

# Taxing Capital, Attracting Investment: India's International Tax Puzzle

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## Abstract

FDI into India has fallen sharply, from forty-five billion US dollars to 0.35 billion US dollars in the last year, prompting the question of whether India's international tax regime is to blame. Arbind Modi, who has served on the Central Board of Direct Taxes, authored the direct taxes code, helped rewrite India's income tax law, and played a key role in designing the GST, argues that tax is not the primary culprit behind the slowdown. Instead, he points to global shifts like the OECD's Pillar Two architecture and domestic macro stability concerns around the Rupee.

Arbind lays out a framework for understanding India's approach to taxing foreign capital, built on a balance between capital import neutrality (treating domestic and foreign investors alike) and capital export neutrality (taxing residents on global income with credit relief). He then walks through the history of retrospective taxation in India, using detailed examples from the late 1980s and 2000s to argue that an absolute ban on retrospective amendments is neither realistic nor desirable, while stressing that it must be exercised sparingly and with compensation where costs fall on citizens or investors.

The conversation closes with Arbind's view on what India should actually do to attract global capital: not cut rates further, but systematically eliminate uncertainty wherever it exists, in policy design, in administration, and in dispute resolution. The notes below trace his argument from the conceptual framework of neutrality, through the retrospective taxation debate and the Vodafone case, to his final prescription for reform.

## Supplementary Resources

- **Rollback of retro tax: A step in the right direction** by Tanmay Bhatnagar (Article) [1]

- **India proposes to remove retrospective applicability of indirect transfer provisions** by EY (Working paper) [2]
- **The State in Retreat? Why has India Experienced Such Half-hearted ‘Liberalisation’ in the 1980s?** by John Harriss (Journal article) [3]
- **How not to contain the fiscal deficit** by Pradeep S. Mehta and Amol Kulkarni (Article) [4]
- **All India Central Bank Officers Federation v. Union of India** by M.S. Sonak and Jitendra Jain (Article) [5]
- **Arun Kumar and Others v. Union of India and Others** by C.K. Thakker, P.K. Balasubramanyan and Y.K. Sabharwal (Article) [6]
- **Lok Sabha Debates (English Version), Eighth Series, Vol. II, No. 4, Second Session (Eighth Lok Sabha): General Budget, 1985-86 — Budget Speech, Finance Bill, 1985, and Compulsory Deposit Scheme (Income-Tax Payers) Amendment Bill** (Working paper) [7]
- **Rajya Sabha Debates (Official Report), Vol. 137: Budget debate of 14 March 1986, pp. 145–163** (Working paper) [8]
- **2010 (8) TMI 252 - HC - Income Tax** (Article) [9]
- **Discussion Draft: Report on Effective Capacity Building on Tax Matters in Developing Countries** (Working paper) [10]
- **The Platform for Collaboration on Tax** (Article) [11]

## Contents

|                                                        |    |
|--------------------------------------------------------|----|
| Introduction to global capital flows and FDI           | 4  |
| Capital import vs export neutrality explained          | 4  |
| Why FDI has stalled despite diversification from China | 5  |
| India's history with retrospective taxation            | 7  |
| Does retrospective taxation deter global capital       | 11 |
| Policy recommendations to attract global capital       | 12 |

## Introduction to global capital flows and FDI

**[00:00:08] Atibhi Sharma:** Hello and welcome to Big Ideas. Today we're going to be spending some time trying to understand global capital flows and how international taxation of India plays a role in attracting FDI. FDI has fallen from forty-five billion US dollars to 0.35 billion US dollars in the last year.

**[00:00:27] Atibhi Sharma:** And we wonder whether international taxation, the way India plays this, plays a role in this. And who better to explain this than Arbind Modi. Arbind Modi has been on the Central Board of Direct Taxes, he wrote the direct taxes code, he helped rewrite the income tax, and has played a key role in designing the Goods and Services Tax of India and is also currently senior research fellow at Xclea Forum. Welcome sir.

**[00:00:55] Atibhi Sharma:** So if I were to describe India's approach to taxing foreign capital, how would you describe that in one line?

## Capital import vs export neutrality explained

**[00:01:03] Arbind Modi:** India's approach to international taxation and foreign capital, if I were to describe in one sentence, I would say that it's a good balance between capital import neutrality and capital export neutrality.

**[00:01:20] Atibhi Sharma:** Okay. You want to expand on that a little bit?

**[00:01:23] Arbind Modi:** Okay. See, broadly, there are many conditions to what I'm going to say. Broadly, capital import neutrality is a situation where you treat domestic investors and foreign investors in the same way.

