



TAX PAK

NEWSLETTER BY TOLA ASSOCIATES



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EDITORIAL NOTE

Asalam-o-alaikum everyone! Hope this monthly issue of TAXPAK finds you in good spirits and immaculate health! I really hope 2022 is going well for all of you. About this newsletter, I would like to briefly communicate that the purpose of this newsletter is to provide a monthly update on the ongoing legal and administrative developments that take place within the field of taxation in Pakistan. Alhumdulillah, so far, we have been successful in our mission to educate about, and



keep the public-at-large updated of, these developments on a monthly basis. Moving on to the content of this letter, I would like to apprise the reader of what information you can expect in this document. This newsletter contains an elaboration of important notifications and circulars issued by the Federal Board of Revenue and its provincial counterparts. Moreover, notifications from the corporate regulatory body i.e. SECP are also discussed. Furthermore, keeping in mind the aforementioned stated purpose of this document, we usually discuss a (relatively) recent judgment passed by the courts of law. In this monthly edition, we have opted to discuss the judgment passed by the Supreme Court of Pakistan in Messers Elahi Cotton Mills & Others vs Federation of Pakistan and Others reported as (1997) 76 Tax 5 (S.C Pak) and discuss the concept of Minimum Tax Regime in light of the said judgment.

Lastly, this newsletter is concluded with our Topic of the month that is titled "SINDH SALES TAX IS APPLICABLE ON FOREIGN INDENTING COMMISSION – THE HIGH COURT OF SINDH". The said topic discusses the judgment passed in "Concept of Minimum Tax Regime(in the light of Messrs Elahi Cotton Mills & others)".

I wish you all an excellent year ahead!

All our readers are requested to visit our website www.tolaassociates.com, or download our mobile application from the links mentioned below, in order to access previously published editions of this monthly issue along with other publications, and to stay updated of future notifications.

1. <https://goo.gl/QDM4ZM> (IOS)
2. <https://goo.gl/LFiWyX> (Android)

Lastly, we request our readers to circulate this e-copy within their circle, as our primary aim is to benefit the masses. Feedback is always welcomed.

Ashfaq Tola - FCA

Editor in Chief

1. NOTIFICATIONS/ CIRCULARS

1. CHANGE IN JURISDICTION OF DIRECTORS AND OFFICERS (DNFBPS)

The FBR has issued a SRO bearing No. 05(I)/2022, dated 05th January 2022, by virtue of which it has made amendments in the DNFBPs (Regulatory Powers and Functions) Regulations, 2020.

Now, the Inland Revenue Audit Officers, Inland Revenue Officers, Superintendents and Deputy Superintendents Inland Revenue, Inspectors Inland Revenue and officers of Inland Revenue cannot exercise jurisdiction under these Regulations. Inspector customs are now given power to exercise jurisdiction under these rules.

2. DRAFT AMENDMENT IN RULE 33G OF THE INCOME TAX RULES, 2002

The FBR has issued SRO 50(I)/2022, dated 13th January 2022, wherein it has proposed a draft amendment to Rule 33G of Income Tax Rules, 2002. As per Rule 33G, the FBR shall ensure to provide a facility on its website to a customer of an integrated enterprise Person to verify and ensure that the invoice or bill issued to him has been duly communicated to FBR's Computerized System and in case of non-verification, he may upload the image of invoice or bill to the FBR's portal. These rules are applicable on:

- Restaurants,
- Hotels, motels, guest houses, marriage halls, Marquees, clubs including race clubs,
- Inter-city travel by road,
- Courier services and cargo services,
- Services provided for personal care by beauty parlours, clinics and slimming clinics,
- body massage centres, pedicure centres; including cosmetic and plastic surgery by such parlours / clinics,
- Medical practitioners and consultants,
- Pathological laboratories,
- Medical diagnostic laboratories including X-Rays, CT scan, M.R. Imaging etc.

- Hospitals or medical care centres providing medical consultation, hospitalization or other ancillary services
- Health clubs, gyms, physical fitness centres, and body or sauna massage centres
- Photographers
- Accountants
- Retailers including manufacturer-cum-retailer, wholesaler-cum-retailer, importer-cum-retailer or such other person who combines the activity of retail sale with another business activity.

