively and this must be assessed separately. A substantive extension means that it has created an effect which cannot be reasonably interpreted from the original provision. This can be seen from the failure of the text/structure factor, using a deeming fiction, adding an element to the charge, creating a new category of activity, limiting an exemption or reversing binding authority. It must be justified as substantive retrospective legislation.

Much of the work is done by the specification category. Classifying an Explanation as a specification does not mean that it must apply retrospectively, and the fact that it is not a mere clarification does not mean that it cannot. The category is purely analytical. Whether the change

[23]*See Vatika*, (2015) 1 SCC 1, para 39 (rate of surcharge not determinable before the amendment); *Sedco Forex*, (2005) 12 SCC 717 (artificial meaning); *Martin Lottery*, (2009) 12 SCC 209, paras 24, 27 (new concept of tax); *Asia Sugar*, 2026 INSC 693, para 65 (restricted exemption).

should apply retrospectively is decided at Stages 3 to 5.

C. Stage 3: Retrospective Prejudice

Stage 2 establishes what has changed. Stage 3 considers what effect applying that change to past situations will have. This produces a profile of the prejudice suffered, compiled for each consequence (tax, interest, civil penalty, prosecution, or loss of a benefit or credit). The questions are: who is affected; what extra liability or disability is imposed; how far back the amendment applies; whether it was reasonably foreseeable; and whether it disturbs concluded transactions, accrued rights, completed assessments or previous judicial decisions.

Evidence is often relevant to more than one stage. In *Asia Sugar*, the Department's original assessments treating imported sugar as exempt showed what the exemption meant, and also showed that the dealers had reasonably not collected tax that they could not now recover from their purchasers.[24]

Stage 3 is descriptive. A heavy prejudice profile does not necessarily mean that the amendment is unconstitutional, and a light profile does not establish validity. The category from Stage 2 does not by itself fix the profile. Generally, an extension will impose the heaviest burden. However, a specification may cause significant prejudice if people organized their affairs around a reasonable alternative interpretation, and a clarification may cause practical prejudice if it disturbs established practices or concluded transactions. Only at Stage 5 does the prejudice profile bear on constitutionality.

D. Stage 4: Context and Purpose of the Legislation

This stage looks at why and in what circumstances the Explanation was enacted. When was it enacted? Did it follow an adverse decision? What do the Memorandum, Notes on Clauses and other materials say? Does it respond to a recognized problem of interpretation, a drafting mistake or a change of policy? Does the stated purpose match the legal effect? Are there transitional or saving provisions to protect those who relied on the previous position? Context is evidence, not an independent ground of invalidity. An amendment is not invalid merely because it follows a judgment,[25] and it is not a clarification merely because it says so.[26] If it

[24] *Asia Sugar*, 2026 INSC 693, paras 60, 74, 79–80.
[25] *NHPC*, 2023 INSC 810, para 15.
[26] *Martin Lottery*, (2009) 12 SCC 209, paras 24, 37.

follows a judgment, the principles of validation and judicial finality come into play at Stage 5.

E. Stage 5: Constitutional Validity

This stage considers whether the Explanation can constitutionally be applied to the past. It relies on the findings of the previous stages but is a separate inquiry, and there is no single test.

Legislative competence. Articles 245 and 246, read with the Seventh Schedule, permit competent legislation to apply to the past, including the grant, restriction and withdrawal of tax exemptions.[27] Competence depends on the substance and effect of the amendment. Its importance can be seen in the lottery cases, where the taxation of lotteries, as betting and gambling, was held to fall within the States' power under Entry 62 of List II.[28]

Judicial finality and validation. If Stage 4 shows that the Explanation follows a judgment, the question is whether the legislature has altered the legal basis of the decision or merely declared that the decision was wrong. If the Explanation follows a binding construction and states that the provision always meant the opposite, it asserts that the court got it wrong. If Stages 1 and 2 show that the amendment reverses a binding construction without providing a new legal basis, it cannot be justified as a clarification; if it can be justified at all, it is only as a new law. The legislature can rephrase the provision or add a deeming fiction to supply a legal basis, but the result must be competent and otherwise constitutional. What it cannot do is obtain a validating effect on the justification that the amendment is a clarification.