**[00:01:41] Arbind Modi:** You treat them, in other words, you apply the same tax burden on both regardless of whether say, in our example, the Tatas, Birlas or Ambanis, Adanis investing in India or Microsoft and Amazon investing in India, they would be subject to the same tax burden. So that's capital importing. And capital exporting is, say, US - US is a typical capital exporting country, even India follows that - it's basically embedded in the residence rule, where regardless of where you invest, whether you invest locally or you invest outside, you pay the same tax in your home country.

**[00:02:22] Arbind Modi:** And this mechanism, capital export neutrality, is typically achieved when you have a residence based taxation where you tax your global income and allow for a tax credit. So, of course, there are other conditions to it for achieving capital export neutrality. I'm not getting into that detail at the moment. And similarly, capital import neutrality is achieved when you typically have a non-discrimination clause between foreign investors - that's one way of doing it.

**[00:02:53] Arbind Modi:** And of course, you also have MFN status, which is a reflection of your capital import neutrality, because if you give one country a better rate or treatment, then you need to give it to everybody, because that's the only way you can achieve capital import neutrality. So what we do in India is we have a residence-based taxation, so that in a way helps you to achieve capital export neutrality.

**[00:03:26] Arbind Modi:** And we have MFN clauses and non-discrimination clauses in most of our treaties. And a good judicial system which ensures that equity is maintained, parity is maintained between the domestic and foreign investors. So overall, I would say we try to achieve both by having a good balance.

## Why FDI has stalled despite diversification from China

**[00:03:51] Atibhi Sharma:** Sir, we've seen that global capital has been trying to shift from China. Countries are trying to diversify their assets, but FDI has not come into India over these years. Why do you think, what explains that?

- [00:04:06] Arbind Modi:** See, as a tax man, I would say when I reflect upon it, I find that tax is certainly not an issue, as such, and in a way it is also an issue. I'll say why it is not an issue and why it is an issue.
- [00:04:27] Arbind Modi:** It is not an issue because by and large, India's tax regime, on the international tax sphere, we have remained stable. There's been no earth shaking changes as such. So if five years back FDI was coming and now it's not coming, with the tax regime remaining almost the same or similar, there's no reason to impute the change in the FDI flow to tax. So we should actually be looking at some other things that are happening or not happening.
- [00:05:03] Arbind Modi:** So what other tax thing is happening in other parts of the world which could be impacting? Yes, as I see, we should not panic. There's a lot of churning taking place because of the Pillar Two architecture - the OECD new international tax architecture. Pillar Two - most investors are reassessing their positions.
- [00:05:31] Arbind Modi:** Because there is a global minimum tax, there's an income inclusion rule, taxpayers are withdrawing from their existing positions wherever possible, and reappraising their existing position to take a new position in the light of the global changes taking place on the tax field. And of course, India specific, there's an issue of macro stability, because if there is an expectation that the dollar rate will go down, the Rupee will fall further, then obviously investors will hold back investment for the time being till the Rupee stabilizes.
- [00:06:13] Arbind Modi:** So those are other issues. I won't get into that at the moment. But from a purely tax angle, nothing has changed as far as India is concerned. But yes, because of Pillar Two, a lot of investors are reassessing their positions, and hopefully when that stabilizes, monies will start flowing in.
- [00:06:13] Arbind Modi:** So we should not panic and do anything in the tax regime as a knee-jerk reaction to the flows not coming.
- [00:06:50] Arbind Modi:** Because even if you did something, you would probably end up losing revenue or doing something very stupid and not getting the kind of results that you expect.

