IN THE HIGH COURT OF SINDH, KARACHI
CP D-3184 of 2014
(and others)

Date Order with signature of Judge

Present: **Munib Akhtar & Abdul Maalik Gaddi, JJ.**

For hearing of main case
Dates of hearing: March 10, 16, 17, 22, 25, 30, 31 and
April 05, 06, 07, 08, 13, 14, 15, 19 and 20.2016

Counsel for petitioners
(in respective petitions):

Mr. Muhammad Yousuf, Mr. Arif Muhammad Khan,
Mr. Shaiq Usmani a/w Mr. Usman Hadi,
Mr. Ali Almani, Mr. Hyder Ali Khan a/w
Mr. Samir ur Rahman Khan,
Mr. Jam Zeeshan, Mr. Ahad Zubair,
Mr. Anwar Kashif Mumtaz,
Mr. Khalid Javed Khan a/w Mr. Muhammad Ahmer,
Mr. Muhammad Ameen Bandukda,
Mr. Iqbal Salman Pasha,
Mr. Nafees Ahmed Siddiqui, Mr. Emad ul Hasan,
Mr. Pervez Iqbal Kasi, Mr. Imdad Hussain,
Mr. Abdul Sattar Awan,
Mr. Umair Qazi, Ms. Sarwat Israr.

Counsel for respondents:

Mr. Salman Talibuddin, Addl. Attorney General a/w
Mr. Ashfaq Rafiq Janjua, Standing Counsel

Mr. Saifullah, AAG a/w Ms. Nasreen Sehto,
State Counsel

Mr. Anwar Mansoor Khan,
Ms. Umaimah Khan a/w
Ms. Reem Tashfeen Niaz, and
Mr. Atifuddin, for SRB, assisted by
Syed Zainul Abidin, Deputy Commissioner, SRB

Mr. Sarfraz Ali Metlo,
Mr. Syed Irshadur Rahman,
Mr. Kafeel Ahmed Abbasi and
Mr. Amjad Javed Hashmi for FBR/Inland Revenue
Department, assisted by Mr. Sharjeel Ahmed,
DC IR, LTU, Karachi (FBR)

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Munib Akhtar, J.: In this judgment we are required to consider an important constitutional issue, which has been exercising (and, no doubt, on occasion even exciting) the minds of the Bar and the Bench for some time, especially after the passage of the 18th Amendment to the Constitution. 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. 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.

2. As will become clear as this judgment proceeds, in order to resolve the issues before us we will have to closely consider the seminal decision of the Supreme Court reported as *Hirjina & Co. v. Islamic Republic of Pakistan and another*1993 SCMR 1342 (herein after "*Hirjina*"). By this judgment appeals from two decisions of this Court, including one reported as *Mondi's Refreshment Room & Bar, Karachi v. Islamic Republic of Pakistan and another* PLD 1982 Karachi 214, were disposed off. The relevant passages from *Hirjina* were in fact read several times during the course of submissions, and the correct resolution of the constitutional question turns in important part on a proper understanding of this decision.

3. Some of the petitioners argued for the issue being decided in favor of the Federation, while others sought to have the Provincial statute sustained. Thus, learned counsel for the petitioners argued (as the case may be) for an affirmative answer to the first or the second question with, correspondingly, a negative answer to the others. On behalf of the respondents the arguments were (as was to be expected) the converse of what was said for the petitioners, but some learned counsel for the respondents submitted that the correct resolution lay in the third question being answered in the affirmative. The fourth possibility did not, as it were, find any takers. For convenience, and departing from strict adherence to the order in which learned counsel appeared, we will first set out those petitioners' submissions who favored the

Federation and then those who supported the Province. Then, we will note the submissions by learned counsel appearing for the Federation and FBR (the Federal Board of Revenue) to be followed by those of learned counsel appearing for the Province and SRB (the Sindh Revenue Board).

4. Mr. Muhammad Yousuf, who appeared for the petitioners in CP D-3184/2014 and other petitions argued for the Federal legislative power. Learned counsel submitted that the petitioners whom he represented were shipping agents or freight forwarders and/or their respective associations. Learned counsel referred to the 2011 Provincial Act and the predecessor legislation which it repealed and replaced, the Sindh Sales Tax Ordinance 2000 ("2000 Provincial Ordinance"). Learned counsel submitted that the earlier provincial law had not applied to the petitioners whom he represented. Turning to the 2005 Federal Act, learned counsel referred to s. 2(23), the definition of services and submitted that shipping agents and freight forwarders were registered under the federal law and paid excise duty on services in the normal course. Reference was made to entry No. 5 of Part II of the First Schedule to the federal law. Learned counsel submitted that after the enactment of the 2011 Provincial Act, the SRB started issuing notices to the shipping agents directing them to get registered under the provincial law, as an obvious prelude to the payment of provincial sales tax on services. In this regard reference was made to s. 2(80) of the provincial law, which defines "shipping agent". ("Freight forwarding agent" is defined in s. 2(47).) Learned counsel referred to the minutes of a meeting held between the representatives of the shipping agents' and freight forwarders' associations with the SRB dated 04.07.2011 (i.e., almost immediately after the enforcement of the 2011 Provincial Act). At that meeting the representatives of the associations had highlighted the problems for the industry by the simultaneous imposition of the federal excise duty and the provincial sales tax. The minutes recorded that the representative of the SRB stated that the Federal Government was in the process of granting suitable exemptions from the 2005 Federal Act, which would ensure that there would be no doubling of the tax burden. Learned counsel then referred to the constitutional provisions, and drew attention to Articles 142 and 143. Referring to the Fourth Schedule to the Constitution (which, post the 18th Amendment, now contains only the Federal Legislative List) learned counsel referred to entry Nos. 24, 27 and 44. It was submitted that the legislative power to impose an excise duty on services existed by reason of entry No. 44. Reliance was also placed on entry No. 53 as an alternate source of federal legislative power, the difference being that while entry No. 44 applied generally to all services, the latter entry applied only and specifically to (as presently relevant) shipping agents and freight forwarders. Learned counsel submitted that a provincial sales tax on services was

recognized by the "exception" added to entry No. 49 by the 18th Amendment. (We may note that after the 18th Amendment this entry read as follows: "Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed, *except sales tax on services*." The words emphasized were added by the Amendment.) However, he submitted that such a tax could not be levied on any matter that came within the scope of entry Nos. 44, 53, 24 and 27. Learned counsel also read out in extenso the relevant passages from *Hirjina*. It was submitted that while entry No. 49 was amended by the 18th Amendment, entry No. 53 had remained unaltered, and reliance was placed on this entry to deny any legislative power in the Province to impose a tax on services provided by shipping agents and freight forwarders. Learned counsel also referred to clauses (6) to (8) of Article 270AA, in particular relying on clause (7) to submit that the federal law had to remain in the field.

5. Mr. Arif Muhammad Khan, learned counsel appearing in CP D-3763/2014 (where also the petitioner was a shipping agent) relied on entry No. 47 (taxes on income) to submit that the provincial levy of sales tax on services could not apply. Learned counsel accepted that by reason of the "exception" added to entry No. 49 by the 18th Amendment the Provinces could levy a sales tax on services. However, learned counsel submitted that the main part of the entry (which was relatable to goods) limited the scope of the power so conferred on the Provinces. Thus, it was contended, it was only services of a limited nature that could be taxed by the Provinces, and this certainly did not include shipping agents. Learned counsel emphasized that since income tax (a federal levy) was imposed, the provincial levy of sales tax on services could not apply.

6. Mr. Shaiq Usmani, learned counsel in CP D-348/2015 (a petition by a clearing/shipping agent) also argued for the federal power. Referring to entry No. 5 of Part II of the First Schedule to the 2005 Federal Act, learned counsel submitted that the petitioner came within the scope of clause (ii) thereof. Learned counsel also relied on the rules framed under the federal law. It was submitted that the Province could not impose the sales tax on services on shipping agents by reason of entry Nos. 20, 24, 27 and 53 of the Fourth Schedule to the Constitution. Learned counsel also read out the relevant passages from *Hirjina*. Learned counsel emphasized that the 2005 Federal Act was admittedly in the field and hence the Province could not levy any sales tax. Referring to entry No. 53, learned counsel submitted that "terminal taxes" were levied at a terminal where goods were loaded and/or discharged. All taxes relatable to a terminal came within the scope of entry No. 53 and hence were the exclusive domain of the Federation. Referring to the 2011 Provincial

Act, learned counsel drew attention to heading 9805.1000 in Part B of the Second Schedule, which applied to "shipping agents". Reference was made to Rule 32 of the Sindh Sales Tax on Services Rules 2011 (framed under the provincial law), which relates to shipping agents. Learned counsel submitted that the term "commission" as used therein was not defined in the statute and submitted that its correct meaning was as given in the relevant entry in *Black's Law Dictionary*. It was neither a fee nor a share and hence no sales tax could be charged on the same. Mr. Nafees Ahmed Siddiqui, learned counsel in CP D-3777/2015 and another petition (where the petitioners were shipping agents and/or freight forwarders) adopted the submissions of Mr. Shaiq Usmani.