Article 14. Retrospective fiscal legislation is not automatically arbitrary. In *R.C. Tobacco*, the question was whether the retrospective operation was unduly oppressive or confiscatory, which depends on the context, the period of retrospectivity and "the degree of any unforeseen or unforeseeable financial burden".[29] Since *Shayara Bano*, legislation can also be struck down as manifestly arbitrary where it is made "capriciously, irrationally and/or without adequate determining principle", or is "excessive and disproportionate".[30] The prejudice profile helps apply both tests. The reach of the amendment relates to *R.C. Tobacco*'s period of retrospectivity; foreseeability relates to the unforeseen burden; completed assessments and the

[27] *Asia Sugar*, 2026 INSC 693, para 66.
[28] Union of India v. Future Gaming Sols. (P) Ltd., 2025 INSC 181, para 18.4 (India).
[29] *R.C. Tobacco*, (2005) 7 SCC 725, *as extracted in Jayam*, (2016) 15 SCC 125, para 14.
[30] Shayara Bano v. Union of India, (2017) 9 SCC 1, para 101 (India) (Nariman, J., for himself and Lalit, J.); *see also* Ass'n for Democratic Reforms v. Union of India, 2024 INSC 113 (India) (Constitution Bench) (applying manifest arbitrariness to plenary legislation).

inability to pass the burden on relate to oppressiveness; and the absence of any link between the burden and a determinate purpose relates to manifest arbitrariness.

Based on these authorities, this article proposes a sliding scale. The further back the amendment reaches and the less foreseeable the burden imposed by an extension, the higher the burden on the State to justify it on a ground beyond simply collecting or recovering revenue for past periods, such as correcting an obvious drafting mistake, preventing a windfall never intended by the original legislation, or maintaining the integrity of the tax base. The proposal draws on *Cawasji*, where a levy imposed retrospectively with no purpose other than to keep money already collected was struck down for want of "proper and cogent" justification,[31] and on *Shayara Bano*'s concern with disproportion. It is not a rule laid down by the Court and does not import a compelling-interest test. Revenue is a legitimate legislative purpose, and if the amendment is a specification with a light profile, very little justification is needed. This is a contextual judgment: the profile is not a score, and no single factor determines how intense the review is.

There may be partial relief where different consequences have different justifications. In *Jayam*, the Court struck down only the retrospective operation of a provision reducing input tax credit already earned.[32] In *Asia Sugar*, the Court upheld the retrospective tax but barred penalties for the past period and allowed interest only from a fresh demand, because penalty presupposes culpability.[33] The Court did not state the constitutional provision on which this was based; this article suggests, as its own inference, that Article 14 is one plausible basis.

Article 265. Article 265 requires that taxes be levied and collected by authority of law. This is a requirement of legality, not of reasonableness. If the retrospective legislation is valid, the tax is levied with authority; if it is invalid, it is not, and any money collected must be returned, as in *Cawasji*. If the legislation is valid only in part, there is authority only for the valid part, which is why *Asia Sugar* directed that penalty or interest already collected be adjusted or refunded.[34]

Article 20(1). Article 20(1) relates only to criminal liability and the enhancement of criminal

[31] *Cawasji*, 1984 Supp SCC 490, [1985] 1 SCR 825, 841–42.
[32] *Jayam*, (2016) 15 SCC 125, para 18.
[33] *Asia Sugar*, 2026 INSC 693, paras 80–84.
[34] *Asia Sugar*, 2026 INSC 693, para 91(e).

punishment. A penalty imposed by tax authorities is "only a civil liability, though penal in character", and is not covered.[35] Its role is narrow but firm: no prosecution can rest on conduct that became an offence only because of a retrospective Explanation. Validating legislation sometimes makes this explicit.[36]

IV. Objections

The first objection is that the specification category is uncertain, because the range of reasonable interpretations may itself be disputed. The point is valid, but the framework reduces the uncertainty. It confines the dispute to a specific question decided by the four-factor test. It reduces the importance of that question, because classifying an amendment as a specification rather than a clarification no longer decides whether it is retrospective. And it requires the court to state its conclusion, so that two benches with differing views of the baseline can still agree on whether retrospective operation was justified.

