IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Agha Faisal

C.P. No. D-4778 to 4780 of 2021

(1) Pakistan Mobile Communication Ltd.
(2) Pak Telecom Mobile Ltd.
(3) Telenor Pakistan (Pvt.) Ltd.
Versus
Pakistan / Federation of Pakistan & others

Date of Hearing:	13.09.2021 and 08.10.2021
Petitioner in CP No.D-4778 of 2021:	Through Mr. Makhdoom Ali Khan Advocate along with M/s Sami-ur-Rehman and Khawaja Aizaz Ahsan Advocates.
Petitioners in CP No.D-4779 and 4780 of 2021:	Through Mr. Raashid Anwar Advocate.
Respondent No.1/ Federation of Pakistan:	Through Mr. Kafeel Ahmed Abbasi, Deputy Attorney General along with Mr. Hussain Bohra, Assistant Attorney General.
Respondents No.2&3/ Federal Board of Revenue:	Through Mr. Ameer Bakhsh Metlo along with M/s Fayaz Ali Metlo and Imran Ahmed Metlo, Advocates.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- These three petitions involve common questions of law arising out of latest amendment vide Finance Act June 2021 effective from 01.07.2011 carried out in Table-II of First Schedule to Federal Excise Act, 2005 (hereinafter called "Act 2005") whereby Serial 6A was introduced without qualification.

2. Brief facts are that Act2005 imposes duty on services specified in the First Schedule attached to the ibid Act 2005 being catered by its charging provision, Section 3. Schedule attached to the said provision sets the description of excisable goods and excisable services as Table I and II respectively. For these petitions we are concerned with Serial 6 and 6A of Table-II being services rendered and provided.

3. Serial No.6 to this Table contains an entry of telecommunication having heading 98.12 as primary heading whereas its different categories thereunder have different suffixes but same prefixes. This amended serial number was last introduced by Finance Act 2008, assented on 26.06.2008. Finance Act 2014 however excludes its application in areas of such province where such province has imposed provincial Sales Tax and has started collecting the same through its own board or authority, as the case may be. Such sales tax regime in Sindh was introduced in June 2011 as Sindh Sales Tax on Services Act, 2011 (SSTA 2011).

4. Notices were issued to respondents as well as Attorney General in terms of Section 27 CPC however they opted not to file any parawise comments. Mr. Metlo rather filed a policy statement on 03.09.2021, whereas Mr. Abbasi chose to argue on the basis of record and law, since primarily Mr. Makhdoom, learned Sr. counsel, claimed it to be covered by Freight Forwarders[1].

5. Mr. Makhdoom Ali Khan, learned counsel as a lead counsel, has extensively argued the main case before us, whereas Mr. Rashid Anwar, learned counsel appearing in rest of the two connected petitions espoused the arguments led by Mr. Makhdoom.

6 It is in this context Mr. Makhdoom Ali Khan, argued that after 18th Amendment to the Constitution, this impugned amendment 6A Table II First Schedule (hereinafter called "6A"), ultra vires the Constitution as it (6A) imposes federal excise duty at the rate of 75 Paisa per call if it exceeds five minutes. This insertion is not as qualified as was earlier Serial No.6.

7. Their (petitioners) primary contention is that the levy and collection of Federal Excise Duty under the impugned Entry 6A within the area of this province by the respondents is in violation of the

[1] 2017 PTD 1 (Pakistan International Freight Forwarders Association v. Province of Sindh & others)

legislative competence, as established through Entry No.49 of Federal Legislative List to Constitution of Islamic Republic of Pakistan, 1973, and the judgment rendered by a bench of this Court in the case of Freight Forwarders (Supra).

8. Mr. Makhdoom Ali Khan submitted that this deliberate attempt to exclude 6A from the purview of Sindh Sales Tax on Services Act, 2011 is an obvious attempt to enforce such levy and recovery across Pakistan which negates the principle stand taken via 18th Amendment. Learned counsel described the attempt as a mala fide since this question has already been decided through an exhaustive/landmark judgment referred above.