7. Mr. Anwar Kashif, learned counsel appearing in CP D-1482/2016 (where the petitioner was not a shipping agent or freight forwarder) argued for the provincial power and against the federal levy. Learned counsel submitted that prior to the 18th Amendment, excise duty was levied on services in terms of the 2005 Federal Act, and referred to clause (d) of s. 3 thereof (the charging provision). However, learned counsel submitted, the situation had changed in the post-18th Amendment scenario. The "exception" added to entry No. 49 made clear that the legislative power now vested in the Provinces alone. It was submitted that the "exception" was intended to override *Hirjina* and shift the legislative power from the (exclusive) federal domain to the (exclusive) provincial domain. The necessary amendment had been made as an "exception" to entry No. 49 rather than by way of a change in entry No. 44 because the matter related to a tax on sales, although of course the "sale" involved here was by way of the providing or rendering of services and not in relation to goods. Learned counsel also referred to clause (7) of Article 270AA.

8. Mr. Hyder Ali Khan, learned counsel appearing in CP D-1272/2016 and other petitions (where also the petitioners were not shipping agents or freight forwarders) argued for the exclusive provincial power to levy a tax on the rendering and providing of services. Learned counsel submitted that prior to the 18th Amendment, the 2000 Provincial Ordinance had been in the field as had equivalent Ordinances in the other Provinces. These laws were challenged in this Court and the Lahore High Court. Reference was made to *Defence Authority Club, Karachi and others v. Federation of Pakistan and others* 2007 PTD 398, a Division Bench judgment of this Court, and certain decisions of the Lahore High Court, being *Nafees Dry Cleaners v. Government of Punjab and another* 2001 PTD 2018, *Hafeezullah Malik & Co. v. Province of Punjab and others* 2003 PTD 1852 and *Gurgson Dry Cleaners v. Sales Tax Officer Rawalpindi* 2004 PTD 1987 (which was, in fact, in respect of a sales tax on

services imposed in the Islamabad Capital Territory by means of a federal law). It was submitted that in each case, the challenge to the provincial legislation (and the federal levy of a sales tax on services in the last mentioned case) was repelled. Referring to the "exception" added to entry No. 49 of the Fourth Schedule, which recognized the provincial power to levy a tax on services, learned counsel submitted that even if it could be argued that it had been put in the wrong place (i.e., ought really to have been added to entry No. 44), it had to be given due effect and meaning. Learned counsel submitted that the taxing event in respect of the federal excise duty on the one hand and the provincial sales tax on the other was exactly the same, i.e., the rendering or providing of services. It was submitted that the "exception" had the effect of divesting the Federation of legislative power to impose a levy (whether called a duty or a tax being immaterial) on the providing or rendering of services. That power vested exclusively in the provinces post-18th Amendment.

9. Learned counsel also read out in detail the relevant passages from *Hirjina*. It was submitted that the constitutional context in which *Hirjina* was decided was the late 1962 Constitution. Learned counsel submitted that the judgment could be regarded as falling into two parts. The first part, which dealt with the federal power to levy duties of excise, had to be understood and applied in the given constitutional context, i.e., the 1962 Constitution. However, the present power was under entry No. 44 of the 1973 Constitution. The constitutional dispensation was not the same. As regards the second part of *Hirjina*, learned counsel submitted that that part started from para 8 onwards of the judgment. It was submitted that the two parts were interlinked. It was submitted that the constitutional dispensation to which the second part of the judgment related (i.e., the 1962 Constitution) was clearly different from that now prevailing under the present Constitution. In particular, the present Constitution did not have any provisions equivalent to those of the 1962 Constitution which were referred to by the Supreme Court in the second part of the judgment. The "exception" added to entry No. 49 was on the constitutional plane and had to be given due effect. Its effect was clear: the legislative power now vested exclusively in the Provinces.

10. Mr. Ali Almani, learned counsel in CP D-4182/2014 and another petition (in both of which the petitioner was the same though not a shipping agent or freight forwarder) also argued in support of the exclusive provincial power. Referring to *Hirjina*, learned counsel submitted that the Supreme Court had considered two questions. Firstly, was the (amending) Ordinance of 1969, whereby a duty on the providing or rendering of services was for the first time introduced into the Central Excises Act, 1944 (the legislation repealed and replaced by the 2005 Federal Act) constitutionally valid in terms

of the 1962 Act, and secondly, the impact thereof in terms of the present Constitution. Learned counsel submitted that the "exception" added to entry No. 49 by the 18th Amendment had brought about a material change on the constitutional plane and this meant that *Hirjina* was no longer binding. Learned counsel also submitted that the taxing power in relation to the providing or rendering of services could not be concurrent since that was contrary to the scheme of the division of such powers under the Constitution, both before and after the 18th Amendment. Learned counsel also relied on *Godfrey Phillips India Ltd. and another v. State of Uttar Pradesh and others* AIR 2005 SC 1103, (2005) 2 SCC 515.

11. Mr. Khalid Jawed Khan, who appeared in CP D-5387/2014 (where the petitioner was not a shipping agent or freight forwarder) also argued for the provincial power, although his submissions were more nuanced in that he did not altogether rule out the possibility of the simultaneous legislative competence of the Federation. Learned counsel submitted that the judgment in *Hirjina* could for present purposes be regarded as falling into three "parts", the first being up to the para 7 thereof, the second being para 8 and the last being up to para 11. Learned counsel also referred to *Governor-General in Council v. Province of Madras* AIR 1945 PC 98. Learned counsel submitted that the taxing event in both the federal and provincial statutes was the same. The "exception" added to entry No. 49 overrode the *ratio decidendi* of the first "part" of the judgment in *Hirjina*. Learned counsel submitted on this basis that in the post-18th Amendment scenario, the legislative power clearly vested in the Provinces, and this also explained the subsequent (and consequent) provincial legislation, of which the 2011 Provincial Act was the outcome in this Province. Mr. Umair Qazi, learned counsel in CP D-385/2016 (where also the petitioner was not a shipping agent or freight forwarder) adopted the submissions made by Mr. Khalid Jawed Khan.

12. Mr. Emad ul Hasan, appearing for the same petitioner in CP D-1877/2016 and another petition (which was also not a shipping agent or freight forwarder) argued for the provincial power and submitted that it was a case of an excluded legislative field. Learned counsel submitted that by reason of the "exclusion" added to entry No. 49 by the 18th Amendment the power to tax services had been excluded from the Federal power and in this regard referred to Article 142 and entry Nos. 44 and 49. Learned counsel contended that the power was exclusive to the Provinces. It was emphasized that the taxing event, i.e., the providing or rendering of services, was the same in both cases.

13. Mr. Salman Pasha, learned counsel in CP D-1998/2016 (where also the petitioner not a shipping agent or freight forwarder) also argued for the exclusive provincial power. Mr. Ameen Bandukda, learned counsel in CP D-2153/2016 and another petition, where the petitioner was a financial services company, also contended for the exclusive provincial power. Learned counsel submitted that it was well settled that the nomenclature used to describe a fiscal measure was irrelevant. In both cases, the taxing event was the same and after the 18th Amendment, the legislative power lay exclusively with the Provinces. There could not be two separate taxing activities. With the coming into force of the 2011 Provincial Act especially, the Federation could not levy the duty. Mr. Pervez Kasi, learned counsel in CP D-2150/2016 and Ms. Sarwat Israr, learned counsel in CP D-2497/2016, also argued for the provincial power and adopted the submissions by other learned counsel in this regard.

14. Turning now the respondents' side, and case for the Federation was opened by Mr. Salman Talibuddin, learned Additional Attorney General. Referring to the predecessor provincial legislation, the 2000 Provincial Ordinance, learned counsel referred to *Defence Authority Club, Karachi and others v. Federation of Pakistan and others* 2007 PTD 398 (SHC; DB) and submitted that that judgment held that the provincial power to levy a tax on services was not an enumerated matter (sometimes also referred to as a "residuary" power). Learned counsel submitted that the mechanism envisaged in the 2000 Provincial Ordinance was that the tax would be collected by the FBR (previously the Central Board of Revenue or CBR) and in the same manner and at the same time as the (federal) sales tax under the Sales Tax Act, 1990, a levy on goods. It was submitted that the revenues so collected were then made part of the National Finance Commission (NFC) award issued in terms of Article 160 of the Constitution and referred in particular to the Award of 2006. Learned counsel drew attention to para 3 of this award. Learned counsel submitted that from the revenues generated by the provincial Sales Tax Ordinances (of 2000) the Federation also deducted certain collection/recovery charges. It was submitted that the Provinces were aggrieved by this mechanism. Their case was that the revenues collected on the provincial sales tax on services should remain with the Province in and from which the same were collected. Learned counsel emphasized that appreciation of this provincial grievance, and the manner in which it was resolved, was crucial to a proper understanding of the "exception" that was ultimately added to entry No. 49 by the 18th Amendment. In this regard, learned counsel placed reliance on the proceedings and debates in the National Assembly that led to the passing of the 18th Amendment, and reference was made to certain passages from the official reports of the National Assembly

debates (21st Session, 6th, 7th and 8th April, 2010). Learned counsel submitted that the Provinces were concerned that their power to tax services was not enumerated, and sought to have some constitutional cover for, or recognition of, this power. They suggested that entry Nos. 44 and 49 be omitted altogether from the Fourth Schedule, since that would give the taxing power in relation to excise and sales wholly over to the Provinces. This was however unacceptable to the Federation. In sum, learned counsel submitted that the Provinces wanted to have control over the proceeds of the provincial sales tax on services rather than the same being collected by (in effect handed over to) the Federation and only then "returning" to the Provinces in terms of the NFC Awards. At the same time, the Federation also wished to retain its power to levy a duty on services. It was to reconcile these positions that a compromise was crafted in terms of which the "exception" was added to entry No. 49 by the 18th Amendment. With this addition to entry No. 49, learned counsel submitted, the position that emerged was as follows. The Federation continued to retain its power to impose a duty on the rendering or providing of services, in terms of entry No. 44. At the same time, the Provinces now also had an expressly recognized constitutional power to levy sales tax on the rendering or providing of services.