The second objection is that five stages burden the courts. However, most cases are decided quickly. If the baseline is fixed by binding authority and reversed by the Explanation, Stages 1 and 2 take a paragraph. If the amendment is beneficial, Stage 5 reduces to competence. Only in the more complex cases will a longer analysis be needed.

V. Applying the Framework

A. *Virtual Soft Systems* and *Gold Coin*

Before 2003, section 271(1)(c)(iii) provided that the penalty would be imposed "in addition to any tax payable", and Explanation 4, inserted in 1976, defined the tax sought to be evaded. The Finance Act, 2002 amended this, with effect from April 1, 2003, to read "in addition to tax, if any, payable", and amended Explanation 4 to cover cases in which concealment reduced a returned loss.[37] The issue was whether the penalty could be imposed for earlier years where the return showed a loss.

In *Virtual Soft Systems*, decided on February 6, 2007, a two-judge bench held that it could not.

[35]Shiv Dutt Rai Fateh Chand v. Union of India, (1983) 3 SCC 529 (India).
[36]*NHPC*, 2023 INSC 810, para 9.1 (quoting Himachal Pradesh Passengers and Goods Taxation (Amendment and Validation) Act, 1997, § 9(2)(b)).
[37]Income-tax Act, 1961, § 271(1)(c)(iii) & expl. 4 (India), *as amended by* Finance Act, 2002 (India).

The penal provision was to be strictly construed; the amendment widened the scope of the penalty and was prospective; the Notes on Clauses could not alter that result; and the contrary view of the Karnataka High Court was disapproved.[38] On a reference made on April 7, 2008, a three-judge bench in *Gold Coin*, decided on August 18, 2008, held that the amendment was clarificatory. It relied on *Harprasad*, which had held that "income" in the charging provisions includes loss, on the recommendations of the Wanchoo Committee, and on CBDT Circular No. 204 of 1976.[39] It held that the view in *Virtual Soft* "is not correct".[40] The larger bench therefore overruled the decision of the smaller bench. What survives of *Virtual Soft* is its statement that the label used in a statute does not bind the court, which *Gold Coin* itself applied.[41]

Why the benches diverged. The difference between the two decisions lies at Stages 1 and 2. *Virtual Soft* treated the canon of strict construction of penal provisions as fixing the baseline: because the provision was penal, the words "tax payable" had to be read narrowly, and a loss return produced no tax payable. On that view the 2002 amendment necessarily widened the law. *Gold Coin*, in contrast, looked at how the provision was understood before the amendment: *Harprasad*, the Wanchoo Committee and the 1976 circular showed that the wider reading was held long before the dispute. It then went further and decided that the wider reading was the only correct one. Each bench therefore reduced a range of reasonable readings to a single point, in opposite directions.

Applying the four factors, the Revenue's interpretation was reasonable on the language: Explanation 4 defined the tax sought to be evaded, and *Harprasad* had read income to include loss (factor 1). It was consistent with the computation provisions (factor 2). It had an institutional history in the 1976 circular and the Committee's report (factor 3). It required no deeming fiction (factor 4). The narrower interpretation was also reasonable, and High Courts had divided.[42] The 2002 amendment is therefore a substantive specification. It cannot be classed as a clarification (as in *Gold Coin*) or as an extension (as in *Virtual Soft*). The Notes on Clauses accompanying the amendment belong to Stage 4. They give no clear evidence: they described the amendment as clarificatory, yet Parliament gave it a prospective commencement

[38] Virtual Soft Sys. Ltd. v. Comm'r of Income Tax, (2007) 9 SCC 665, paras 24, 51–52, 56 (India).
[39] *Gold Coin*, (2008) 9 SCC 622, paras 7–11; Comm'r of Income Tax v. Harprasad & Co. (P) Ltd., (1975) 3 SCC 868 (India); CBDT Circular No. 204 (July 24, 1976) (India).
[40] *Gold Coin*, (2008) 9 SCC 622, para 17.
[41] *Id.* para 6.
[42] *Virtual Soft*, (2007) 9 SCC 665, para 56; *see also Gold Coin*, (2008) 9 SCC 622, para 4 (recording the Revenue's submission).

date.