9. It is argued that via 18th Amendment, Entry 49 to the Fourth Schedule to the Constitution was amended to exclude subject of sales tax on services from purview of Federation and consequently provisions of Act 2005 precisely for rendering and providing services were/are rendered ultra vires the Constitution w.e.f. 01.07.2011. Counsel argued that this is yet another attempt to step over the provincial domain legitimized by the Constitution followed by Sindh Sales Tax on Services Act, 2011.

10. Learned counsel further argued that only way of saving the impugned amendment (6A) could be by way of reading it down provided it is considered as subset of Serial No.6 as it is also one of the categories of telecommunication services, by applying "exclusion" applied to Serial No.6. Hence a harmonized reading of 6 and 6A was suggested only in case it is not being declared as unconstitutional. In addition to it, the new structure of Entry 49 could only enable it to read it down with such exception i.e. could only be enforced in areas of federal domain and federally controlled territories, provided provincial legislature has been made.

11. He argued that Rule 2005 framed under the Act 2005 have not yet been amended and Rule 43 delineates the manner and mode of collection by service providers.

12. Mr. Makhdoom Ali Khan heavily relied upon Freight Forwarders (Supra) and summarized that the effect of Hirjina's[2] case to 1973's Constitution of Islamic Republic of Pakistan was such that sales tax on goods and services were still with Federation until 18th Amendment to the Constitution followed by appropriate legislation.

13. Mr. Metlo, learned counsel appearing for respondents No.2 and 3 controverted the submissions of the learned counsel for petitioners on the strength of Article 151 of the Constitution and the judgment of Lahore High Court in the case of LPG Association[3]. He further relied upon Entry Nos.7, 31, 58 and 59 of Part-I of Federal Legislative List. It is argued by Mr. Metlo that Article 151 remedied the federation to impose restrictions on freedom of trade, commerce and inter-course between one province and another and within any part of Pakistan and this Article enables the federation under the umbrella of Entry 58 of Part-I to the Fourth Schedule, to be the legislative authority to levy federal excise duty on entities operating across Pakistan.

14. Learned counsel for the respondents next relied on the case of Sindh Revenue Board[4] in support of his argument that a province cannot levy tax on any subject falling within the Federal Legislative List. To make it fall within the Federal Legislative List, he relied upon Entry Nos.7, 31, 58 and 59. Learned counsel further argued that the petitioners being trans-provincial entity could only be subjected to federal legislation. It is last argued by the respondents' counsel that in the case of Freight Forwarders the Hon'ble Supreme Court was pleased

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[2] 1993 SCMR 1342 (Hirjina & Co. v. Islamic Republic of Pakistan)
[3] 2021 CLD 214 (LPG Association of Pakistan v. Pakistan)
[4] 2017 SCMR 1344 (Sindh Revenue Board v. Civil Aviation Authority)

to grant leave by suspending the judgment and hence this Court may not rely on it.

15. Mr. Kafeel Ahmed Abbasi, Deputy Attorney General, has objected to the territorial jurisdiction of this Court as earlier petitioner had challenged Entry 6 of Table-II of Schedule to Act 2005 before Islamabad High Court, which was dismissed. He referred to the case of Telenor[5] and submitted that they (petitioners) cannot approach this Court to raise a challenge in respect of subsequent Entry 6A to the same Table-II of Schedule of 2005 Act and must surrender before the same Court where they earlier surrendered. He relied upon the cases of MCB[6] and Shahida Maqsood[7].

16. Learned Deputy Attorney General further submitted that the case of Freight Forwarders has not been decided after taking into account the law that is required to be considered and hence it is not correct law and the matter should be referred to a larger Bench.

17. We have heard the learned counsel for parties as well as Deputy Attorney General and perused material available on record.

18. Let us first take up issue of territorial jurisdiction of this Court, as objected by learned Deputy Attorney General.