15. The learned Additional Attorney General emphasized that in the post-18th Amendment scenario, the two powers were simultaneous but exclusive. Learned counsel accepted that the taxing event was the same in both cases. However, he submitted, the legislative powers were not concurrent in the constitutional sense. Learned counsel submitted that the term "concurrent" could be used in different senses. One was where it meant simply, covering the same matters, e.g., where there were concurrent interests. Another was, having authority over the same matter(s), and it was this sense that went to the legislative power or competence. Learned counsel submitted that to the extent that the taxing event was the same, there was concurrence in the first sense. But, and this was crucial, that did not mean that there was concurrence in the second, or constitutional, sense. Learned counsel submitted that the federal power to levy a duty on services arose out of entry No. 44 and it remained vested there, both before and after the 18th Amendment. However, the position of the provincial power to levy a sales tax was altered. Prior to the 18th Amendment, it was not an enumerated matter (i.e., was a "residuary" power). After the 18th Amendment, it was given express constitutional recognition. But, it was only as a sales tax and not in any other manner. This recognition also did not (and could not) affect the federal power to levy the excise duty. This was the true import, purpose and effect of the "exception" added to entry No. 49. There was no concurrence in the constitutional sense even though the taxing event was the same. Referring to the well known use of the "field"

metaphor in relation to legislative entries, the learned Additional Attorney General submitted that all legislative fields had "boundaries" no matter how broadly they were construed. Learned counsel submitted that the situation created by the 18th Amendment was that both the Federation and the Provinces could legislate in their relevant "field", i.e., had the power to tax the rendering or providing of services. However, the "well heads" of the constitutional power were different, one vesting in the Federation by virtue of entry No. 44 and the other in the Provinces by reason of the "exception". This ensured that there was no concurrence in the second (constitutional) sense and hence Article 143 of the Constitution was not engaged even though there was concurrence in the first sense. Hence there could be simultaneous but exclusive federal and provincial legislation in respect of the taxing power, without the one affecting the other.

16. With reference to the judgment in *Hirjina*, the learned Additional Attorney General submitted that the constitutional dispensation at hand (in terms of the present Constitution) was different from that in terms of which the Supreme Court had given its decision (the 1962 Constitution). However, learned counsel accepted that the first "part" or *ratio decidendi* of *Hirjina*, where the Supreme Court located the power to levy excise duty on services in entry No. 43(b) of the Third Schedule to the 1962 Constitution, was applicable even in terms of the present Constitution. This was because the relevant entries (i.e., in relation to excise duty) were the same in all respects. The addition of the "exception" by the 18th Amendment did not bring about any change in this regard. Learned counsel emphasized that there was never any intent to deprive the Federation of its legislative power under entry No. 44. As regards entry No. 53, learned counsel submitted that that also conferred exclusive power on the Federation to impose "terminal taxes" in the situations contemplated by the entry. Mr. Salman Talibuddin concluded by citing from *State of Himachal Pradesh and another v. Kailash Chand Mahajan and others* AIR 1992 SC 1277 and *Union of India v. Elphinstone Spinning and Weaving Co. Ltd. others* AIR 2001 SC 724, relying strongly on the following passage from the latter judgment (pg. 740):

> "But by no stretch of imagination a Judge is entitled to add something more than what is there in the Statute by way of a supposed intention of the legislature. It is, therefore, a cardinal principle of construction of statute that the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed…. Courts are not entitled to usurp legislative function under the disguise of interpretation and they must avoid the danger of determining the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somehow fitted. Caution is all the more necessary in

> dealing with a legislation enacted to give effect to policies that are subject to bitter public and parliamentary controversy for in controversial matters there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable; it is the Parliament's opinion in these matters that is paramount."

The learned Additional Attorney General submitted that the "mischief" sought to be remedied by the addition of the "exclusion" to entry No. 49 was to address the concerns and grievances of the Provinces. It was not at all intended to deprive the Federation of its undoubted competence to levy a duty on services by reason of entry No. 44.

17. Mr. Irshad ur Rehman, learned counsel appearing for the (federal) Inland Revenue Department in some of the petitions, submitted that the excise duty on services was within the Federal domain. Learned counsel submitted that in or around 2009 it had been decided to levy a general VAT, which was to cover both goods and services, but this never came about. That was why the "exception" was added to entry No. 49 in 2010 (i.e., by the 18th Amendment). Referring to *Hirjina*, learned counsel submitted that the legislative entry there under consideration was the same as entry No. 44 of the present Constitution. This was the basis of the federal legislative power. The taxing event was the same in both the federal and provincial levies. Learned counsel submitted that notwithstanding the "exception", the legislative power had not shifted to the Provinces, and he therefore questioned the constitutionality of the 2011 Provincial Act. Learned counsel relied on *Province of Madras v. Boddu Paidanna and Sons* AIR 1942 FC 33.

18. Mr. Sarfraz Metlo, learned counsel who appeared for the FBR in some of the petitions, adopted the submissions made by the learned Additional Attorney General, and contended that the 2005 Federal Act and the 2011 Provincial Act were both validly enacted under legislative powers separately inhering in the Federation and the Provinces respectively, and each law operated in its own domain. Learned counsel submitted that the situation created by these two laws was not a case of double taxation. Rather, it was a case of "multiple" taxation and that was not prohibited constitutionally. In this regard, learned counsel accepted a submission made by Mr. Anwar Mansoor Khan, learned counsel for SRB (see below). There was no question of any "occupied field" since the legislative fields were different. This was the effect of the "exception" added to entry No. 49; a separate legislative field had been created for the Provinces. Learned counsel submitted that the first "part" or *ratio decidendi* of *Hirjina* was still constitutionally applicable and valid in terms of the 1973 Constitution and thus the excise duty on services was validly enacted.

19. Mr. Kafil Abbasi, learned counsel appearing for the Inland Revenue Department in some of the petitions, submitted that the federal excise duty was validly levied and the law was constitutionally competent. The necessary legislative power was to be found in entry No. 44. Learned counsel referred to Articles 70 and 142 of the Constitution and relied on various cases in support of his submission that the 2005 Federal Act was intra vires the federal power even in relation to services. Learned counsel submitted that both the federal and provincial laws were valid and operated in their own spheres. There was no conflict between the two, nor was there any constitutional bar against either.

20. Mr. Amjad Jawed Hashimi, learned counsel appearing for FBR submitted that there was one basis of taxation but multiple jurisdictions (i.e., both federal and provincial) that could exercise the necessary legislative power in respect of the same. Learned counsel referred to the various entries in the Fourth Schedule that related to the taxing powers and submitted that they fell into two categories. One was where the entry simply identified or described a species of tax such as, e.g., "income" or "excise". The others were where the basis of taxation was also indicated. In the first category, the entries referred to the tax or duty being "of" the relevant kind, whereas in the second category, the reference was to the tax or duty being "on" some thing or person. As presently relevant, learned counsel submitted that the taxing power was exclusive and simultaneous both in the Federation and the Provinces. Thus, the 2005 Federal Act was constitutionally valid when it imposed an excise duty on services.

21. The case for the Province was opened by Ms. Umaimah Khan, learned counsel appearing for SRB in some of the petitions. Learned counsel submitted that the principal points that required consideration were: (i) the difference between excise duty and sales tax; (ii) whether the distinction applied in respect of services; and (iii) whether the position of shipping agents and freight forwarders was any different from the others sought to be brought within the provincial tax net. Referring in particular to para 5 of the judgment in *Hirjina* learned counsel submitted that the term "excise" had to be widely interpreted and applied. It could be levied at any stage. Referring to entry No. 44, learned counsel submitted that the first part of this entry was not exhaustive, but the latter portion (i.e., where reference is made to alcoholic liquors, opium, etc.) placed a restriction or a block on the width of the federal power. Learned counsel submitted that there was no restriction on the imposing of an excise duty on services. A sales tax on the other hand could not be imposed at any stage; it could only be imposed on a sale. In this regard,

reference was made to entry No. 49 and the (federal) Sales Tax Act, 1990 (herein after the "1990 Federal Act"). Referring to the 2011 Provincial Act, learned counsel submitted that it imposed a sales tax on services. It was emphasized that excise duty on services was different and distinct from a sales tax on services, and in this regard reliance was placed on *Governor-General in Council v. Province of Madras* AIR 1945 PC 98 (at p. 108) and *Muhammad Younus v. Central Board of Revenue and others* PLD 1963 SC 113 (at p. 117). Learned counsel then referred to the "exception" added to entry No. 49 by the 18th Amendment, and submitted that there were concurrent powers of taxation vesting on the one hand in the Federation (to impose its excise duty) and the Provinces on the other (to impose a sales tax). However, learned counsel submitted, Article 143 was not thereby engaged because there was no overlap in the two taxing powers, which could, and did, exist side by side. Learned counsel submitted that the situation thereby created was not a case of double taxation. Learned counsel also referred to the 2005 Federal Act and certain notifications issued in terms thereof.