The paradox of penalties. The case highlights the conflict between strict construction of penal provisions and the purposive interpretation of fiscal statutes. This can be resolved through the stages. Strict construction is applied at Stage 1, but it does not exclude a reasonable interpretation that has textual and institutional support. The penal nature of the provision returns at Stage 3, where the penalty is recorded separately from the tax, and at Stage 5. Article 20(1) does not apply, because the penalty is a civil liability.[43] Article 14 does apply, and here penalty differs from tax: because penalty is based on culpability, it is harder to justify imposing it retrospectively where the taxpayer relied on a reasonable interpretation, particularly if that interpretation was binding in the taxpayer's own jurisdiction. Under the third principle of Stage 1, an assessee within the territory of a High Court that had adopted the narrow interpretation faced a baseline fixed by binding authority. For that assessee, the 2002 amendment was an extension, and a penalty for the earlier years would need justification of the kind that was found lacking in *Asia Sugar*.

On the facts of *Gold Coin*, however, the prejudice was modest. The penalty attached to concealment or inaccurate particulars, conduct wrongful under either interpretation; the retrospective resolution affected only whether a penalty was payable where concealment reduced a loss. The Revenue's interpretation had been public since 1976, and only open assessments were affected. The Solicitor General's statement that, even if the Revenue succeeded, penalty would not be demanded in two of the matters before the Court is consistent with this.[44] There was also no question of validation, because the amendment responded to conflicting High Court decisions rather than to a Supreme Court judgment. The framework therefore supports the outcome of *Gold Coin* but not its reasoning: the justification lay in foreseeability and culpability, not in the proposition that the law had always been clear.

B. *Allied Motors*

Section 43B, inserted with effect from April 1, 1984, allowed deduction of specified statutory liabilities such as sales tax only when they were actually paid in the year. Where the tax for the last quarter was paid after the close of the year, no deduction could be claimed in that year. The proviso inserted by the Finance Act, 1987, effective from April 1, 1988, allowed the deduction

[43] *Shiv Dutt Rai*, (1983) 3 SCC 529.
[44] *Gold Coin*, (2008) 9 SCC 622, para 18.

where payment was made before the due date for filing the return; Explanation 2 was inserted by the Finance Act, 1989 with retrospective effect from April 1, 1984.[45] A three-judge bench in *Allied Motors* held that the proviso "supplies an obvious omission", was "remedial in nature", and had to be treated as retrospective so that "a reasonable interpretation can be given to the section as a whole".[46]

Stage 1: the original section admitted a literal interpretation allowing no deduction and, on the Court's reasoning, a purposive interpretation allowing it. Stage 2: the classification is debatable. If the purposive interpretation satisfies the textual and structural factors, the proviso is a substantive specification; if the literal interpretation is the only way the words can be read, it is a substantive extension of a benefit. The word "curative" used by the Court does not help, because it states the conclusion. Stage 3: the amendment was favourable to the assessee, so there was no burden. Stage 4: the provision had a remedial purpose. Stage 5: only competence arises.

Here the Court's reasoning differs from the framework in a way that matters. *Sree Sankaracharya* cites *Allied Motors* as an example of clarification.[47] Read as a case about meaning, it would allow the Revenue to impose burdens by using the "obvious omission" argument. Read through the framework, it is a case about the absence of prejudice. As a specification, it supports retrospective choice between available interpretations where nobody is prejudiced; as an extension, it shows only that the legislature may give relief retrospectively. In either case, it gives no authority to cure an obvious omission retrospectively against the taxpayer.