19. Scope of earlier litigation in 2015 before Islamabad High Court was outcome of show-cause notices issued by the respondent department for the recovery of federal excise duty. Those show-cause notices were impugned in the referred petition at Islamabad. Since the same were issued at Islamabad, therefore, the wisdom of the petitioners compelled them to surrender to the territorial jurisdiction of Islamabad High Court and perhaps rightly so as no other Court had territorial jurisdiction in this regard subject matter of which remained show-cause

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[5] 2017 PTD 2269 (Telenor Pakistan (Pvt.) Ltd. v. Pakistan
[6] 2002 SCMR 958 (Muslim Commercial Bank v. Momin Khan
[7] 2005 SCMR 1746 (Shahida Maqsood v. President of Pakistan)

issued at Islamabad. Though it involved a challenge arising out of a show-cause before Islamabad High Court but the controversy set at rest. Present controversy involves an amendment when 6A was inserted in Table-II of First Schedule without qualification. Earlier petitions at Islamabad may have ended in the dismissal but that does not forever concludes that for any other event or a fresh cause or for any subsequent challenge in respect of any other enactment or amendment, Islamabad High Court is the only Court left for the petitioner to avail remedy. We thus consider this argument as irrelevant. Jurisdiction is not conferred on mere surrender of a litigant by filing a lis before a Court or authority. Jurisdiction is conferred as to where the cause has triggered and this would create jurisdiction in accordance with law. Parties cannot opt or choose to decide the jurisdiction on their own.

20. The current challenge is Entry 6A inserted in Table-II of the First Schedule to Act 2005 on 01.07.2021 and undoubtedly petitioners also operates in a province where this Court extends/exercises its jurisdiction. Impugned here being a fresh cause and in fact a most recent one as Entry 6A was inserted having effect from 01.07.2021, much after conclusion of the referred lis at Islamabad High Court, this Court enjoys territorial jurisdiction. It is immaterial if petitioners operate from all over the country, rather the event under consideration which attracted impugned levy paved way for territorial jurisdiction. The insertion made in the Entry 6 by the Finance Act 2014 whereby the federation was excluded from the ambit of Entry 6, by virtue of Entry 49 to Federal Legislative List, the jurisdiction of this Court is obvious as such board and authority exist by virtue of Sindh Revenue Board Act, 2010. It is one of the cases/grounds of the petitioners that this Entry 6A is a sub-set of Entry 6 and/or this entry cannot withstand the rigors of

Entry 49 to the Fourth Schedule to the Constitution of Islamic Republic of Pakistan, 1973, hence the jurisdiction is conferred.

21. Even otherwise this Entry 6A being an independent Entry, notwithstanding the arguments of the petitioners' counsel, which shall be discussed later on this Court has jurisdiction to adjudicate a challenge, as made by the petitioners. The challenge to the vires of the impugned Entry 6A thus on the touchstone of the findings hereinabove and also as observed in the judgments of Hon'ble Supreme Court in the cases of Asghar Hussain[8], Al Iblagh Limited[9], Flying Kraft Paper Mills[10] and Federal Government[11], are amenable to jurisdiction of this Court for adjudication. The cases relied upon by learned Deputy Attorney General are thus distinguishable.

22. We now discuss the merit of the case:-

23. Originally, Constitution of Islamic Republic of Pakistan, 1973 recognized three categories for allocation of legislative competence between federation and provinces. First being the Federal Legislative List which encompasses all areas in which parliament of Pakistan was exercising jurisdiction and hence the legislative powers were enjoyed; second being concurrent legislative list which provides equal powers to National as well as Provincial assemblies to legislate, subject to the conditions that in case of inconsistency, the federal law to prevail. The final category is the one which we called residuary subjects to dwell on any other topic not provided in the first two counts. What brought a significant change to our Constitution was the act of parliament whereby Bill of 18th Constitutional Amendment was unanimously passed and record amendments were made to the Constitution.

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[8] PLD 1968 SC 387 (Asghar Hussain v. Election Commissioner of Pakistan)
[9] 1985 SCMR 758 (Al Iblagh Limited v. Copyright Board)
[10] 1997 SCMR 1874 (Flying Kraft Paper Mills (Pvt.) Ltd. v. Central Board of Revenue
[11] 2017 SCMR 1179 (Federal Government v. Ayyan Ali)

24. 18th Amendment abolished the concurrent list to the Constitution of Islamic Republic of Pakistan, 1973 whereas Federal Legislative List remained intact with few additions. Leftover subjects not forming part of Federal Legislative List were normally being considered within the domain of provinces and the amended Article 142(c) then allowed the provincial assemblies to legislate on matters not contained in the Federal Legislative List.