Now, through the above SRO, Foreign Exchange Dealers/Exchange Companies are also proposed to be included for online integration with FBR. It may be noted that the online integration in this chapter of Income Tax Rules is applicable only to service providers which are otherwise covered in jurisdiction of provinces under indirect taxes. So practically, sales tax on goods is covered for online integration under the Sales tax Rules, 2006 and services are covered in Income Tax Rules, 2002.

3. AMENDMENT IN RULE 78 OF THE INCOME TAX RULES, 2002

The FBR has issued SRO 118(I)/2022 dated 20th January 2022 whereby it has added following wordings in the **Form of Reference Application to High Court under Section 133 of the Income Tax ordinance, 2001**

"7. It is certified that the respondent has been intimated regarding filing of reference along with this copy of reference on _____".

4. AMENDMENTS IN THE FBR ANTI-MONEY LAUNDERING AND COUNTERING FINANCING OF TERRORISM REGULATIONS FOR DNFBPS, 2020

The FBR has issued SRO 128(I)/2022 dated 25th January 2022 whereby it has made amendment in above Regulation whereby:

- Every DNFBP shall ensure that it has measures in place to prevent any person who has been convicted of a criminal offence or any associate of such a person from-
 - (a) holding any ownership or controlling interest in the DNFBP;

(b) being the beneficial owner(s) of the DNFBP;
And

(c) holding any senior management or board position in the DNFBP.

- Every DNFBP shall notify the FBR when there is a change in-
 - (a) any ownership or controlling interest in the DNFBP;
 - (b) any beneficial owner(s) of the DNFBP; and
 - (c) any senior management or board position in the DNFBP.

5. EXTENSION IN DEADLINE STIPULATED UNDER SECTION 21(LA) OF THE INCOME TAX ORDINANCE, 2001

The FBR has issued a Circular bearing No. 11 of 2021, dated 3th January 2022, whereby it has extended the date for the deadline for digital payments by corporate sector stipulated under Section 21(la) of the Ordinance up to January 31st, 2022.

However, through the Finance Supplementary Act, 2022 passed on 14th January 2022, the FBR has been given power to give date of applicability of the above clause, having effect that operation of section 21(la) will not be effective until notified by FBR through a Notification.

6. CONSTITUTION OF SUB-COMMITTEE ON TAX ADMINISTRATION MODERNIZATION AND AUTOMATION (TAMA) - SUB-COMMITTEE ON ADMINISTRATION ON SUPPLY CHAIN CAPTURE

The FBR has issued Letter no. C.No. 1(5) ST-L&P/TAMA/2022-P dated 20th January 2022 whereby it has issued Terms of Reference (TORs) of the Sub Committee on the supply chain capture business. These are as follows:

- To identify wholesalers, distributors, small, medium, and large manufacturers/importers who potentially have taxable income but neither, they have been brought into the tax base of Pakistan nor being part of the tax base but are evading and suppressing taxes and invoices.

- To define the potential target market and quantify the size of the target market.
- Develop a Business Plan comprising of budget pertaining to project plan, human, IT, and infrastructure resources required to bring the potential target market into the tax base, in order to generate incremental tax revenue.
- To obtain legal and regulatory protection, facilitation, and support of stake holders in order to achieve the objective in collaboration and support of FBR.
- To define policy & Rules for a licensing framework for appointment of intermediaries who will coordinate and facilitate the integration of supply chain to capture and report all sales transactions.
- To coordinate with various associations and trade bodies to facilitate the integration of supply chains.
- Controlling, monitoring & implementation of supply chain capture integration program in coordination with IRS Operations.
- To develop a correlation between invoices and digital/electronic payments for the purpose of audit, in coordination with necessary stakeholders including but not limited to SBP.
- To leverage software to capture the entire supply chain from manufacturer, distributor, wholeseller, retailer and customers to capture transactions, WHT information and use the developed database to capture potential taxpayers.
- To leverage data analytics to capture Sales Tax demand on the input/output at each stage of supply chain from manufacturer to end consumer, thereby bringing unregistered distributors, sub-distributors, and retailers into the tax net.
- To develop organizational structure required to deliver on above TORs based on size of potential target market, physical dispersion of potential target market, and committed time lines for achieving TORs. Develop the costs associated with recruitment, third party agreements, or consultancy arrangements required to acquire the desired human resource.
- To determine IT-related resources required in terms of hardware, software, bandwidth, storage along with financial cost and timelines for delivery.

- Determine the infrastructure in terms of premises, furniture, equipment, rent/lease, and renovation/internal layout-related costs.