C. The Vodafone Legislation

A three-judge bench in *Vodafone* held that the transfer of shares in a foreign company indirectly holding an Indian business did not give rise to income deemed to accrue in India under section 9(1)(i), and therefore no withholding obligation arose under section 195.[48] This was countered by Explanations in the Finance Act, 2012, each stated to be "for the removal of doubts" and deemed to have been inserted from April 1, 1962. Explanation 5 to section 9(1)(i) deemed a

[45]Income-tax Act, 1961, § 43B (India), *as amended by* Finance Act, 1987 (India), *and* Finance Act, 1989 (India).
[46]Allied Motors (P) Ltd. v. Comm'r of Income Tax, (1997) 3 SCC 472, (1997) 224 ITR 677, 685 (India).
[47]*Sree Sankaracharya*, 2023 LiveLaw (SC) 468, para 8.4.
[48]Vodafone Int'l Holdings B.V. v. Union of India, (2012) 6 SCC 613 (India).

share in a foreign company to be situated in India if it derived its value substantially from Indian assets. Section 119 of the Finance Act provided that notices, demands and taxes relating to such income "shall be deemed always to have been valid", notwithstanding any judgment of any court, and that there would be no obligation to refund tax.[49] The Supreme Court never ruled on a constitutional challenge to these provisions.[50]

Stages 1 to 4. A binding three-judge construction fixed the baseline. Explanation 5 reached its result through a deeming fiction relocating the situs of foreign shares and reversed that construction; under factors (1) and (4) it is a substantive extension of the law. The prejudice was substantial, with a reach of over five decades and completed transactions affected. The amendments were made within months of the decision and were clearly a response to it, as section 119 shows. The Expert Committee concluded that the amendments were not clarificatory and recommended that interest be waived and that payers should not be treated as assessees in default.[51]

Judicial finality: did section 119 go too far? The question is whether section 119 removed the basis of the decision, which *Prithvi Cotton Mills* permits, or merely made the ruling ineffective without changing the law, which *Cawasji* prohibits. Two reasons suggest that it was permissible. First, the *Vodafone* ruling found that there was no charging provision applying to indirect transfers; Explanation 5 added one, so that the ruling could not have been made under the new law. Secondly, section 119 was general and referred to a class of transactions rather than to the specific ruling; *NHPC* confirms that an amendment made in response to a specific ruling is not for that reason invalid.[52] Two reasons suggest that it went too far. First, section 119 did not simply rely on the new charging provision but independently deemed all previous demands to have always been valid, notwithstanding any ruling, which is the kind of override *Cawasji* prohibited. Secondly, the Explanations stated that the law had always been so, which, as discussed in Part III, amounts to an assertion that the Court was wrong.

[49]Finance Act, 2012, § 119 (India); Income-tax Act, 1961, §§ 2(47) expl. 2, 9(1)(i) expls. 4–5, 195(1) expl. 2 (India).

[50]The tribunal constituted under the India–Netherlands bilateral investment treaty found a breach of the fair and equitable treatment standard. Vodafone Int'l Holdings B.V. v. Republic of India, PCA Case No. 2016-35, Award (Sept. 25, 2020). That finding applies treaty standards, not Articles 14 or 265, and is not relied on here. The Taxation Laws (Amendment) Act, 2021 later withdrew the application of Explanation 5 to transfers before May 28, 2012, on conditions including withdrawal of litigation, with refunds paid without interest; it is a policy choice that leaves the constitutional questions undecided. *See* Taxation Laws (Amendment) Act, 2021 (India).

[51]EXPERT COMM., *supra* note 20.

[52]*NHPC*, 2023 INSC 810, para 15.

Overall, section 119 can be defended on finality only to the extent that it rests on the new law in Explanation 5; its independent deeming of demands adds nothing that a valid change in the law requires. The key issue therefore becomes whether the legislation was justified under Article 14, given a substantive extension reaching back more than fifty years, applied to completed transactions, and imposing withholding liability on persons who could not have deducted tax under the law as declared. Under the graduated standard suggested in Part III.E, the burden on the State would be at its highest. The no-refund clause would also need to be examined under Article 265 if the retrospective charge failed. Finally, under Article 20(1), no one could be prosecuted for failing to deduct tax where the obligation to deduct arose only retrospectively. These are the author's conclusions; no court decided these questions.