25. In order to save the vacuums from effect of 18th Amendment, Article 270AA acted as a rescue which permitted that all laws with respect to all the matters enumerated in the concurrent legislative list including Ordinances, orders, rules, bylaws, regulations, notifications and other legal instruments having the force of law which were in force in Pakistan or any part thereof or having extra territorial operation immediately before commencement of the Constitution i.e. 18th Amendment which were carried out in 2010, shall continue to remain in force until altered, repealed or amended by the competent authority. This is the reason perhaps that invited provincial legislation.

26. Scrutiny before us is federal competence to legislate on the subject. As discussed, pre 18th Amendment to Constitution the regime of Federal Legislative List and Concurrent Legislative List was in vogue however post 18th Amendment, subject to Article 142, these legislative competence (under consideration) of federation were questioned. Whatever came within domain of federation for legislation after 18th Amendment is excluded from provincial regime, however subjects which were excluded from federal domain came in the pool for provincial consideration unless a case of trans-provincial subject could be made out. Despite this there cannot be a physical yardstick to segregate the legislative intent as the individual subject for legislation has to be seen from the scheme of Constitution as it stands.

27. This entire history was traced in Freight Forwarder's case in the backdrop of Hirjina's case and the effect of 18th Amendment was also scrutinized. In particular the word "exception" was dissected by the bench to understand its effectiveness:

> *"57. …..The first point is the most obvious one: the "exception" recognizes expressly on the constitutional plane that the Provinces have a taxing power in relation to the taxing event of providing or rendering of services. This is an important point to which we will revert. However, the immediate question is: what is the true nature and effect of the "exception"? Prior to the 18th Amendment, no one had succeeded in suggesting—and quite rightly so—that the taxing power contained in entry No. 49 had anything to do with services, let alone the taxing event of providing or rendering of services. What then was being 'excepted' by the "exception"? The obvious short answer would be: nothing. That however, could reduce the "exception" to a redundancy, which cannot be so. The "exception" obviously has to be given proper meaning and effect. It is a strong thing to impute redundancy to even a statutory provision or to so interpret a statute that a part of it is rendered futile or nugatory. Such an approach would be almost impossible in relation to the Constitution. Now, an exception would ordinarily be regarded as limiting or restricting the main enactment by, e.g., taking something out of it that, but for the exception, would be regarded as falling within the main enactment. That is patently not the case with entry No. 49. ….."*
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> *"58. In our view, the "exception" added to entry No. 49 is not a "true" exception. Rather, it is an independent provision in its own right. It has two primary effects. Firstly, and most importantly for present purposes, it recognizes expressly on the constitutional plane that a taxing power in respect of the taxing event of rendering or providing of services vests in the 48 Provinces. The crucial question is whether or not this power is exclusive to the Provinces. It has been noted above that in the scheme of the present Constitution, the same taxing event cannot simultaneously vest in two legislatures. For that to happen would mean that the taxing power is also the same. It has also been noted that the constitutional scheme does not envisage a sharing of a taxing power. The Constitution recognizes a division of a taxing power and that is all. In our view, both of these principles are fully attracted and applicable here. The real effect of the "exception" is to "shift" the taxing power in relation to the taxing event of rendering or providing of services from the Federation to the Provinces. As has been noted above, in our view this*

power had earlier vested solely in the Federation by reason of the First Ratio of the Hirjina judgment, as applied to the 1973 Constitution. This was a decision of the Supreme Court operating on the constitutional plane. It follows that its effect could only be displaced or overridden by a constitutional amendment and nothing else. It is for this reason that it was necessary to recognize the taxing power of the Provinces expressly on the constitutional plane; anything less could not possibly have altered the effect of the Hirjina judgment. What the "exception" has done is that it has not simply recognized that "a" taxing power in respect of the taxing event of rendering or providing of services vests in the Provinces. Rather, it has established that "the" said taxing power in respect of the said taxing event now vests solely in the Provinces. It is of course immaterial that when the power vested in the Federation it manifested as a duty of excise, while on its "shift" or "transfer" to the Provinces it manifests as a sales tax. As is well established, it is the substance and not the form (and certainly not the label) that is of importance in fiscal matters. The "exception", being an independent provision in its own right thus has the effect of overriding the First Ratio of Hirjina in relation to the present Constitution. It is almost as if the premise of the Second Ratio has now been given effect, shorn of the peculiar features that had attended the premise in the context of the 1962 Constitution. So divested, the premise of the Second Ratio, i.e., that the Provinces alone can exercise the taxing power, now holds the field."