7. PROCESSING OF INCOME TAX REFUND APPLICATION - T/Y 2021 - INSTRUCTIONS REGARDING THERETO

The FBR has issued a Letter bearing No. 4(10) Rev Bud /2020 Vol-III, dated 24th January, 2022 whereby it has directed to Chief Commissioners of all LTOs, MTOs, CTOs and RTOs that in continuity of institutional stance that “current year’s refund liability should be paid out of the current year’s revenue stream and that no due refunds should be withheld”, therefore, field formations are directed to expeditiously dispose of refund applications pertaining to tax year 2021 (upto Rs 50 Million) after completing all codal formalities. Timely disposal of refund applications will ensure effective management of cash flows as well as facilitation of taxpayers by providing liquidity to run business smoothly.

The letter further states that, simultaneously, it is equally imperative to desk audit those returns where tax liability has been set off by refunds in returns with view to determine genuineness of such adjustments. Moreover, the CCIRs have also been requested to direct concerned CIRs to oversee progress of desk audit conducted by each unit officer on monthly basis.

8. CHANGE IN PETROLEUM RATES

The FBR has issued SRO 01(I)/2022, dated 3rd January 2022, whereby it has made following amendments in sales tax on petroleum products w.e.f **16th December 2021**:

S.No	Description	Current Rate	Previous Rates
1	MS Petrol (2710.1210)	4.77% ad valorem	1.63% ad valorem
2	High Speed Diesel Oil (2710.1931)	9.08% ad valorem	7.37% ad valorem
3	Kerosene (2710.1911)	8.30% ad valorem	8.19% ad valorem
4	Light diesel oil (2710.1921)	2.70% ad valorem	0.46% ad valorem

The FBR has further issued SRO 88(I)/2022 dated 18th January 2022, whereby it has made following amendments in sales tax on petroleum products w.e.f. **1st January 2022**:

S.No	Description	Current Rate	Previous Rates
1	MS Petrol (2710.1210)	2.50% ad valorem	4.77% ad valorem
2	High Speed Diesel Oil (2710.1931)	5.44% ad valorem	9.08% ad valorem
3	Kerosene (2710.1911)	8.30% ad valorem	8.30% ad valorem
4	Light diesel oil (2710.1921)	2.70% ad valorem	2.70% ad valorem

9. CHANGE IN VALUE OF SUPPLY OF CNG

The FBR has issued SRO 39(I)/2022, dated 8th January 2022, through which it has made following amendments in the rate of CNG (Value of supply) w.e.f 1st January 2022:

- For Region-I - KPK, Balochistan and Potohar Region (Rawalpindi, Islamabad, and Gujjar Khan) = Rs 134.57
- For Region-II - Sindh and Punjab excluding Potohar Region = Rs 128.11

10. CHANGES IN SALES TAX RULES REGARDING APPEAL IN ATIR AND REFERENCE IN HIGH COURT

The FBR has issued SRO 43(I)/2022, dated 10th January 2022, whereby an amendment is made in Rule 150ZU of the Sales Tax Rules, 2006. Now the Appellant, before filing of an appeal in the Appellate Tribunal is required to send a copy of the Memorandum and grounds of appeal to the respondent. In case of filling of reference by the appellant before the High Court, copy of reference is also required to be sent to the Respondent.

11. EXTENSION IN DATE OF PAYMENT AND FILING OF SALES TAX AND FEDERAL EXCISE RETURN FOR THE TAX PERIOD OF DECEMBER, 2021

The FBR has issued a Letter bearing No. C.No.9(11) ST-LPE/Misc/2016/10320-R, dated 21st January 2022, whereby it has extended the dates as follows:

- The date of payment of Sales Tax & FED for all taxpayers, is hereby further extended upto 25.01.2022
- The date of submission of Sales Tax & FED return for all taxpayers is hereby extended upto 28.01.2022.

12. EXTENSION IN THE LAST DATE FOR E-DEPOSIT OF SINDH SALES TAX FOR THE TAX PERIOD DECEMBER, 2021 AND FOR E-FILING OF TAX RETURN (FORM SST-03 OR FORM SSTW-03, AS THE CASE MAY BE) FOR THE TAX PERIOD DECEMBER, 2021

The SRB has issued a Circular bearing No. 01/2022, dated 18th January 2022, through which it has extended dates as follows:

- The date of payment of Sales Tax & WHT is hereby further extended upto 21.01.2022
- The date of submission of Sales Tax return/Form SSTW-03 for taxpayers is hereby extended upto 25.01.2022.