22. With reference to the case of the shipping agents and freight forwarders, learned counsel referred in some detail to the decision of the Federal Court reported as *Punjab Flour and General Mills Co., Ltd., Lahore v. Chief Officer, Corporation of The City of Lahore and another* AIR 1947 FC 14. (We may note that the decision was in relation, inter alia, to entry No. 58 of List I (the exclusive Federal legislative list) of the Seventh Schedule to the Government of India Act, 1935. This entry was quite similar to the present entry No. 53 relied upon, as noted above, by learned counsel appearing for shipping agents and freight forwarders. In the Federal Court decision, the following observation was made in relation to entry No. 58, which prima facie could apply to the present entry No. 53, and hence negate the Provinces' legislative competence to tax services provided by shipping agents and freight forwarders: "The [terminal] taxes must be (a) terminal (b) confined to goods and passengers carried by railway or air. They must be chargeable at a rail or air terminus and be referable to services (whether of carriage or otherwise) rendered or to be rendered by some rail or air transport organisation.") Learned counsel submitted that the organization referred to in the Federal Court decision meant an agency or authority like the Karachi Port Trust, Port Qasim Authority etc. It did not refer to or mean or include actors like (private) shipping agents or freight forwarders. Learned counsel submitted that the Federal Court decision was considered by the Supreme Court in *Pakistan Textile-Mill Owners' Association and others v. Administrator of Karachi and others* PLD 1963 SC 137 (at p. 145), and also referred to *Pakistan Tobacco Co. Ltd. v. Karachi Municipal Corporation* PLD 1967 SC 241 (at p. 244). Learned counsel submitted that entry No. 53 was not at all infringed upon by

the levy of the tax under the 2011 Provincial Act on shipping agents and freight forwarders. Referring to the "exception" added to entry No. 49, learned counsel submitted that the concept of "services", as used therein, had to be given the widest possible meaning. It was pointed out that the 18th Amendment had not touched entry Nos. 44 and 53. Learned counsel submitted that all of the entries had to be read together and reconciled, and the *Hirjina* judgment, in the post-18th Amendment scenario, had to be applied accordingly. It was submitted that on a proper reconciliation, the sales tax on services had become the exclusive provincial preserve. Learned counsel also relied on certain Indian Supreme Court decisions.

23. Mr. Saifullah, learned AAG, ably assisted by Ms. Nasreen Sehto learned State counsel, raised an issue as to the maintainability of the petitions. It was submitted that the sales tax imposed by the 2011 Provincial Act was an indirect tax and the final incidence or burden fell on the end consumer. Therefore, the petitioners, who were all service providers in one form or another, had not the standing to challenge the levy. In this regard reliance was placed on *Province of Balochistan and others v. Murree Brewery Company Ltd.* PLD 2007 SC 386 (at p. 392, paras 9-10). On the merits the learned AAG referred to entry Nos. 44, 49 and 53 and submitted that the term "excise" had to be interpreted properly. The definition of "goods" given in Article 260 was referred to and reliance was placed on *Colony Sarhad Textile Mills Ltd. v. Superintendent Central Excise and Land Customs* 1979 SCMR 640 (at p. 655). As regards entry No. 53, learned counsel submitted that the incidence was on goods and not services and hence the 2011 Provincial Act was not an encroachment on the federal legislative power in terms of this entry. Reliance was placed on *Man Mahon Tuli v. Municipal Corporation of Delhi and others* AIR 1981 SC 991 (at p. 993 (para 7) and p. 995 (para 14)). As regards the 2005 Federal Act, learned counsel submitted, relying on Article 142(c), that the levy of excise duty on services was an encroachment on the provincial power. It was submitted that the 2011 Provincial Act was wholly intra vires the Province of Sindh.

24. Mr. Anwar Mansoor Khan, learned counsel for SRB in some of the petitions, submitted that the following questions needed to be answered in order to properly resolve the controversy: (1) whether the sales tax on services could be levied only by the Provinces? (2) Whether the federal legislature could levy federal excise duty on services? (3) What was the effect of the 18th Amendment? (4) Whether entry Nos. 44 and 49 of the Federal Legislative List were in conflict with each other and if so, how could such conflict be resolved? And (5) whether sales tax on shipping agents was the same as the "terminal taxes" referred to in entry No. 53? Learned counsel referred to the

Hirjina judgment and read out the relevant passages, including in particular para 6, where a paragraph from the judgment of Gwyer, CJ in *In Re: The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938* AIR 1939 FC 1 was cited with approval. Referring to the "exception" added to entry No. 49, learned counsel submitted that it had to be given due and proper effect. By means thereof, the Provinces had exclusive legislative competence to impose a sales tax on services. Excise duties were dealt with in an entirely separate entry, i.e., No. 44 which, learned counsel pointed out, did not actually refer to production or manufacture, terms that did on the other hand appear in entry No. 49. Learned counsel submitted that the same event could give rise to multiple taxes, i.e., the same taxing event could be the subject matter of different and separate taxing powers. It was accepted that the event here relevant, i.e., the rendering or providing of services, was the same both in relation to the federal law and the provincial law. However, each legislature exercised its own legislative competence in relation thereto, which were independent of each other. The two taxing powers—that of the Federation to levy excise duty and of the Province to levy sales tax—were exclusive of each other. Thus, there could be simultaneous yet exclusive competences vesting in the two legislatures in relation to the same event. Both the 2005 Federal Act and 2011 Provincial Act were therefore intra vires the respective legislatures, each law operating in its own sphere on the basis of the constitutional competence conferred in the one case by entry No. 44 and in the other by the "exception" to entry No. 49. Reliance was placed on *Accountant General Sindh and others v. Ahmed Ali U. Qureshi and others* PLD 2008 SC 522 (at pp. 535-6 (para 18)). As regards entry No. 53, learned counsel referred to *Punjab Flour and General Mills Co., Ltd., Lahore v. Chief Officer, Corporation of The City of Lahore and another* AIR 1947 FC 14 and *Pakistan Tobacco Co. Ltd. v. Karachi Municipal Corporation* PLD 1967 SC 241, already noted above. It was submitted (without conceding) that while there might be incidental overlapping or encroachment by the 2011 Provincial Act, that did not invalidate the latter on account of well established principles of how legislative entries were applied. Reliance was placed on *Governor-General in Council v. Province of Madras* AIR 1945 PC 98. Learned counsel submitted that both the federal and provincial laws were valid and prayed that the petitions be disposed off accordingly.

25. Mr. Atifuddin, learned counsel for SRB in some of the petitions, submitted that the 18th Amendment had brought about a fundamental change in terms of the "exception" added to entry No. 49, which had to be given due and proper effect. The taxing power in respect of services now vested exclusively in the Provinces. The Federation no longer had any such power, and the relevant provisions of the 2005 Federal Act were therefore ultra vires.

Learned counsel referred to the doctrine of implied repeal and relied on certain Supreme Court judgments in this regard. Reference was also made to clause (7) of Article 270AA. Learned counsel further submitted, relying on *Abbasi Textile Mills Ltd. v. Federation of Pakistan and others* PLD 1958 SC 187, that it was impermissible to refer to Parliamentary debates and proceedings to interpret and explain the relevant legislation and therefore questioned the attempt by the Federation to justify the (continued) constitutionality of the 2005 Federal Act (in its relevant provisions) on such basis. Learned counsel emphasized that to the extent as here relevant, the federal law failed in the post-18th Amendment scenario. As regards concurrence (in the constitutional sense) learned counsel submitted that, as made clear by the substituted Article 142, only three matters were now concurrent and none of those related to any taxing power. Therefore, the 2011 Provincial Act was constitutionally valid, the relevant provisions of the 2005 Federal Act were not, and the petitions ought to be decided accordingly.

26. Mr. Khalid Jawed Khan, who it will be recalled, argued for the provincial power, exercised the right of reply. Learned counsel submitted that under the Constitution while taxing powers could be divided between the Federation and the Provinces, they were never shared, i.e., there were no areas where the taxing power was simultaneously exercisable by both legislatures. The taxing event here was the same. It could therefore vest either in the Federation or the Provinces but not simultaneously in both (i.e., could not be shared). It was submitted that the Concurrent Legislative List, omitted by the 18th Amendment, had had no entry relating to any taxing power. This was historically the position in the Constitutions in the sub-continent, which allocated taxing powers specifically to one or the other legislature, allowing at most for a division of certain taxing powers between the two. After the 18th Amendment, the power to levy a tax on the rendering or providing of services had been taken out from the federal domain and handed over to the Provinces. Mr. Muhammad Yousuf, who it will be recalled appeared for shipping agents and freight forwarders and argued for the federal power, also exercised the right of reply. Reference was made to clauses (6) and (7) of Article 270AA and entry No. 44. It was submitted that the 2005 Federal Act, in all its various provisions, was sustained by and in terms of the foregoing provisions and hence it was the Federation alone that could levy a tax on the providing or rendering of services.

27. We have heard learned counsel as above, examined the record and considered the various constitutional and statutory provisions and case law referred to and relied upon. It is convenient to start by setting out the three entries from the Federal Legislative List that require consideration, as well as

entry No. 47, which will be useful for analytical purposes. The entries are as follows:

> "44. Duties of excise, including duties on salt, but not including duties on alcoholic liquors, opium and other narcotics.
>
> 47. Taxes on income other than agricultural income
>
> 49. Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed, *except sales tax on services*.
>
> 53. Terminal taxes on goods or passengers carried by railway, sea or air; taxes on their fares and freights."

The words emphasized in entry No. 49 constitute the "exception" that was added by the 18th Amendment. The other entries remained untouched by the Amendment.