"62. It will be convenient to pause and recapitulate. In our view, the First Ratio of the Hirjina decision in its application to the 1973 Constitution ensured that the taxing power in relation to the taxing event of the rendering or providing of services vested in the Federation alone. The 2000 Provincial Ordinance, which purported to tax the rendering or providing of services, was therefore unconstitutional as it encroached substantively and directly thereon. Furthermore, the operation of the provincial Ordinance was also constitutionally suspect inasmuch as the revenue collected in terms thereof was pooled with other such provincial collections and then shared in terms of Article 160. The 18th Amendment, by inserting the "exception" into entry No. 49 radically altered the position. The taxing power in relation to the aforesaid taxing event was "shifted" and "transferred" to the Provinces and now vests in them alone. This follows also from the constitutional principles noted above, namely that under the scheme of our Constitution there is only a division of a taxing power and not a sharing thereof, and that for two taxing powers to have the same taxing event can mean only that the taxing powers are also the

> *same. The effect of the 18th Amendment has been to override the First Ratio of Hirjina in its application to the 1973 Constitution. It is as though the premise of the Second Ratio is now applicable, shorn and divested of the peculiar features of the 1962 Constitution."*

28. Freight Forwarders' case somehow appears to have covered substantial issues and unless we form a different view, the findings therein are binding on this Bench. In order to form a view, we took into consideration different observations made by the earlier Bench that decided the referred case. The material questions which were before the earlier Bench for consideration are as under:-

> *"The issue is this: where lies the legislative competence to impose a fiscal levy (whether tax or duty) on the rendering or providing of services? Does it lie solely with the Federation, which presently levies a duty in terms of the relevant provisions of the Federal Excise Act, 2005 ("2005 Federal Act")? Or does it vest only in the Provinces, where a tax is levied in terms of their respective statutes, being here the Sindh Sales Tax on Services Act, 2011 ("2011 Provincial Act")? Or, as some have contended before us, does the taxing power vest simultaneously yet exclusively in both the Federation and the Provinces? Or (finally) is it that the taxing power is common and concurrent? It will be appreciated that an affirmative answer to any of these questions (and concomitant negative answer to the others) has widely differing consequences.*
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> *Thus, an affirmative answer to either of the first two questions would mean that (as the case may be) either the 2005 Federal Act (in its relevant provisions) or the 2011 Provincial Act is ultra vires the Constitution. An affirmative answer to the third question would mean that both statutes are able to exist side by side, but could result in the doubling of the fiscal burden. Finally, an affirmative answer to the fourth question, which is concurrence in the constitutional sense, could result in Article 143 of the Constitution being engaged, with serious (and potentially fatal) consequences for the provincial statute."* [12]

29. This is exactly what we are facing. The Freight Forwarders case declared that in taxing legislative entries the concerned legislature exercises its legislative powers through charging sections which imposes

[12] Page 5 Para1 of 2017 PTD 1 (Freight Forwarders)

a levy on taxing event[13]. Thus, taxing event yields way to all fiscal statutes. The Bench however declared that such statutes are necessarily a manifestation or exercise of taxing power constitutionally vesting in the appropriate legislature and it can be safely said that the taxing event lies at the heart of such power and hence any associated legislative Entry[14].

30. Thus, the federation and the province in view of such conclusion drawn do not have concurrent powers to tax the same common event. The constitutional scheme does not permit two taxes in respect of same event and that too being imposed by two separate legislatures i.e. Federation and province. The conclusion drawn by the Bench in paragraph 40, 58 and 60 are as under:-