13. EXTENSION IN RETURN FILING DATE TILL 24TH JANUARY 2022

The PRA has issued a Letter bearing No. PRA/Orders.06/2021/45, dated 17th January 2022, whereby it has extended dates as follows:

- The date of payment of Sales Tax & WHT is hereby further extended upto 24.01.2022
- The date of submission of Sales Tax return/Form SSTW-03 is hereby extended upto 24.01.2022.

14. POS INTEGRATED RETAILERS — IMPLEMENTATION OF RULE 150ZEB(II) OF THE SALES TAX RULES, 2006

The FBR has issued Letter no. C.No.1(05) STL &P/TAMA/2022/8559-R, dated 18th January 2022, wherein it is noted that all Tier-I Retailers as defined in section 2(43A) of the Sales Tax Act, 1990 are expected to maintain highest standards of documentation, reporting, and transparency. In their endeavors to achieve such high standards, they are integrated with FBR's IT system for real-time reporting of their economic transactions.

The said letter further states that it has transpired that many integrated Tier-I Retailers are indulged in making cash transactions, which mutilates not only the overall scheme of things, but also the intended objectives. In this connection, it the letter makes it pertinent to note that Rule 150ZEB(II) of the Sales Tax Rules, 2006, mandates that each Tier-I Retailer "must have the facility of debit and credit card machine installed at each notified outlet and the sales through debit or credit cards shall not be ordinarily refused."

The Letter accordingly states that all integrate-able Tier-I Retailers are liable to have debit/credit card machine installed at their outlets and IRS Field Formations are instructed to ensure implementation of the rules in this respect.

2. CORPORATE NOTIFICATIONS / CIRCULARS

1. ACCOUNTING STANDARD ON ACCOUNTING FOR COMMON CONTROL TRANSACTIONS

The SECP has issued SRO 53(I)/2022, dated 12th January 2022, whereby the SECP has approved the Accounting Standard on 'Accounting for Common Control Transactions', earlier approved by the Council of the Institute of Chartered Accountants of Pakistan which shall be followed by the companies while carrying out common control transactions and preparing financial statements on or after June 30, 2022. However, the SECP may in the public interest, on its own motion, or upon an application made to it, grant an exemption to any company from compliance with all or any of the requirements of the aforesaid standard.

2. NEW INSTRUMENTS OR INVESTMENTS, IN ADDITION TO SHARIAH COMPLIANT GOVERNMENT SECURITIES

The SECP has issued SRO 121(I)/2022, dated 19th January 2022, whereby it has notified the following instruments or investments, in addition to Shariah compliant government securities under clause (g) of sub regulation 4 of regulation 17 of the Modaraba Regulations, 2021:

- a) Islamic income and money market funds with a rating of AA-;

b) Shariah compliant listed Sukuk/TFCs rated “A” or above; and

c) Shariah compliant bank accounts rated “A” or above.

3. CONSTITUTION OF THE RELIGIOUS BOARD FOR MODARABA

The SECP has issued SRO 63(I)/2022, dated 14th January 2022, whereby it has constituted a Religious Board which consists of the following personnel:-

(i) Syed Ahmad Hassan Shah - Chairman

(ii) Dr. Zeeshan Ahmed – Member

(iii) Mufti Irshad Ahmad Aijaz - Member

3. CONCEPT OF MINIMUM TAX REGIME (IN LIGHT OF MESSERS ELAHI COTTON MILLS & OTHERS VS FEDERATION OF PAKISTAN & OTHERS [(1997) 76 TAX 5 (S.C.PAK)

➤ PREAMBLE

At the end, we conclude this edition of our newsletter with our very own topic of the month, in which we will discuss the Minimum Tax Regime (“MTR”) under the Income Tax Ordinance, 2001 (“ITO”). Before the Finance Act 2019, most of the businesses were covered under the ambit of Final Tax regime (FTR). Under the FTR, certain transactions are treated or presumed as income and the advance tax paid on such transactions is considered as full and final discharge of the tax liability in respect of such transactions. Income under FTR is not reduced by any deductions and/or allowances. Neither is any income under the FTR included in total income, nor are any tax credits allowed against the tax paid under FTR. Minimum books of accounts and records under Rule 30 of the Income Tax Rules 2002 (“ITR”) are not required to be maintained as per Circular No. 14 of 2002, where tax collectible or deductible in case of a business is a Final Tax.