28. A constitution that establishes a federal state and regulates both the federating units (whether called Provinces or States) and the federation itself (whether called the Union or the Centre or simply the Federation) invariably makes provision for the distribution of legislative powers between the two tiers of the state. In the sub-continent the archetypal distribution was that made in the Government of India Act, 1935 ("GOIA"), which sought to set up a federal system for British India and served as the first constitution for both the Dominions of Pakistan and India. In drawing up the legislative lists, the Imperial Parliament drew on experience with the constitutions set up for the Dominions of Canada and Australia, and primarily the former, being the British North America Act, 1867 (known, since the "patriation" of the constitution to Canada, as the Constitution Act, 1867). There, sections 91 and 92 enumerate in two separate lists the exclusive legislative powers of the Canadian Parliament and the Provinces respectively. The pronouncements of the Judicial Committee of the Privy Council in relation to the interpretation and application of those lists laid down principles that were adopted by the Board itself and the Federal Court (set up under the GOIA) in respect of the legislative lists contained in the latter. Subsequently, those principles were affirmed, adopted and applied by the Supreme Courts of Pakistan and India in relation to the post-Independence Constitutions.

29. As is well known, the GOIA contained three lists in its Seventh Schedule, the first enumerating legislative powers exclusive to the Federation, the second those exclusive to the Provinces, and the third those matters in respect of which both could make laws (i.e., the concurrent list). Both the Indian Constitution and the Constitution of 1956 used the same device, i.e., had three lists, which took over the distribution as contained in the GOIA, the

Indian version being the Seventh Schedule to that Constitution, and the Pakistani version being contained in the Fifth Schedule. The Indian version has undergone several changes in the intervening decades. The Pakistani version, like the Constitution in which it appeared, got swallowed up by the events of October, 1958. The Constitution of 1962, which we will examine in greater detail especially in relation to *Hirjina*, had only one list, which appeared in the Third Schedule, and enumerated matters exclusive to the Centre. As will be seen, this Constitution had certain features peculiar to it. The Interim Constitution of 1972 revived, in its Fourth Schedule, the model of three legislative lists. Finally, the present Constitution of 1973 had two lists, one exclusive to the Federation (the Federal Legislative List) and the other enumerating powers in respect of which both the Federation and the Provinces could legislate (the Concurrent Legislative List). The latter list has of course been omitted by the 18th Amendment, which also made many changes in the Federal Legislative List. It should also be noted that the GOIA and all the Constitutions made provision for those matters that did not appear in any of the lists. Thus, s. 104 of the GOIA (headed "residual powers of legislation") provided that a matter not enumerated in any of the three lists would be allocated to either the Federation or the Provinces by the Governor-General. Article 248 of the Indian Constitution (also headed "residual powers of legislation") on the other hand provides that any matter not enumerated in any of the three lists, including expressly any power of taxation, would fall in the (exclusive) Union domain. Article 109 of the 1956 Constitution (which bore a similar heading) on the other hand vested legislative powers not enumerated in the Provinces. Article 132 of the 1962 Constitution (subject to a qualification important for our purposes) provided that the Provinces had the power to make laws in respect of any matter that did not fall in the Third Schedule. (Significantly, the word "exclusively" was not used in this Article nor did its heading refer to the powers as "residual".) The Interim Constitution reverted to the pattern of the GOIA; Article 141, with the heading "residual powers of legislation", provided that any powers not enumerated would be allocable by the President to either the Federation or the Provinces. Finally, in the present Constitution, Article 142, which bears the heading "subject-matter of Federal and Provincial laws" both pre- and post-18th Amendment, provides that any matter not enumerated in the Federal Legislative List or concurrent between the Federation and the Provinces falls exclusively in the provincial domain. We may note that it is somewhat commonplace to refer to the non-enumerated powers of the Provinces under the present Constitution as "residual". In our view, this characterization is misleading and an unnecessary holdover from and echo of the GOIA and the 1956 (and Indian and Interim) Constitutions. In those Constitutions where the exclusive powers of both the Federation and the Provinces were elaborately listed, and there was also a

fairly lengthy concurrent list, it was understandable that any remaining powers could be regarded as "residual". However, in a distribution such as that adopted in the present Constitution, where the exclusive legislative powers of the Provinces were never listed and now even more powers have been allocated to them with the omission of the Concurrent List, it is inappropriate to regard those powers merely or only as "residuary". While this point may seem somewhat pedantic, it is nonetheless of importance. In our view, it does tend to color somewhat negatively one's perception of the Provinces' legislative powers if the same are regarded as "residuary", as though the "real" powers vest only in the Federation on account of the Federal Legislative List. Huge swathes of legislative power, many of an essential and important nature, inhere in the Provinces by virtue of not being enumerated. With respect, to describe these powers as "residuary" can hamper a proper understanding of the functioning of the Constitution.

30. One issue that can arise in a federal state, where powers are distributed along the lines described above, is that a law made by one legislature may be challenged as relating to a matter that is exclusively within the domain of the other, and hence beyond the former's constitutional remit. This problem arose early in the Canadian context, and the Privy Council developed the well known rule of "pith and substance" to address it. If a law, in its pith and substance, was found to be within the legislative competence of the legislature that made it, then it was constitutionally valid. This was so even if the law also incidentally encroached or trenched upon a matter that fell within the exclusive competence of the other. The doctrine of "pith and substance", of fundamental importance to this branch of constitutional law, was adopted and applied in relation to the GOIA both by the Board and the Federal Court and, post-Independence, by the Supreme Courts of Pakistan and India to the various Constitutions referred to above. At the same time, another constitutional rule was developed, using the metaphor of the "field", which too is of importance: the legislative entries in the lists were regarded as "fields" of legislative power that had to be interpreted and applied not narrowly and pedantically but liberally and in the widest sense possible. Of course, and especially where the Constitution expressly enumerated the exclusive powers of both the federal and provincial legislatures, these principles had to be applied in such manner as reconciled and resolved any conflict or differences, since a legislative entry on one list could not be interpreted and applied in such manner as rendered redundant or nugatory an entry on another list. However, in the main these two principles constituted, and continue to constitute, the principal bedrock on which rests the interpretation and application of the legislative entries.

31. It is important to keep in mind that a legislative entry (or "field" of legislative power) exclusive to one legislature is precisely that: a legislative area made over to that legislature where it alone, subject to any incidental encroachment permissible under the "pith and substance" rule, can legislate. (Nice questions can arise where there has been a permissible incidental encroachment and the legislature exclusively empowered then also makes a law in relation to the area encroached upon (or even vice versa), and the provisions of the two statutes are in conflict. However, a consideration of such issues will take us too far afield and they must therefore be regarded as left open.) It is for that legislature alone to decide whether and if so to what extent it wishes to legislate in relation to the "field" exclusively allocated to it. Thus, the legislature may let the field lie "fallow" for years, even decades (i.e., not make a law in relation thereto at all); it may "till" (and go on "tilling") only this or that part of the field (i.e., exercise its legislative power only in part); or it may "occupy" the field in its entirety (i.e., enact one or more laws that appear to cover the entire subject matter of the legislative entry). Subject only to any permissible incidental encroachment, the other legislature cannot at all legislate in relation to a legislative field allowed to lie "fallow" or "tilled" only in part. Where there are concurrent powers on the other hand, and the legislative field may be acted upon by either legislature, the nature of the problem changes. If the one or the other legislature has not exercised its legislative competence or has done so only in part, the other legislature may enact in relation to the portion not acted upon. However, the constitution sets up rules of precedence in this context, with the federal legislature invariably trumping the exercise of provincial legislative power to the extent of any inconsistency between the two statutes. Thus, in effect, the federal legislature has the competence to "clear" the field for its own use to any extent necessary and even, if it so desires, "occupy" the whole of it.

32. Now, all legislative competence, whether listed in an entry on a legislative list or not specifically enumerated, must in the end be expressed or manifested in the shape of statutory law (using this phrase to include both Acts of the relevant legislature and Ordinances promulgated by the concerned executive branch, and subsuming "existing law" therein as well). It is however, important to remember that the scope or extent of the legislative entry or competence (i.e., the field) is not determined by how the power is manifested in sub-constitutional legislation. On the constitutional plane, the legislative competence exists on its own footing, and in this sense must be regarded as autonomous of how (or even if at all) the power is manifested or expressed in statute law. After all, as just noted, the competent legislature may allow the field in relation to a legislative entry to lie "fallow" for years and decades; this legislative inaction cannot deprive the entry of its due

constitutional content, scope and extent. It is certainly not the case that the legislative tail wags the constitutional power. Nonetheless, and as long as the point just mentioned is kept in mind, the manner in which a legislative competence is manifested in sub-constitutional legislation can shed important light on the extent and scope of the power and related entry (if any). And perhaps this is all the more true for a taxing power and entry (if any) relating thereto. The reason is that all fiscal statutes invariably (one can almost say universally) contain what is referred to as the charging section, which sets out the tax (or taxing) event. Usually, a fiscal statute has only one such section and one such event, but this is by no means necessary. The same law may include more than one such section and/or event. Furthermore, the "statute" itself may be no more than a section in some enactment (e.g., the capital value tax imposed by s. 7 of the Finance Act, 1989 or the customs duty called the "Iqra Surcharge" imposed by s. 5 of the Finance Act, 1985). Even there, the taxing event is either set out in the section itself (the first of the examples just mentioned) or can be ascertained with reference to the event in some fiscal statute (the second example). In addition, it goes almost without saying that the scope and extent of the taxing event, as set out in sub-constitutional legislation, is in many cases also settled by, or described and developed in, judicial decisions, which can stretch over many years and even decades.