> *"40. During the course of submissions, one question, of considerable importance, that we invited learned counsel to address was whether the taxing events in the two statutes were the same or different. Many learned counsel 31 submitted immediately that the taxing events were identical. As to those learned counsel who took a different view, we invited them to give us any concrete or practical example that would illuminate or establish the difference, if any, between the two taxing events. It is telling that none were able to do so, and in the end all learned counsel accepted that the taxing events were the same, indeed identical. We agree. Furthermore, in our view, for convenience and without any loss of accuracy, the taxing event can be described as a levy (whether called a duty or tax) on the "rendering or providing of services". "Provided" and "rendered" are words used in the 2005 Federal Act, and the expression is used in the Schedules to the 2011 Provincial Act, which are key to the functioning and applicability of the statute.*
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> …
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> *58….. In our view, both of these principles are fully attracted and applicable here. The real effect of the "exception" is to "shift" the taxing power in relation to the taxing event of rendering or providing of services from the Federation to the Provinces.*

[13] Page 24 Paragraph 32 of Freight Forwarder judgment
[14] Page 25 Paragraph 32

> *60. The importance of placing the "exception" in entry No. 49 now becomes even more apparent. The 1973 Constitution of course always lacked an enumeration of those legislative powers that vested exclusively in the Provinces. A taxing power was now, in part, being "shifted" from the Federation to the Provinces. In order to give it express recognition in the Constitution, it had to be placed somewhere in the text. The nature of the power (and in particular the taxing event being "shifted", i.e., the rendering or providing of services) was such that it would inevitably interact with the exclusive taxing power that vested in the Federation in relation to the sale of goods. What could be better then, than to place the Provincial power in juxtaposition to the Federal power, where it would emphasize both the exclusiveness of each power and yet recognize that the scope and extent of the powers would have to be properly balanced, reconciled and resolved in such manner that allowed each to operate in its own field and yet in harmony."*

31. An established principle is that if there was a conflict between a provision of a Statute and that of Constitution then the Statute must yield to the superior mandate of the Constitution.

32. The imposition of federal excise duty on services in the area of province of Sindh after 01.07.2011 having been declared to be unconstitutional in the aforesaid judgment to which we find no reason to disagree and likewise 6A would not withstand the exclusion made in Entry 49 to Federal Legislative List.

33. The entries in the Fourth Schedule have been meaningfully arrayed in serial and sequence and there is a method in it. Competence to regulate such subjects and competence to levy are two elaborate subjects and purposely they have been kept aligned in such sequential way. Regulation and levy may have remained with federation however for imposition of tax/duties the subject has to find its way under Entry 43 to 53 in the Fourth Schedule. Entry 49 which deals with the taxes of sales and purchases of goods imported, exported, produced, manufactured or consumed purposely excludes sales tax on services via 18th Amendment.

34. 18th Amendment has changed a number of Articles of Constitution of Islamic Republic of Pakistan, 1973 and one of the articles, for the purposes of present controversy, is Article 142. A comparison to the regime pre/post 18th Amendment is as under:-

Article 142

After amendment	**Before amendment**
142. Subject-matter of Federal and Provincial laws.-- Subject to the Constitution—	142. Subject-matter of Federal and Provincial laws.-- Subject to the Constitution—
(a) Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to any matter in the Federal Legislative List;	(a) Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to any matter in the Federal Legislative List;
(b) Majlis-e-Shoora (Parliament) and a Provincial Assembly shall have power to make laws with respect to criminal law, criminal procedure and evidence;	(b) Majlis-e-Shoora (Parliament) and a Provincial Assembly also shall have power to make laws with respect to any matter in the Concurrent Legislative List;
(c) Subject to paragraph (b), a Provincial Assembly shall, and Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative List;	(c) A Provincial Assembly shall, and Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in either the Federal Legislative List or the Concurrent Legislative List; and
(d) Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to all matters pertaining to such areas in the Federation as are not included in any Province.	(d) Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to matters not enumerated in either of the Lists for such areas in the Federation as are not included in any Province.

Thus, the 18th Amendment has brought significant changes in it such as in terms of Article 142(b) Majlis-e-Shoora (Parliament) and Provincial Assembly shall have the power to make laws with respect to criminal law, criminal procedure and evidence. Sub-clause (c) of Article 142 then enabled the Provincial Assembly and not Majlis-e-Shoora (Parliament) to have power to make laws with respect to any matter not enumerated in Federal Legislative List. Sub-clause (d) however has exclusively empowered the parliament/Majlis-e-Shoora to make laws with respect to all matters pertaining to such areas in the federation as are not included in any province. As discussed Entry 49 by virtue of 18th Amendment has

excluded the federal competence to legislate on an event of providing or rendering services in a province and 6A being applied to an event of service which is originated and rendered in this province and which area is not in such areas of federation which are not included in any province. Respondent has not demonstrated any part or territory not included in Sindh province where such services are being rendered.