In order to document the economy, the Minimum Tax Regime was introduced for various incomes as discussed below:

The MTR is a method of taxation under which tax deductible or collectible (WHT) is treated as a minimum tax

in respect of such transaction. The WHT under MTR shall become final tax where tax under the Normal Tax Regime on such transaction is less than WHT. However, WHT shall be adjustable where tax under the NTR on such transaction is higher than the WHT.

The WHT under following the sections is under the MTR regime:

1	Section 153	Services rendered by a resident person
2	Section 235(4)	Tax on electric bills
3	Section 148	Commercial imports
4	Section 153(2)	Services of stitching etc for export order
5	Section 152(1AAA)	Payment to non-resident media person
6	Section 236Q	Use of machinery and equipment
7	Section 153	Supply of goods and execution of contracts by resident person (with certain exceptions)
8	Section 234A	CNG stations
9	Section 233	Commission or brokerage
10	Section 152(1AA)	Insurance premium to non-resident

1. MINIMUM TAX/TURNOVER TAX U/S 113

The following business entities shall pay tax @1.5% of turnover if their tax liability is nil or less than 1.5% of their turnover. This Section shall apply even if the income of business entity is exempt from income tax or no tax is otherwise payable on account of loss for the tax year, brought forward loss, tax credit, depreciation etc. These businesses are as follows:

- i. A resident company
- ii. Permanent establishment of a non-resident company
- iii. An individual or AOP having turnover of Rs 10 million or above in the tax year 2017 or in any subsequent tax year.

Minimum tax in excess of normal tax liability shall be carried forward and adjusted against the tax liability of subsequent 5 tax years.

2. THE PURPOSE OF MINIMUM TAX/TURNOVER TAX U/S 113

The background of introducing Turnover tax regime was to mitigate the possibility of tax evasion by claiming excessive and bogus tax expenses and/or adjustments. The Legislature was bound to adopt a modern and progressive approach with the object to eliminate leakage of public revenues and to generate revenues which may be used for running of the State and welfare of its people. The imposition of Minimum Tax under Section 80D also [paramateria of Section 113] in 1991 under the Repealed Income Tax Ordinance, 1979 was designed and intended to achieve the above objectives.

There is a difference between minimum tax u/s 113 and other Sections such as Section 153, 233 etc. as minimum tax on turnover (Section 113) if in excess of normal tax can be carried forward for 5 tax years, which benefit is not available in the case of others.

3. THE ISSUES IN THE MTR REGIME UNDER SECTIONS 153, 233 ETC.

In case of the FTR regime, in its landmark case reported as Messers Elahi Cotton Mills the Honorable Supreme Court of Pakistan (“SCP”) noted as under:

“Quoted”

“...We are inclined to hold that presumptive tax is in fact akin to capacity tax i.e., a capacity to earn. In this view of the matter, we will have to read Entry 47 in conjunction with Entry 52 which provides taxes and duties on production capacity of any plant, machinery, undertaking, establishment or installation in lieu of the taxes or duties specified in Entries 44, 47, 48 and 49 or in lieu of any one or more of them. Since under Entry 52, tax on capacity in lieu of taxes mentioned in Entry 47 can be imposed, the presumptive tax levied under Sections 80C and 80CC of the Ordinance is in consonance with the above two entries if read in conjunction”... However, we may point out that in Entry 52, the key words used are “in lieu of taxes and duties specified in Entries 44, 47, 48 and 49 or in lieu of any one or more, of them”. In order to understand the real import of the above portion of Entry 52, we will have to refer to the meaning of the words “in lieu of”. In this regard, reference may be made to Black’s Law Dictionary, Sixth Edition, Ballantine’s Law Dictionary, Third Edition; and the

Legal Thesaurus by Steven C De Costa, which provide as follows:

Black’s Black’s Law Dictionary Page 787, “In lieu of”: Instead of; in place of; in substitution of. It does not mean “in addition to”. Ballantine’s Law Dictionary Page 628, “in lieu of”: In substitution for or in place of, ordinarily implying the existence of something to be replaced. Legal Thesaurus Page 266, “In lieu of”: Proposition as a substitute for, as an alternative, by proxy, or, in place of, instead of, on behalf of, rather than, representing.