33. The taxing event is thus fundamental to all fiscal statutes. Since such statutes are necessarily a manifestation or exercise of a taxing power constitutionally vesting in the appropriate legislature, it can be safely said that the taxing event lies at the heart of such power, and hence of any associated legislative entry. However, the caveat noted above must always be kept in mind. The autonomy, on the constitutional plane, of the taxing power cannot be overemphasized. It is the taxing power (and its associated entry, if any) that controls the taxing event as set out in sub-constitutional legislation, and not vice versa. This has several ramifications, which must be considered in some detail. Firstly, it may be that the taxing event, as manifested in sub-constitutional legislation even over a period stretching over many decades, is not the full scope or extent of the taxing power. A classic example is in relation to the power to tax income, contained in entry No. 47 of the present Constitution. Leaving aside the power to tax agricultural income (of which more later), the power to tax income as such has always vested exclusively in the Federation, and this goes back to even before the GOIA. Now, the scope of the taxing event in the legislation (starting with the Income Tax Act, 1922), as developed in judicial decisions given at the highest levels, was regarded as confined to revenue as opposed to capital. This distinction was regarded as fundamental to income tax law: revenue receipts could be brought to tax but capital receipts could not. Equally, expenditure that went to revenue account

could be claimed as a deduction but capital expenditure could not. Therefore, when the Indian legislature sought to tax capital gains, such levy was challenged as falling outside the legislative entry and hence beyond the legislature's constitutional power. In a landmark judgment, *Navinchandra Mafatlal v. Commissioner of Income Tax* AIR 1955 SC 58, 26 ITR 758, the Indian Supreme Court dismissed the challenge. The late N. A. Palkhivala, perhaps post-Independence India's greatest tax lawyer (and of course, much else besides) had no doubt as to the correctness of this decision. The matter is put in the following terms in the latest edition (10th, 2014) of his justly renowned work on income tax law (internal citations omitted; emphasis supplied):

> "The Supreme Court held in *Navinchandra Mafatlal v. CIT* that the word 'income' in entry 54 in List I of the Seventh Schedule to the Government of India Act, 1935 should be given the widest connotation, in view of the fact that it occurred in a legislative head conferring legislative power, and in that context, it did not bear the meaning as was ascribed to it in cases decided under the income-tax statutes but included capital gains. Consequently, the court held the levy of tax on capital gains under the 1922 Act to be *intra vires* the central legislature. *There can be no question about the Parliament's competence to levy a tax on capital gains under the Constitution*." (*Kanga & Palkhivala's The Law and Practice of Income Tax*, Vol. I, pp. 1177-8)

The same view has been taken in Pakistan. This decision underscores the danger of attempting to divine the extent and scope of a legislative entry, and especially a taxing competence, from the sub-constitutional manifestation of the taxing power, in terms of the taxing event as set out in the statute. At the same time, it affirms the autonomous nature of the power on the constitutional plane. In not taxing capital gains in income tax law earlier the legislature had simply not exercised in full the constitutional power that vested in it. The legislative field was not being "tilled" to the extent permissible. By extending income tax law to capital gains, a portion of the field that had lain "fallow" was occupied by legislative action. (Of course, it could be incorrect to assume that the taxing event within the scope of the constitutional power to tax income stands exhausted, now that capital gains have also been taxed.)

34. Secondly, it may be that more than one taxing event lie at the heart of a taxing power and any associated entry. Furthermore, the nature of the various taxing events that together constitute a single taxing power may be distinct, divergent or even disparate. This issue was in fact central to the question that arose before the Supreme Court in *Hirjina*, and the point will therefore be elaborated further below. Thirdly (and subject to the fourth point), the taxing event(s) that lie at the heart of two distinct taxing powers

that vest separately in the two legislatures, must also be separate and distinct from each other. It may be that in practice it proves difficult to distinguish between the taxing events of the two powers. However, no matter what the practical hurdles, on the plane of constitutional principle the taxing events must be distinct. This is so because for the taxing event(s) to be the same can only mean that the taxing powers are also the same. That would however, negate the vesting of the taxing powers separately in the two legislatures. The point can be illustrated by an issue that arose in respect of two taxing powers under the GOIA, one vesting exclusively in the Federation and the other in the Provinces. These were, respectively, entry 54 on the Federal List (in relation to taxes on income) and entry 46 on the Provincial List (in relation to "taxes on professions, trades, callings and employments"). On the constitutional plane, and conceptually, the difference between the taxing events was clear. However, in practice, it proved difficult to distinguish the provincial levy in many instances from a tax on income. The nature of the problem, and the solution adopted under the GOIA, was described in the following terms by Mr. H. M. Seervai in his *Constitutional Law of India* (4th ed., Vol. III, pp. 2418-9) (internal citations omitted; emphasis supplied, except in the first paragraph, which is original):

> "22.169 Before proceeding further, it is submitted that in certain situations the distinction between the *measure* of taxation and the *subject* of taxation may disappear, and the *measure* of taxation becomes a subject of taxation. The clearest illustration of this is provided by the legislative history of Art. 276 [of the Indian Constitution]. As originally enacted, the G.I. Act 35, provided for:
>
> "taxes on income other than agricultural income (entry [54], List I); "taxes on agricultural income" (entry 41, List II); "taxes on professions, trades, callings and employments" (entry [46], List II).
>
> We have seen that in that Act, the legislative entries relating to tax were mutually exclusive, and even on general principles of construction, a tax on professions could not be a tax on income since that was a subject of exclusive federal legislation. Even if the entries overlapped, they would have to be construed to mean that the income derived from a profession fell under entry [54], List I, and a tax imposed on a person for carrying on a profession fell under entry [46], List II. … [A] tax on professions is not necessarily connected with income…. However, certain Provinces levied a profession tax and related it to income, the maximum amount of tax being a small amount. Presumably, this was done because a uniform tax was felt to be inequitable. Even so, the tax could be justified on the ground that whereas in a tax on income, the income is the subject of taxation, in a tax on professions, the income is only a measure of taxation. *However, this distinction, though generally sound, would make a profession tax indistinguishable in practice if, for example, a tax ranging from five to eighty per cent of the income was imposed.* Faced with this possibility, the British Parliament inserted s. 142A in the G.I. Act, 35, and amended entry [46], List II, to make it subject to s. 142A. That section (which corresponds to Art. 276 [of the Indian Constitution] except that the maximum amount is Rs.250) provided that a tax on professions

> was not to be held void on the ground that it was a tax on income, but it limited the amount of tax to Rs.50 per annum, continuing existing levies if they were for a larger amount, until the Federal legislature otherwise provided. It was further provided that nothing in the section was to be construed as limiting the power of the Federal legislature to levy a tax on the income arising from such profession, etc. It is submitted that it is not a correct inference from the language of s. 142A and Art. 276, that a tax on professions is a tax on income. These provisions deal with a mode of imposing a tax on professions which, if not limited, would have made it indistinguishable from a tax on income. *But in law, they are distinct and separate imposts. A tax on income can be imposed only if there is income. A tax on professions can be imposed if a person in fact carries on a profession, etc., and irrespective of the question of income*…."

Section 142A of the GOIA has echoed in all subsequent Constitutions, and finds its place in the present Constitution as Article 163.

35. Another point that requires clarification in the present context is where the same event, act or transaction is seemingly within the scope of two separate taxing powers. A closer analysis invariably reveals that what appears to be the same event is (usually) in fact and (certainly) in law, two separate taxing events each of which falls, properly, within the scope of a distinct taxing power. The point can be illustrated by a decision of a learned Division Bench of this Court dated 19.11.1981, but reported many years later as *Hydri Ship Breaking Industries Ltd. v. Sindh Government and others* 2007 MLD 770. The judgment disposed of around 130 petitions. The relevant facts were that ships were acquired by the petitioners for ship breaking and reached Gadani beach in Baluchistan for that purpose. In some cases, the ships passed through Outer Anchorage, outside Karachi Port. In others, the cargos on board were first off loaded at Karachi and the ships were then taken for scrapping to Gadani. In any event, that is where the ships were broken up. Some of the scrap was then brought to Karachi for local sale, use or consumption. The Karachi administration sought to levy octroi not on the rate applicable to scrap (which was unobjectionable) but rather *ad valorem* on the value of the ships themselves on the basis that they had passed through the local limits of Karachi. There was a substantial difference between the amounts of octroi payable under the two computations, which led to the filing of the petitions. It will be recalled that octroi, though long since abolished, is a tax within the exclusive legislative competence of the Provinces (though the power was normally exercised at a lower, local level of administration). The taxing event is the "import" of goods into a local area for use, consumption or sale therein. Since the ships were coming from abroad, one of the grounds taken by the petitioners was that the charging of octroi on the ships was nothing other than a customs duty since the ships were being imported in the international sense, and hence beyond the legislative competence of the Province. It is this aspect

of the judgment that is relevant for present purposes. The learned Division Bench was pleased to repel this submission. The relevant passages from the judgment are in the following terms (emphasis supplied) (pp. 791-3):

> "15. For the first time, through the [impugned] notifications … Octroi was levied on goods entering the K.M.C. octroi limits through sea from abroad. These Notifications and the Notification, dated 7-11-1973 amending the 1964 Octroi Rules have been challenged as being ultra vires of the Interim Constitution, 1972 as well as the 1973 Constitution. On behalf of the petitioners this point was agitated by Mr. Haidermota and developed by Mr. Khurshid Anwar Shaikh during his arguments. *It was contended by Mr. Khurshid Anwar Shaikh that octroi in question though described as octroi was actually a customs or import duty which is a Federal subject under the two Constitutions and the Provincial Government by levying such octroi duty has transgressed the Federal field of legislation*."