35. The impugned enactment is for area which formed part of province i.e. Sindh hence for all intent and purposes Article 142(c) is significant. It emphasized Provincial Assembly to legislate with respect to any matters not enumerated in the Federal Legislative List. The impugned Act whereby Serial No.6A was introduced to the First Schedule forming part of Table-II is introduced through a Money Bill in terms of Article 73 of Constitution of Islamic Republic of Pakistan, 1973. No other Entry of Part I of the Federal Legislative List could then be taken into account as this was a money bill which is primarily covered from Entry No.43 to 53 as routed through Article 73 of the Constitution of Islamic Republic of Pakistan, 1973. The federation has already conceded and we are not required to deliberate on the point that for a tax to fall under the said Federal Legislative List it must be covered by Entries No.43 to 53. This, as claimed to be a sales tax/Federal Excise Duty, is apparently covered in terms of Entry 49 to the Fourth Schedule to the Constitution of Islamic Republic of Pakistan, 1973. Thus, the 18th Amendment excludes the Federation by virtue of the Entry 49 from the competence to legislate on the subject of services rendered in their province on account of SSTA, 2011 w.e.f. 01.07.2011.

36. Mr. Metlo's argument with regard to application of Article 151 is now being scrutinized. Article 151 finds its place in Second Chapter that relates to Administrative relations between federation and province. Article 151 of the Constitution of Islamic Republic of Pakistan, 1973 does

not authorize levy or collection of any tax unless it finds appropriate entry in the Federal Legislative List; it only authorizes the federation to impose restrictions on free trade, commerce and inter-course throughout Pakistan insofar if such restrictions are in public interest. This Article is not at all synonymous to the controversy in hand as the exercise of powers to restrict from trade, commerce and inter-course between the two provinces and or part of federation is for regulating the framework of policies made under law and is also not synonymous to extend power to legislate on tax in view of "event" under consideration. This principle was invoked in LPG Association's case. The subjects under Competition Act which may include monopoly, cartels, anti-competitive practices could be regulated or restricted under the referred article within the frame of Entry 58 of Part-I of the Federal Legislative List and that could also be said to be in public interest however it cannot and should not spill over a different perspective i.e. event that invited levy. In order to apply Article 151 the event under consideration has to be inter-provincial.

37. The event that enabled the legislature to legislate after insertion of 6A, is a call that originates from a particular region within the province for the purpose of a levy. This event is not trans-provincial. Notwithstanding that the call may end-up in another province or any other part of country with federal domain, the "event" remains the one that call originate from a particular place which form part of a province. The completion of the event is not dependent on the recipient to receive the call. The event is a call from where it originates, even after event's conclusion of five minutes duration or even more.

38. This alone cannot be treated as intra-provincial trade to apply Article 151 to Constitution of Islamic Republic of Pakistan, 1973. This exercise (Article 151) by the federation was qualified for imposing

restrictions, which is in the public interest alone. Neither Article 151 nor any of the Entries in the Part-I of the Fourth Schedule to the Constitution in particular is relied upon by Mr. Metlo that authorizes the federation to impose such levy on services within the area of a province, which has also promulgated law in this regard i.e. Sindh Sales Tax on Services Act, 2011. Though such authority is lacking on the count that there is no public interest established, yet we are of the view that had it been such a situation even then for tax levy, the federation had to find an Entry within the tax Entries such as Entry 43 to 53 of Part-I of the Fourth Schedule of the Federal Legislative List.