## India's history with retrospective taxation

- [00:07:00] **Atibhi Sharma:** Okay. So India has spent a long time trying to fight retrospective taxation. Do you think we are finally past that era, or is it still there hiding in plain sight?
- [00:07:14] **Arbind Modi:** See, as a general rule - let me step back. As a general rule, we must accept that the sovereign has a right to amend laws retrospectively. That's something which is completely unquestionable.
- [00:07:40] **Arbind Modi:** So does this mean you should exercise it anytime and every time? In order to provide stability, I won't use the word that you should not do retrospective taxation at any time. But you should do it sparingly.
- [00:08:07] **Arbind Modi:** And that is where the political judgment has to be exercised. Number one. Number two, as a principle, I would imagine that if you're doing a retrospective amendment and there are costs to citizens, then you should pay for that cost - adequately compensate.
- [00:08:42] **Arbind Modi:** Now let me give you two or three examples of retrospectivity which we did in the tax law, particularly in the income tax. If I remember correctly, it was 1988 or '89 - I don't remember exactly - during that period we did two retrospective amendments, very interesting.
- [00:09:13] **Arbind Modi:** One was the Calcutta High Court ruled that DA, dearness allowance given to employees, is not taxable. Now, because of that judgment - I mean, obviously we were planning to go to the Supreme Court and all that, but that would have further delayed the whole thing - so we immediately stepped in with an amendment to say that right from 1961, when the law came into being, DA is specifically taxable.
- [00:09:50] **Arbind Modi:** Now why did we do that? Somebody can say, well, the court ruled that it is not, so because millions of people started filing for a refund, and we didn't even have their old tax records, the situation became chaotic. So we said, no, it was always the accepted position, and even as a policy, going forward, we will tax it.

- [00:10:22] Arbind Modi:** So these millions of refunds - not only is there a financial cost to it, an unexpected financial cost, but also they cannot be executed because we don't have records, so people could make flimsy and fraudulent claims. So in order to provide stability there, we made a retrospective amendment to undo that judgment. So somebody can say, well, that's a retrospective amendment, you should not have done it, and there were some noises at that time, but in those days the media was not so active and awareness was much more limited, so it didn't create the kind of reaction.
- [00:11:04] Arbind Modi:** But some unions did take this up, but we got over that. So, as I said, when I take you through three or four examples, you'll know exactly why and under what circumstances we do it. Then there was a very interesting thing - I think it was in '89 definitely - there was a tax provision on investment allowance. Many of you may have heard of that.
- [00:11:04] Arbind Modi:** It was there till about 1990 and then we eliminated it.
- [00:11:37] Arbind Modi:** It allowed you, apart from recovering a hundred percent of your cost on capital investment, an additional twenty-five percent deduction. So that was an investment incentive kind of provision. There you could set off twenty-five percent of your new investment against your profit, and you had to create a reserve for that, out of which I think seventy-five percent had to be taken into a reserve or some such thing.
- [00:12:12] Arbind Modi:** And part of that had to be used for buying new machinery. Now, that reserve thing was clarified - there was some clarification issued under a circular. The other thing the circular said was, in the case of loss-making companies, how do you provide a reserve?
- [00:12:42] Arbind Modi:** So by circular, we had allowed that in the year in which you actually have a profit, you will create the reserve. Instead of a loss, because if you are investing in year one and you don't have profits, then you don't have to provide a reserve because there is no money. So you provide for that reserve in the year of profit. Now that was clarified by circular.

- [00:13:11] Arbind Modi:** And that was the acceptable position - there was no controversy. Everybody, even the department, accepted it, because that was the circular issued by the department. But the Supreme Court, in - I think it was Subbalakshmi Mills or something like that, a very famous judgment - said, no, the circular is bad, effectively saying the circular is bad to that extent, and if you've not created the reserve in the year in which it is due, this benefit of deferral was not allowed.
- [00:13:46] Arbind Modi:** The Supreme Court said, no, it's not allowed. Now this is in favor of the department, in favor of the government, please understand - we would have got thousands of crores of money in terms of taxes. But we said, no, this is not the correct position, for whatever reasons the Supreme Court said no. We made a retrospective amendment to say what we said in the circular, and overrode the judgment.
- [00:14:19] Arbind Modi:** So I'm just making these two points to highlight that you cannot have an absolute ban. I see a lot of discussion saying retrospective amendment should not be made, retrospective amendment should not be made - but then how does the government have to respond to these kinds of situations?
- [00:14:45] Arbind Modi:** And so the call, at the end of the day, is also a political call - how much. More recently, I think it was 2006 probably, we had a judgment where HRA - no, valuation of concession housing provided by the employer - the mechanism for taxing it was provided in the rules.
- [00:15:17] Arbind Modi:** The Supreme Court said - and that's going on since '61 - suddenly in 2006 the Supreme Court said, no, that rule itself is bad in law, and they said you can't do it by rule, something which we had been doing since '61. So after 43, 44 years, if you have that kind of ruling, then what do you do? And again, people wanted their refund. We said, okay, this is what it is.
- [00:15:17] Arbind Modi:** Now that's not possible.
- [00:15:45] Arbind Modi:** So we had to put that same rule into the law and insert it from 1961. Again, a retrospective amendment. So, as I said, many times the government has to do these amendments, and there cannot be an absolute position that it's either yes or no. It has to be on a case-to-case basis.