After citing the above references, the Supreme Court held: “If we were to construe Entry 52 of the Legislative List keeping in view the above meanings of the expression “in lieu of”, it becomes evident that the Legislature has the option instead of invoking Entry 47 for imposing taxes on income, it can impose the same under Entry 52 on the basis of capacity to earn in lieu of Entry 47, but it cannot adopt both the methods in respect of one particular tax. Since under Sections 80C and 80CC the imposition of presumptive tax is in substitution of the normal method of levy and recovery of the income-tax, the same is in consonance with Entry 52.”

Unquote

4. IMPLICATIONS FOR THE NEWLY INTRODUCED MTR REGIME U/S 153, 233 ETC

The Sections 153 and 233 of the ITO which were previously part of the FTR regime, were converted into a MTR through Finance Act, 2019 by using both Entries 47 & 52 of Part 1 of the Federal Legislative List present in the Constitution of Pakistan 1973. Whereas, as per the Order of the SCP, Entry no 52 can only be invoked in lieu or as a substitute of entry no. 47. Through Finance Supplementary Act, 2022 the Legislature provided an explanation to remove this anomaly by treating the receipts under these section as income.

4. TOPIC OF THE MONTH

SINDH SALES TAX IS APPLICABLE ON FOREIGN INDENTING COMMISSION – THE HIGH COURT OF SINDH

➤ FACTS OF THE CASE

The case is titled “**Concept of Minimum Tax Regime (in the light of Messrs Elahi Cotton Mills & others)**”. The facts of

the case are that the Assistant Commissioner of the Sindh Revenue Board (“SRB”) issued show-cause notices requiring the indenters to be registered with SRB under Section 24B of Sindh Sales Tax Act, 2011 (“SSTA”) with consequential penal action under Serial No.1 of Table provided in Section 43 of the SSTA on violation and breach of Section 24 of the SSTA read with Rules of Chapter II of Sindh Sales Tax on Services Rules, 2011 (“SSTSR”).

As per the definition under Section 2(51A) of the SSTA, an indenter is defined to be a person who is representative of a non-resident person or non-resident company or of a foreign product or a foreign service. The indenters get their consideration in the shape of commission, remuneration or royalty on a transaction, irrespective of whether the transaction has taken place out of his effort, consent or otherwise.

THE BASIS OF CHALLENGE OF SCN

1. DEFINITION 2(51A) PROVIDED BY SSTA 2011 & PCT HEADINGS IS ULTRA VIRES THE CONSTITUTION

The definition was claimed to be confiscatory and claimed to be hit by doctrine of occupied field in terms of entries relied upon and/or having been catered by Chapter 21 of Foreign Exchange Manual and Section 154 of Income Tax Ordinance, 2001.

The petitioners have challenged PCT Heading 9819.1200 to the First Schedule of SSTA being ultra vires to the Constitution as contrary to referred entries of Federal Legislative List that deals with foreign exchange, import/export and extra territorial limits, being within the domain of federation. The petitioners have further sought declaration that the impugned show-cause notices which seek registration of these indenters, to be declared ultra vires to the Constitution in view of above.

2. CONTRACTUAL RELATIONSHIP

The indenters do not have any contractual relationship with the local parties receiving the goods from foreign exporters and hence in the first instance it may be a transaction of direct import by the local party through foreign entity and any understanding between foreign

principal and the indenters does not come within the clutches of at least the subject provincial statute, i.e. SSTA.

The contract between applicant/indenters and foreign principal is a document which are governed by foreign laws including foreign arbitration. These indenters claimed to have been paid fixed emoluments by principal and that too on the conclusion of sale of goods to the local party by its foreign principal.

3. IT IS WITHIN FEDERAL JURISDCITION

3.1 IT IS FOREIGN REMITTANCE

Since the amount was received in foreign exchange as remittance through banking channels, it is only the Federation which could impose tax on such foreign remittance which is otherwise covered in terms of Section 154 of the ITO. It is thus a tax which cannot be recovered from the foreign principal by the indenters as it becomes a direct tax and hence constitutionally not permitted through provincial Legislation. It is argued that the provinces lack the competence to legislate on the subject on the touchstone that it is in relation to extra territorial jurisdiction and the SSTA cannot encroach upon the subject of extra territorial jurisdiction in terms of Article 141 of the Constitution as it is with the parliament to legislate and make laws in reference therewith.