D. *Gameskraft*

In *Gameskraft*, a two-judge bench held that Rule 31A of the Central Goods and Services Tax Rules was intra vires, and that the 2023 amendments, including the substitution of Entry 6 of Schedule III and the insertion of Rules 31B and 31C, "are clarificatory and explanatory in nature and consequently retrospective in operation".[53] It also held that the valuation of online gaming "shall stand governed by Rule 31B, including in relation to pending show cause notices".[54] The case can be analyzed using the framework.

Stage 1: the statutory baseline. Rule 31A (3) was inserted in January 2018. It states that "the value of supply of actionable claim in the form of chance to win in betting, gambling or horse racing in a race club shall be 100% of the face value of the bet or the amount paid into the totalizator".[55] Under section 15(5) of the Act, the value of supplies notified by the Government on the recommendations of the Council is determined as prescribed; section 15(4) provides for prescribed valuation where value cannot be determined under section 15(1); and section 164 confers a general rule-making power.[56] It has been argued that, since there was no notification under section 15(5), the valuation measure was not validly prescribed.[57] The Court held, however, that Rule 31A can be traced to sections 15(4) and 164, that the GST Council's recommendation at its 25th meeting satisfied the requirement common to those provisions, and

[53]Directorate Gen. of GST Intelligence v. Gameskraft Techs. (P) Ltd., 2026 INSC 595, paras 84(viii)–(ix) (India).
[54]*Id.* para 84(x).
[55]Central Goods and Services Tax Rules, 2017, r. 31A(3) (India), *inserted by* Notification No. 3/2018–Central Tax (Jan. 23, 2018).
[56]Central Goods and Services Tax Act, 2017, §§ 15(4), 15(5), 164(1), 164(3) (India).
[57]Soni, Part I, *supra* note 21.

that "the precise statutory channel through which delegated authority was exercised cannot by itself invalidate the Rule".[58] The Rule was therefore validly prescribed. The real issue at Stage 1 was whether online games of skill played for stakes could be considered betting or gambling under Rule 31A (3) and Entry 6 of Schedule III before October 2023.

The institutional history. The history of this issue can be seen from the minutes of the GST Council. At the 47th meeting in June 2022, the Group of Ministers recommended that online gaming be taxed at 28 per cent on the full value of consideration, and observed that the law did not differentiate between games of skill and games of chance. This supports the Revenue's interpretation.[59] At the 50th meeting in July 2023, the convener reported that the Group's views "remained inconclusive due to complexity of issue". The Revenue Secretary noted that online gaming companies were arguing that they were not supplying taxable actionable claims under Schedule III, and stated that "an amendment to the law is necessary". It was proposed that online gaming be added to Entry 6 of Schedule III, and the Council decided that the law "may be amended to provide clarity on the matter".[60] In Parts E and F of the judgment, and in its conclusions, the Court relies on the 25th meeting and does not refer to the 47th or 50th meetings.[61]

Under factor (3), the record is mixed, and it must be weighed with the safeguards against hindsight in mind. The 2022 report was made before both the show cause notices of September 2022 and the amendment, and was produced in the course of developing policy. The 2023 statements were made after the issue was raised; however, the Revenue Secretary's acknowledgment that an amendment was required was against the Revenue's interest and carries weight for that reason. Taken together, they show that both the Revenue's and the industry's interpretations were held within the institutions responsible for the tax. That indicates a range of reasonable interpretations.

Stage 2: separating the amendments. The Court treated the amendments as a single clarification.[62] The framework would separate them. The inclusion of online money gaming in

[58] *Gameskraft*, 2026 INSC 595, paras 59–59.3, 62–63.1.
[59] GST Council, Minutes of the 47th Meeting, annex. 8 (Report of the Group of Ministers on Casinos, Race Courses and Online Gaming), at 150–53 (June 28–29, 2022) (India).
[60] GST Council, Minutes of the 50th Meeting, paras 6.2, 6.30, 6.32 & Decision, at 46–56 (July 11, 2023) (India).
[61] *Gameskraft*, 2026 INSC 595, paras 56–67.1, 84–86; *see also* Soni, Part II, *supra* note 21 (making the same observation).
[62] *Gameskraft*, 2026 INSC 595, paras 66.2, 66.7, 67.