39. The reference to Entries 7, 31, 59 of Part I of the Federal Legislative List is completely misplaced. An examination of Federal Legislative List makes it clear that under Entry 54 a fee can be levied on any matter covered by Part I of the Federal Legislative List. Entry 15 has same effect for Part II of the Federal Legislative List. There is no corresponding entry for tax in either Part. It suggest that unlike fee a tax cannot be levied in respect of any of the matters in the Federal Legislative List. Entries 43 to 53 of Part I of the Federal Legislative List authorize the levy of taxes. The Constitution makers in their wisdom confined the federal authority to tax via Entries 43 to 53 of Part I of Federal Legislative List. All the other entries are fields of legislation for matters other than tax. Contrary view would mean that the Federation has the authority to tax each and every field covered by the entries in same/both parts of the Federal Legislative List, which is not the frame or intent. If Entry 31 (Corporation) to the Federal Legislative List confers the authority to tax on federation then the one as Entry 48 would conclusively be redundant and likewise Entry 48 would do the same to Entry 31. Hence the scope of the two is different and distinct.

40. The insistence of learned counsel for respondents for relying on Entries such as Entry No.24, 27 and 31 (as discussed above) would be inconsequential since these entries (other than Entries No.43 to 53) are meant for federation to regulate them. Had these entries (i.e. Entries No.24, 27 and 31) are such which could enable the federation to legislate for levying duties and taxes, then this would render the consequential entries such as Entry No.43 dealing with duties of customs including export duties, Entry No.48 dealing with taxes on corporation and Entry 53 dealing with terminal taxes on goods or passengers carried by rail, sear or air, taxes on their fares and freights, as redundant.

41. Similarly, the reliance on Entry No.58 by the respondents is also inconsequential as the subject has to be within the competence of the parliament first. Entry 58 reads as under:-

> "*Matters which under the Constitution are within the legislative competence of Majlis-e-Shoora (Parliament) or relate to the federation.*"

42. It is neither in the competence of the federation to legislate after 18th Amendment nor it relates to federation to invoke Entry No.58 of the Fourth Schedule to the Constitution of Islamic Republic of Pakistan, 1973. Similarly, Entry No.59, as relied upon by the respondents' counsel, that these matters are incidental or ancillary to any matters enumerated in this part, is also inconsequential as this cannot be invoked independently unless a reciprocal entry is found within the competence of federation. One may argue this Entry 59 may have a bridged with Article 151 but we have already discussed non-application of Article 151.

43. Coming to the case of LPG Association case (Supra) its scope is that of legislative competence of the federation, which is not related to levying tax, such as Competition Act, 2010. Thus, facts of LPG Association's case are distinguishable from the one in hand.

44. Similarly, the case of Sui-Southern[15] also involves common trade unions of the entities across the country hence a trans-provincial subject and distinguishable.

45. Submissions of Mr. Abbasi and Metlo, learned DAG and Respondents No.2 and 3's counsel respectively, that in the case of Freight Forwarders, the Hon'ble Supreme Court was pleased to grant leave by suspending the judgment, we may observe that leave granting order does not operate as binding precedence[16]. Interim orders operate between parties and law declared in this case (Freight Forwarder's case) would continue to remain law until and unless it is set aside[17].

46. With regard to arguments for referring the matter to larger bench, we are not persuaded by the arguments raised on behalf of respondents that the correct law was not taken into account in Freight Forwarders case and we find no reason to deviate from and form a contrary view for referring the matter to Hon'ble Chief Justice for forming a larger Bench.

47. In view of above we are of the view that impugned legislation/ Entry 6A to Table-II of First Schedule ultra vires to the Constitution and as a consequence whereof is being strike down and the petitions are as such allowed to this effect.

48. Above are reasons of our short order dated 08.10.2021.

Dated: **Judge**

Judge

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[15] 2018 SCMR 802 (Suit Southern Gas Company Ltd. v. Pakistan)
[16] 2013 SCMR (Muhammad Tariq Badar v. National Bank of Pakistan), 2015 SCMR 1708 (Haji Farman Ullah v. Latif ur Rehman Khan) and 2015 SCMR 1401 (Rana Tanveer Khan v. Naseer ud Din)
[17] PLD 1975 Lahore 65 (Mian Ghulam Jilani v. The Federal Government), 2012 CLD 2029 (Meeran Bibi v. Manager Zarai Taraqayati Bank, 2014 PLC 288 (Ejaz Rasool v. Member NIRC), PLD 1980 Karachi 492 (Yousaf A. Mitha v. Aboo Baker), 2009 YLR 2096 (Collector of Sales Tax v. Wyeth Pakistan Limited)