The learned Division Bench noted the various provisions from the Interim Constitution and the present Constitution relied upon by learned counsel for the petitioners, and continued:

> "As observed earlier, "octroi" has been defined in the 1964 Octroi Rules as a tax on the "import" of goods for consumption, use or sale within the octroi limits, and "import" has been defined as import within the octroi limits. Import simpliciter of any goods within the octroi limits, therefore, does not attract octroi but the import within the octroi limits must also be coupled with the purpose of consumption, use or sale within the octroi limits. Unless octroi is equated with customs duty, we do not see how such tax falls within the items of Federal Legislative Lists of the two Constitutions of 1972 and 1973 pointed out by the learned counsel. We say so as by Item No.47 of the Provincial List of the Fourth Schedule to the Interim Constitution, framers of that Constitution specifically and with clarity included octroi within the Provincial Legislative field. Item 47 reads as follows:
>
> "Cesses on entry of goods into a local area of consumption, use or sale therein."
>
> Now in the Interim Constitution of 1972, apart from the Federal and Concurrent Lists, there was a separate Provincial Legislative List, whereas in the 1973 Constitution there are only two legislative lists namely the Federal Legislative List and the Concurrent Legislative List. However, Article 142(e) of 1973 Constitution provides that "a Provincial Assembly shall, and 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". It may be mentioned here that Article 142 remains intact and has not been deleted by the Provisional Constitution Order, 1981. Subject contained in Item 47 of the Provincial Legislative List of the Interim Constitution, 1972 is neither mentioned nor covered by any item of the two Legislative Lists of the 1973 Constitution. The only logical conclusion is that by virtue of Article 142(c) of the 1973 Constitution, the subject "Cesses on entry of goods into a local area for consumption, use or sale therein" falls squarely within the Provincial Legislative Field."

The learned Division Bench noted certain judgments relied upon by learned counsel for the petitioners and distinguished the same. The judgment then continued as follows (emphasis supplied):

> "*We may now examine the other limb of the argument of the learned counsel for the petitioners that octroi on goods imported by sea is in essence and reality a duty of customs but in the garb of octroi*. According to Mr. Khurshid Anwar Shaikh as octroi becomes leviable as soon as the goods are imported into Karachi from abroad, the [impugned] Notifications … are in effect imposing a duty of customs. Mr. A.A. Fazeel, learned counsel for K.M.C. referred us to a Division Bench judgment of this Court in the case of *Universal Merchants v. Commissioner of Karachi* 1980 CLC 704 [decided, in fact, on 15.03.1973] and urged that this point has been considered and decided in that judgment. In para 6 of the said judgment it is observed as under:--
>
> > "Assuming, however, for the sake of argument in favour of the petitioners that the Municipality cannot, under the Ordinance, impose a tax in any field which belongs to the exclusive competence of the Central Legislature I still do not think that octroi is such a tax as come within the relevant item which I have quoted from the 1956 and the 1962 Constitutions. *It is true of course that goods which enter the city of Karachi may be entering from a province other than the one in which Karachi is situate or even from outside the country altogether. The tax is nevertheless a tax upon the import of goods for consumption, use or sale in a Municipality*. The purpose of the tax, therefore, is to levy a charge upon goods which are brought in, not only within the city but for consumption, use or sale within the City. *If goods are landed from abroad but are not intended for such consumption, sale or use but are intended to be so used, let us say, in Lahore, then octroi would not be leviable*. The entire purpose of making the Central Legislature the Authority who alone is competent to legislate upon inter-provincial trade and trade with foreign countries, is to allow it to have control over such trade. Octroi on the other hand is a charge upon import within a city. *The fact that in a given case the goods may happen to come from another province or from outside the country is incidental and besides the point*. Even as if they are not intended for use in the city the tax would not be chargeable. The argument, therefore, I think is wholly fallacious…."
>
> We are in respectful agreement with the aforesaid observations. Octroi tax has been clearly distinguished from other taxes and the basic reason is that it is a tax "upon goods which are brought in not only within the city but for consumption, use or sale within the city". *In our view octroi tax on goods coming from abroad and entering the municipal octroi limits for the purpose of consumption, use or sale within the octroi limits cannot be equated with duties of customs*."

36. As these rather lengthy extracts show, a seemingly single event, that of goods entering Karachi, in law comprised of two taxing events. One was importation in the international sense, and that attracted a duty of customs, which taxing power was (and is) exclusively in the Federal domain. The other taxing event was importation in the local sense (i.e., for local use, sale or consumption) and that attracted the octroi, which was (and is) a taxing power exclusively within the Provincial domain. The principle is thus clear: on the

constitutional plane, the same taxing event does not fall within the scope of two separate and distinct taxing powers, even though the event(s) may seemingly spring from, or be relatable to, the same act or transaction.

37. The fourth point (to continue with the broader analysis of taxing powers and legislative entries) is that an examination of the present Constitution and the previous Constitutions as also the Indian Constitution and the GOIA shows that while a taxing power may be divided between the federal and provincial legislatures, it is not shared, i.e., there is no concurrence in the constitutional sense. For example, entry No. 47, which relates to taxes on income, divides this taxing power between the Federation and the Provinces. The latter get to tax agricultural income, while the former taxes all other sorts of income. But, there is no sharing: the Federation cannot tax agricultural income, and the Provinces cannot reach the other sorts of income. Even the entry with which we are most concerned, entry No. 44, divides the power to levy duties of excise, clarifying that the power to tax salt and to impose excise duties generally lies exclusively with the Federation, while it is exclusively within the Provincial power to levy excise duty on alcoholic liquors, opium and other narcotics. The historical nature of this distinction has been noted by Mr. Seervai in his monumental treatise as follows (*op. cit.*, Vol. I, pg. 166; internal citations omitted; emphasis supplied):

> "1A.25 The innovation made for the distribution of taxing power may now be mentioned. In the United States the power of taxation is conferred on the Congress in wide general terms. But the power is not exclusive except as to the imposts or duties on import or export subject to a limited exception not here material. In Canada the power of taxation is conferred in the widest terms on the Dominion, and a power of direct taxation within the province to raise revenue for provincial purposes is conferred on the provinces. Thus the taxing powers are independent but as regards direct taxation they cover an overlapping field. In Australia "The Federal power over customs and excise duties is exclusive …, but as regards other taxation the Commonwealth and State Parliaments have separate rather than concurrent powers." These overlapping powers of taxation covering the same field, for example, the power to impose an income tax, have given rise to much litigation and have raised the question whether the federal power can be so exercised as to nullify the State's power of taxation. *The lists contained in the Sch. VII to the G.I. Act, 35, provided for distinct and separate fields of taxation, and it is not without significance that the concurrent legislative list contains no entry relating to taxation but provides only for "fees" in respect of matters contained in the list but not including fees taken in any court*. List I and List II of Sch. 7 thus avoid overlapping powers of taxation and proceed on the basis of allocating adequate sources of taxation for the federation and the provinces, with the result that few problems of conflicting or competing taxing powers have arisen under the G.I. Act, 35. This scheme of the legislative lists as regards taxation has been taken over by the Constitution of India with like beneficial results."

The Indian Supreme Court has also made the same point in a recent decision, *Commissioner, Central Excise and Customs, Kerala and Ors v. Larsen and Toubro Ltd. and Ors* AIR 2015 SC 3600, (2016) 1 SCC 170. In order to put the passage about to be cited in its proper context, it may be noted that in India, a tax on services is an exclusively Union matter (entry 92C of the Union List) whereas a tax on the sale of goods is exclusively with the States (entry 54 of the State List). The States sought to levy a sales tax on the "goods" element of a works contract. In *State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd*. AIR 1958 SC 560, the Indian Supreme Court held that such a contract was one and indivisible and hence any so-called "goods" element thereof could not be separately taxed by the States. This led to certain constitutional amendments, and the insertion of a definition (clause (29A)) of "tax on the sale and purchase of goods" in Article 366 of the Indian Constitution. This enabled a works contract to be divided into a "goods" element and a "service" part. The issue before the Indian Supreme Court in the cited decision was in the foregoing context. It was observed as follows (emphasis supplied):

> "16. At this stage, it is important to note the scheme of taxation under our Constitution. *In the lists contained in the 7th Schedule to the Constitution, taxation entries are to be found only in lists I and II. This is for the reason that in our Constitutional scheme, taxation powers of the Centre and the States are mutually exclusive. There is no concurrent power of taxation*. This being the case, the moment the levy contained in a taxing statute transgresses into a prohibited exclusive field, it is liable to be struck down. In the present case, the dichotomy is between sales tax leviable by the States and service tax leviable by the Centre. When it comes to composite indivisible works contracts, such contracts can be taxed by Parliament as well as State legislatures. Parliament can only tax the service element contained in these contracts, and the States can only tax the transfer of property in goods element contained in these contracts. Thus, it becomes very important to segregate the two elements completely for if some element of transfer of property in goods remains when a service tax is levied, the said levy would be found to be constitutionally infirm."

It may be noted that the foregoing passage also illustrates the point sought to be made above with the assistance of *Hydri Ship Breaking Industries Ltd. v. Sindh Government and others* 2007 MLD 770. What is seemingly one transaction—a works contract—is in law two separate taxing events, one in respect of the sale of goods and the other in respect of services, albeit that here the two taxing events have been brought about by means of a constitutional amendment. However, the broader point on the constitutional plane is illustrated. Before proceeding further, we may note parenthetically that the position in India as highlighted above, i.e., no concurrence of the taxing powers, may be about to change. It appears that India is poised to introduce a comprehensive tax on goods and services in the VAT mode,

which will be levied concurrently by the Union and the States. However, for this to come about, a constitutional amendment is required, and the 122nd Amendment to the Indian Constitution is apparently in the works. This amendment, inter alia, will expressly enable both the Union and the States to levy a "goods and service tax" (i.e., create a concurrent taxing power) and make extensive changes in the Seventh Schedule to the entries relating to excise duties, service tax and sales tax. If anything, the proposed amendment underscores the point made by the Indian Supreme Court, namely that as things stand, there is no concurrent power of taxation.