3.2 IT IS EXTRA TERRITORIAL ACTIVITY

To support the activity, being of extra territorial application, it is urged that the principal of the petitioners/indenters are foreign entities and they did not have place of business or office in Pakistan and apart from this the agreement and the relationship between them i.e. principal and indenters is also governed by foreign laws and the dispute between them is resolved through a resolution or arbitration which jurisdiction too is contemplated abroad and hence the foreign entity cannot be subjected to the local laws for the purposes of implementing SSTA 2011 to recover taxes, as levied and had been the subject matter of show-cause notices issued to them (indenters).

It is urged that the activities across the country and beyond territorial limits of a province could only be governed by Article 141 of the Constitution and hence being of extra

territorial limits of this province, the SSTA 2011 lacks its application over the subject and province lacks competence to legislate.

3.3 IT IS COVERED UNDER ENTRIES 3, 32 AND 27

Entry No.27 of Federal Legislative List of Fourth Schedule to the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter called "Constitution") relates to import and export across customs frontiers as defined by the Federal Government, inter-provincial trade and commerce, trade and commerce with foreign countries and standard of quality of goods to be exported out of Pakistan.

The next entry that was relied upon was Entry No.3 of Federal Legislative List to the Fourth Schedule of the Constitution i.e. implementing treaties and agreements, including educational and cultural pacts and agreements with other countries; extradition, including the surrender of criminals and accused persons to Governments outside Pakistan.

Entry No.32 relates to international treaties, conventions and agreements and International arbitration. Thus, geographical stretch of the business under consideration claimed to have taken it away, beyond the territorial limits of province, as alleged, and either goods or services, could not be squeezed down to a restricted area of province of Sindh alone. It is thus concluded in terms of the aforesaid entries of the Federal Legislative List that the parliament has exclusive powers to make laws on the subjects enumerated in the Federal Legislative List and the parliament is only restricted to make laws with respect to matters not enumerated thereunder.

3.4 DOCTRINE OF REPUGNANCY & OCCUPIED FIELD APPLICABLE

If the relationship of indenters, economic activities and the services being rendered, comes within the legislative powers of both federation and the province, the subject matter is still covered by the legislative competence of federation in terms of Article 143 of the Constitution as there is serious inconsistency even within the domains of both federation and province and since the field has already been occupied in terms of earlier legislation (with reference of entries relied upon), there is no room or scope

left with the provincial legislature to enter into such regime. Even if the field of legislation is not occupied, as argued, and provincial legislature made an attempt to venture or attempt to legislate all such unoccupied terrain, then also the federal legislation within constitutional frame, shall push aside the provincial law to the extent it is in conflict with the federal law and it is at this point of time where doctrine of repugnancy would come into play.

SHC OBSERVATIONS & DECISION

4. IT IS A PROVINCIAL MATTER

The SHC observed that the only thing that requires consideration is whether the event of rendering services to the foreign principal is covered by the relied entries, and hence the provincial competence to legislate on the subject. An attempt has been made to create an impression that indenters are in fact importers and exporters of the goods and thus are ousted from purview of the provisions of services and have relied upon several entries of Federal Legislative List of Fourth Schedule of the Constitution and Section 154 of Income Tax Ordinance, 2001, read with Chapter 21 of Foreign Manual 2012.

Sale of Goods is an independent transaction as compared to the services provided by the indenters to a foreign principal. It cannot be equated or kept at par with the goods being supplied to a local buyer or to a foreign principal, as the case may be, as both the export indenters and import indenters are being subjected to similar provisions under consideration. Both categories of indenters i.e. either import and/or export indenters provide services under an agreement or arrangement to foreign principal and hence it is this event which formed part of consideration as far as the SSTA is concerned and not the goods or value of the goods. It is the foreign principal who receives services from these specialized and qualified entities calling themselves as indenters in Sindh under agreement(s) and are not agreement(s) of import and export of the goods. These services by indenters provide special assistance to foreign principals on account of their better understanding of goods description and its requirement, utility and their marketing skills, as the case may be, in terms of understanding between indenters and foreign principal.

5. THE ARGUMENT OF EXTERNAL AFFAIR & CITED ENTRIES NOT APPLICABLE

The subject of external affairs, implementation of treaties etc. agreements that concerns with education, culture promote and/or extradition may be the exclusive domain of federation but it does not spill over entries such as Entry 49 after its amendment, meant for imposition of taxes which entry consciously excludes tax on service after the 18th Amendment. Similarly, Entry 27 and 32 in the Federal Legislative List of the Fourth Schedule enabled Federation to regulate such laws to which there is no cavil, however, it does not overpower Entry 49 with its exclusion so far as sales tax on services are concerned.