Entry 6 of Schedule III selected one interpretation from that range, and is best classed as a substantive specification. The proviso to section 2(105), deeming the platform to be the supplier, operates through a deeming fiction and is presumptively an extension under factor (4), unless the platform was already the supplier on the ordinary meaning of the words. Rule 31B changed the method of valuation, from "the face value of the bet" to "the total amount paid or payable to or deposited with the supplier".[63] Where winnings are re-staked, this may produce a lower value, so its retrospective application may be beneficial; its classification depends on which reading of Rule 31A(3) the baseline adopts.

Stages 3 to 5. The prejudice varies by consequence and by assessee. A large amount of tax was demanded for 2017 to 2022 from platforms that had paid tax on their platform fees, a basis which, according to Soni, the Revenue accepted until the notices of 2022.[64] Interest and penalties raise the further questions considered in *Asia Sugar*, which the conclusions of the judgment do not address. At Stage 4, the delegate had power under section 164(3) to make Rules 31B and 31C retrospective, but brought them into force from October 1, 2023; the Court did not treat the commencement date as decisive.[65] At Stage 5, competence and validity were upheld. Once the 2023 amendments are separated into a specification and an extension, the questions of interest and penalty for the earlier period call for the consequence-by-consequence approach of *Asia Sugar*. The framework does not suggest that *Gameskraft* reached the wrong outcome on tax; it identifies the questions on which the retrospective consequences depend.

Two short examples complete the picture. *Martin Lottery* reached the correct outcome despite combining issues: when determining whether the 2008 Explanation was a clarification, the Court considered Entries 92C and 97 of List I.[66] Under the framework, the Explanation added an activity not covered by the main provision, which is an extension at Stage 2; competence belonged at Stage 5, and it proved decisive in the later litigation.[67] The case closest to the framework is *Asia Sugar*. The baseline was determined from the text, analogous authority and departmental practice; the amendment was treated as an alteration; competence and validity

[63]Central Goods and Services Tax Rules, 2017, r. 31B (India), *inserted by* Notification No. 51/2023–Central Tax (Sept. 29, 2023) (effective Oct. 1, 2023).
[64]Soni, Part I, *supra* note 21.
[65]*Gameskraft*, 2026 INSC 595, para 66.7; *see* Central Goods and Services Tax Act, 2017, § 164(3).
[66]*Martin Lottery*, (2009) 12 SCC 209, para 24.
[67]K. Arumugam v. Union of India, 2024 INSC 630 (India); *Future Gaming*, 2025 INSC 181, para 18.7.

were considered separately; and tax, penalty and interest were considered individually.[68]

VI. Conclusion

The issue with retrospective Explanations has never been the power to enact them. It has been the lack of a structure for determining when an Explanation actually alters the law and what effect this has. The framework provides that structure: it fixes the baseline, recognizes that change comes in degrees, and considers the constitutional question only after considering the effects of applying the law retrospectively.

There are three wider implications. The first concerns constitutional adjudication. Separating the issues means that review under Article 14 can focus on the actual impact on those affected, including the extent and foreseeability of each consequence, so that relief can be given consequence by consequence, as in *Jayam* and *Asia Sugar*, as a principled rather than an exceptional remedy. Secondly, the framework suggests that a legislature intending a retrospective change should say so, explain the problem it is correcting, and provide transitional relief for interest and penalty, rather than relying on the formula "for the removal of doubts". Finally, in tax administration, contemporaneous evidence matters: circulars, committee reports and council minutes created before a dispute arose will be used to determine the baseline, which favors administrations that state their interpretations openly and early.

The rule of law does not require legislatures to refrain from retrospective legislation. It requires courts to consider what the legislation actually does, rather than what it is called.

[68] *Asia Sugar*, 2026 INSC 693, paras 53–63, 65, 66–71, 72–84.