- [00:15:45] Arbind Modi:** And what are its implications? What is the cost? And one of the ways to resolve this could be that, if there are costs to people, whether we can compensate them in some way.
- [00:16:34] Arbind Modi:** That's one. The other thing is, undoubtedly there is a dispute - like let's take the case of Vodafone, which is where this whole thing became an issue. What is the correct law? The correct law is not necessarily what the Supreme Court has interpreted.
- [00:16:34] Arbind Modi:** There is a judgment, fair enough, whatever, but that is not necessarily how the government sees it.
- [00:17:15] Arbind Modi:** So, at that point in time, what do you do? The Supreme Court has also ruled - there are judgments, I'm not getting the name, but the principle they have enunciated is that our decisions are final and should be followed, not because we are necessarily correct.
- [00:17:45] Arbind Modi:** If there was a court above us, most of our judgments would have been reversed. But as a matter of judicial discipline, once the highest court has given a judgment, that must be followed and implemented by everybody.
- [00:18:12] Arbind Modi:** So they themselves are admitting that there can be errors of judgment, and they also review their own judgments many times. So the Vodafone case, if it was referred to maybe a larger bench of five judges or seven judges or nine judges, maybe the decision would have been different.
- [00:18:43] Arbind Modi:** Or maybe if it was another bench, the decision could have been different. But for the government, we have to put in place a correct policy. So that is when this conflict comes up - what do you do? Do you put in a retrospective amendment or not?
- [00:19:16] Arbind Modi:** Now the difficulty in the Vodafone case, as I see it, was the correct way to do it was to do a retrospective amendment but protect the Vodafone judgment - which means that Vodafone would have been entitled to the benefits given by the court, and not any other taxpayers, because of the retrospective amendment. Because they went to the court, you respect the court and say, okay, you fought the case, you won it.

- [00:19:57] **Arbind Modi:** That fight is in your favor - whatever the consequences, you get the benefit. But others don't. So you prevent others from getting that benefit by making it retrospective, but protecting them. In fact, I think in the Subbalakshmi case, we did that.
- [00:19:57] **Arbind Modi:** We respected the judgment - we said the law as decided, as interpreted by the Supreme Court, will apply to that case, regardless of whether it is beneficial to that person or otherwise.
- [00:20:26] **Arbind Modi:** But for all other cases, we reversed it. So he doesn't have a grievance, and that way you probably extend greater respect to the court also. So that is one way of dealing with it. But a complete ban, we will never - and you should not - because that would mean a mistake can never be corrected, because there can be mistakes in interpretation also, as I said.
- [00:20:26] **Arbind Modi:** So that's the problem.

## Does retrospective taxation deter global capital

- [00:20:35] **Atibhi Sharma:** You don't think retrospective taxation, in your opinion, hinders global capital in any way? So India is not retrospectively taxing more than other countries?
- [00:21:25] **Arbind Modi:** Good question. One of the concerns on retrospective taxation, particularly on taxation per se, is that it affects global capital flows. So let's look at what exactly this global - first, we have to appreciate that most of the capital flows are in areas where there is huge rent, which is either resource-based, location-based, things like that. There are very few marginal investments when it comes to international global investments.
- [00:21:56] **Arbind Modi:** So clearly, if there is a jurisdiction which is repeatedly doing a retrospective amendment, then there is an uncertainty premium. You add it to your user cost of capital, and you take a call on whether your investment is feasible or not. And in most cases, despite that, they continue to invest, because they derive rent from these jurisdictions, be it India or Africa where there are minerals.

- [00:22:38] Arbind Modi:** So if somebody is investing in India, it's not a marginal project where you are only getting the normal return - the return is much higher. So despite that uncertainty premium, you continue to invest because the returns are much higher. So that's one thing. The second aspect is - I think I've covered both the user cost of capital - and the third, another point to that is that we also have to ensure that we put in place some form of compensation mechanism.
- [00:23:14] Arbind Modi:** If you do a retrospective taxation as a nation, we should be mentally prepared that yes, this is very important from an overall social welfare perspective, and we will do it despite the fact that there is a cost to us in terms of slower investment. Or, if you want to protect the investment, you compensate the person who has lost adequately, so that investors who have taken positions are not adversely affected.
- [00:23:50] Arbind Modi:** But yes, I agree with you, if it's too frequent, then it will affect global capital, because your premium will keep going up, and at some point even that rent will be eroded. And what will happen is, over time, if you keep doing it, this premium goes up, user cost of capital will keep going up, and the projects which are just at the margin of rent, with very small rent, will completely get eroded, and investment will get affected.
- [00:24:28] Arbind Modi:** You move from high rent to medium rent to low rent. So all those low-rent cases, investments will go away over time. And that can be very significant for you.