As far as Regulations with respect to identified subjects, such as import, export external affairs, implementation of treaties, educational and cultural issues etc. are concerned, the Federal Government regulates them in terms of policies framed. However, Entry 43-53 of Federal Legislative List deals with levy of tax which cannot be subjected to any other entries in the Federal Legislative List of Fourth Schedule of the Constitution. The Court held that it may conclude that sales tax on services cannot be subjected to entries such as, 3, 9, 27 and 32 of Federal Legislative List of Fourth Schedule. The subject controversy is of sales tax on services, which, for the purposes of taxes should have been fallen within Entries 43 to 53

The Court further held that, followed by 18th Amendment on applicability of Article 270AA, the Province of Sindh had the constitutional mandate and the court considers the levy under consideration to be within the competence of the province under present enactment i.e. SSTA 2011. The economic activity in relation to both the categories of indenters was either originated from Sindh or terminated in Sindh. This is perhaps the original requirement of the Statute and is irrespective of the ultimate destination of the goods/ commodities. The sales tax on service has nothing to do with the ultimate destination of the goods. Similarly, the sale and consumption of the goods being imported and exported is beyond the purview of this levy under consideration. All that is required is that the indenters must be resident persons as defined above and are providing a taxable service.

Having place of business in Sindh is also defined under subsection (64) of Section 2 which means that a person owns, rents, shares or in any other manner occupies a space in Sindh from where it carries on an economic activity whether wholly or partially or carries on an economic activity through any other person such as an agent, associate, franchisee, branch, office, or otherwise, in Sindh or through virtual presence or a website or a web portal or through any other form of e-Commerce, by whatever name called or treated, but does not include a liaison office.

Secondly the general principle of passing on value added tax (VAT) to the end consumer is not an absolute principle for any legislation but the exceptions are always there considering the circumstances, which at times are inbuilt in VAT mode legislation and it has always remained prerogative of legislature to shift this burden either to the end consumer or to the provider of service for the administrative or legal needs. Thus, formula of shifting the burden of tax either on recipient or provider of service is established around the globe and being implemented all over the world where VAT regime of tax existed. The Court was of the view that it is not an absolute mechanism that on an event of indirect tax, it must be passed on to the end consumer though in general the principle exists but carries exceptions along with it.

6. DOCTRINE OF REPUGNANCY & OCCUPIED FIELD NOT APPLICABLE

Considering another aspect of the arguments that the indenters are associated with the import of goods and hence would attract the provisions of Section 154 of the ITO read with Chapter 21 of the Foreign Exchange Manual 2012, the Court stated that it may conclude this controversy by observing that it is purchaser of the goods who can be said to be importer under section 2(13) of Sales Tax Act, 1990 which defines the term "Importer" of any goods of import indenter whereas in the matter of export it is manufacturer of goods who could be called "exporter". In both the situations the indenters are neither termed as importer nor exporter. The Court further held that Perusal of entire provisions of Section 154 read with Division IV Part III of the First Schedule of Income Tax Ordinance, 2001 takes the Court to the conclusion that when it talks about

indenter all it requires is that authorized dealer of the bank may deduct a required percentage of the remittances as commission received by the indenters. There is nothing to show in the context of the said provisions for a treatment that the very activity of indenters is either import or export of goods.

The SHC concluded that there is no space of interpretation provided by petitioners in relation of Foreign Exchange Manual read with Section 154 of Income Tax Ordinance, 2001. Similarly, there is no applicability of extra territorial operation for giving effect to Article 141 of the Constitution. The doctrine of occupied field would also not come into play as the Court is of the view that Entry 49 of Federal Legislative List, as structured after 18th Amendment, empowers the Province to legislate on the subject under consideration. The legislative powers defined under Articles 141, 142 and 143 of the Constitution have not been violated while encompassing services rendered by indenters to be within the frame of SSTA 2011 and find its place within exclusion defined in Entry 49 of Federal Legislative List of Fourth Schedule of Constitution.

CONCLUSION

Hence, the SHC held that the Foreign Indenting Commission is liable to Sindh Sales Tax on Services.

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