## Policy recommendations to attract global capital

- [00:24:42] Atibhi Sharma:** Thank you. So, to tie everything together now - what is the one thing that you think India could do differently to attract global capital? Only in terms of tax - you said we shouldn't change our tax policy per se, because that will affect things, but retrospective taxation has a hint of that. So should we improve our dispute resolution mechanisms, or what else should we be doing, just in terms of tax policy?

- [00:25:12] Arbind Modi:** Good point again, building upon what I said earlier. All investors, as I said, when they calculate their minimum return, add to it an uncertainty premium. So everything in the tax system which causes uncertainty must be eliminated, or minimized to the extent possible. It's not just in policy - sometimes it's in administration.
- [00:25:12] Arbind Modi:** Say, for example, dispute resolution.
- [00:25:52] Arbind Modi:** You can give all the decisions against them - you can give all the decisions against them, but you've given them certainty, so that premium will become zero. For example, reopening of assessments - tax assessments - that's another contentious issue. You're creating uncertainty.
- [00:26:26] Arbind Modi:** There's no finality. And what makes it worse is that once you reopen an assessment for some small amount, the whole assessment opens up. So even on positions where we've had a threadbare discussion and the tax officer has taken a view and given you relief, if for some other reason the tax assessment opens up, then that issue also gets revisited. So there is complete uncertainty for five years, six years, whatever that period is.
- [00:27:14] Arbind Modi:** And for each of that uncertainty, as a country, we are paying a price in terms of investment. So I would not limit it to dispute resolution - I would say wherever there is uncertainty, that must go, be it in administration or in policy. For example, even on the policy side, sometimes you make an announcement that, okay, we are reforming the tax system.
- [00:27:48] Arbind Modi:** A general announcement that you will reform the tax system, but you don't spell out the contours, you don't actually act. Then there is uncertainty about what kind of reform you have announced - what kind of reform will take place? Will it give relief, or will it result in windfall gains, or unexpected taxes? So people will hold back investment.
- [00:28:17] Arbind Modi:** So you need to ensure that there is no uncertainty in the minds of the people. Typically that is where some kind of white paper or policy paper helps - we had one in 1985, we released one, that was the only time we released a long-term fiscal policy, for five years, clearly laying out what you are going to do over the next five years.

- [00:28:50] Arbind Modi:** So what you're doing then is giving a direction - there is no shock, no surprises, and investors expect that. For example, that was a document where we said investment allowance will be withdrawn. So new investments were not contingent on the investment allowance continuing. Those who were investing in '85 knew this was coming, so this benefit would not be available.
- [00:29:23] Arbind Modi:** So finally, when it was removed in '86, there was no pushback. So there are ways countries are dealing with this - for example, the World Bank and IMF have a tool they call the medium-term revenue strategy. They use this - where you do your multi-year strategy on what measures you will implement over the medium term, three to five years.
- [00:29:56] Arbind Modi:** So that's another way of giving a clear indication of how you will move, so that there are no unpleasant shocks. You clearly know, three years in advance, that in the third year you are going to do this. So when you do your investment, you do your IRR calculation based on these expected changes. So there are ways to handle it.
- [00:30:24] Arbind Modi:** It may not be perfect, but yes, there are, and countries are doing it regularly. So India is not unique in this - it's a worldwide problem. But as you mature, once you become a large economy, one of the top ten economies in the world, you need to focus more on these little things, because even that half a percent or one percent uncertainty premium can move investments in large amounts.
- [00:30:56] Arbind Modi:** So you have to look for all these small things and clean that up. And that is what reform is all about - because you've reached a point where rates cannot be cut anything more. You've already reached 25, maybe you can play around a little bit more, but all the low-hanging fruits have already been harvested. So now you have to look for these small benefits and clean these up.
- [00:31:24] Arbind Modi:** The headroom is much less for you now.
- [00:31:28] Atibhi Sharma:** Thank you. Thank you so much, sir.
- [00:31:30] Arbind Modi:** Done? Thank you.

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