38. Whatever may be imminent in India, the position in Pakistan is clear: there is no concurrent taxing power. There has only been a division, and not a sharing, of the taxing powers. Thus, the Concurrent Legislative List of the present Constitution did not contain any entry relating to a taxing power. The position was likewise in the concurrent lists of the Interim Constitution and the 1956 Constitution. The position under the GOIA, which served as Pakistan's first constitution, has already been noted. Special mention must however be made of the 1962 Constitution, which had certain features peculiar to it. It will be recalled that this Constitution had only one list, set out in the Third Schedule and exclusive to the Centre, and provided in Article 132 that the Provinces could legislate in respect of the powers not there listed. Now, Article 131(2) provided that the Centre could also legislate in respect of any matter not enumerated in the Third Schedule where the national interest of Pakistan so required, in relation to either the security of the country (including its economic and financial stability) or planning or co-ordination or the achievement of uniformity of any matter in different parts of the country. Article 133 provided that the responsibility of deciding whether a legislature had the competence to make a law was that of the legislature itself, and that the validity of a law could not be challenged on the ground that the legislature in question had not the competence to make it. Thus, the Central legislature could, of its own volition and subject to its own determination that the conditions laid down in Article 131(2) were fulfilled or applicable, legislate in respect of a matter not enumerated in the Third Schedule. However, in *Province of East Pakistan v. Siraj ul Haque Patwari* PLD 1966 SC 854, the Supreme Court had indicated that the Court could determine whether the pre-conditions that made permissible Central legislation in respect of a matter not enumerated existed or not (on this, see the judgment in *Hirjina* at pg. 1350). In our view, the position under the 1962 Constitution was not true concurrence but rather conditional concurrence. By the former, we mean a situation where either legislature has the competence, without anything more and subject only to any applicable rules of precedence, to make laws in relation to any matter that is concurrent. By the latter, we mean a situation

where such power does vest in one legislature but the other can only legislate in respect of the "concurrent" matters if the conditions specified are fulfilled. However, be that as it may, one point is clear: the 1962 Constitution had special features peculiar to it, which are conspicuous by their absence in the present Constitution. The guiding principle is therefore as noted above: there have never been any concurrent taxing powers in terms of the present Constitution. Taxing powers have at most been divided but not shared.

39. We turn now to examine the taxing event with which we are here concerned in light of the above discussion and analysis. The taxing event in the 2005 Federal Act, as set out in its charging section is as follows:

> "**3. Duties specified in the First Schedule to be levied**.– (1) Subject to the provisions of this Act and rules made there under, there shall be levied and collected in such manner as may be prescribed duties of excise on,— …
>
> (d) services provided in Pakistan including the services originated outside but rendered in Pakistan; …"

Services are defined in s. 2(23) as meaning: "services, facilities and utilities leviable to excise duty under this Act or as specified in the First Schedule read with Chapter 98 of the Pakistan Customs Tariff, including the services, facilities and utilities originating from Pakistan or its tariff area or terminating in Pakistan or its tariff area". The taxing event in the 2011 Provincial Act, and attendant definition sections, to the extent presently relevant, are in the following terms:

> "**3. Taxable Service.--** (1) A taxable service is a service listed in the Second Schedule to this Act, which is provided:
>
> (a) by a registered person from his registered office or place of business in Sindh;
>
> (b) in the course of an economic activity, including in the commencement or termination of the activity….
>
> **4. Economic activity.--** (1) An economic activity means any activity carried on by a person that involves or is intended to involve the provision of services to another person…
>
> **8. Scope of tax.--** (1) Subject to the provisions of this Act, there shall be charged, levied and collected a tax known as sales tax on the value of a taxable service at the rate specified in the Schedule in which the taxable service is listed…."

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

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.

41. It will be recalled that the learned Additional Attorney General and Mr. Anwar Mansoor Khan, learned counsel for SRB had argued that in the present case the taxing power vested simultaneously yet exclusively in both the Federation and the Provinces. Although learned counsel had approached the matter from different starting points, they had converged on the same conclusion. With respect, we are unable to agree with both the conclusion and the reasoning that led to it. Mr. Anwar Mansoor Khan had submitted that the same event could give rise to multiple taxes, i.e., the same taxing event could be the subject matter of different and separate taxing powers. With respect, we are unable to agree. As is clear from the analysis and discussion above, this cannot be so. If the taxing event is the same, that can only mean that the taxing power is the same. This is so because, on the plane of constitutional principle, the former emanates from the latter. As set out in a fiscal statute, a taxing event is the sub-constitutional manifestation of a competence or power that exists autonomously on the constitutional plane. It has been seen that even if in practice it becomes difficult to distinguish the taxing event relatable to one taxing power from that relatable to another that does not, and cannot, obliterate the distinction on the constitutional plane. It has also been seen that even if at first sight it appears that the same transaction, act or event relates to two taxing powers, the transaction, etc., when properly analyzed, reveals two distinct taxing events. The same taxing event cannot therefore support two separate taxing powers. The learned Additional Attorney General had argued that there were, post the 18th Amendment, two "well heads" of legislative power, one inhering in the Federation in terms of entry No. 44 and the other in the Provinces, as reflected in the "exception" added to entry No. 49. Both had the same taxing event. With respect, we are unable to agree. This submission, in our view, is tantamount to nothing other than that there is a sharing of a taxing power, it being irrelevant that in the case of the Federation it is called a duty of excise and in the case of the Provinces a sales tax. As has been shown above, in the scheme of the present Constitution there is no concurrence of

any taxing power. Taxing powers have, in some cases, been divided, but they are not shared. Furthermore, the distinction sought to be drawn by the learned Additional Attorney General as regards the different meanings of "concurrence" also cannot, with respect, be accepted. As has already been said, if the taxing event is the same, then the taxing powers are also the same, i.e., there is concurrence in the constitutional sense. Once it is accepted (as in our view it must be) that the taxing event is the same (viz., a levy on the rendering or providing of services) then the taxing power would be constitutionally concurrent. But that can only mean that it is shared, which is not the case under the present Constitution.

42. The stage is now set for a detailed consideration of *Hirjina & Co. v. Islamic Republic of Pakistan and another*1993 SCMR 1342. The judgment can, in our respectful view, be regarded as having two parts. The first, which considers the constitutional point, ends at para 11. The second goes from para 12 to the end of the judgment, where specific statutory provisions are considered. We are concerned only with the constitutional point, i.e., the first part of the judgment. As will be seen shortly, this can itself be regarded as falling into two parts. But first, it will be appropriate to give a description of how the dispute came before the Supreme Court. In the words of the Court itself (pp. 1345-6):

> "2. Except in CA No. 14-K, the appellants are owners of hotels, liquor bars and restaurants. They have been asked to pay excise duty in respect of the services they render in providing rooms, liquor and other refreshments to their clients. They have called in question the liability of the levy on a number of grounds including the law by which the services provided by them have been brought under tax.
>
> 3. Before examining the various contentions raised on behalf of the appellants it will be of advantage to refer to the relevant legislation. The demand of excise duty made upon the appellants is founded on the provisions of the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act). In this Act the charging provision is contained in section 3. Under subsection (1) of this section, prior to the promulgation of Finance Ordinance, 1969 (No. XVI of 1909), hereinafter referred to as the Ordinance, the excise duty was available on excisable goods produced or manufactured in Pakistan. The list of excisable [goods] was given in the First Schedule to the Act. The Ordinance amended the subsection making excisable services also subject to the levy of the duty. It added a new clause as clause '(dd)' to section 2 to define 'excisable services'. According to this clause 'excisable services' meant 'services, facilities and utilities, specified in Part II of the First Schedule as being subject to a duty of excise'. Item 13.01 of Part II of the First Schedule identified 'the excisable services' as follows:-
>
> "Services rendered by Hotels and Restaurants.-
>
> A. All services, facilities and utilities, including catering, supplies and merchandise provided or rendered by any hotel 15% of the charges. …

> B. All services, facilities and utilities, including supplies and merchandise, provided or rendered by a restaurant 15% of the charges. …"
>
> Certain hotels were granted exemptions from payment of the excise duty but except in CA. No.149 these exemptions are not relevant to the appeals before us."
>
> (We may note that in the law report, the word "foods" appears instead of the word placed in square brackets above ("goods"). The word in the law report is an obvious typographical error.)

43. As is well known, a judgment may have more than one *ratio decidendi*. In our respectful view, *Hirjina* has two *rationes decidendi*, and due recognition of this is crucial for a proper appreciation of the judgment. The first is covered by paras 4 to 7 (and is herein after referred to as the "First *Ratio*"). There is then a "bridging" paragraph (para 8). The second (herein after referred to as the "Second *Ratio*") is covered by paras 9 to 11.

44. We begin with the First *Ratio*. The principal challenge to the levy was as set out in para 4 of the judgment:

> "4. The main contention on behalf of the appellants in these appeals was that the Ordinance, inasmuch as it brought the excisable services to tax, was beyond the competence of the Central Legislature and as such it was ultra vires to that extent. It was stated that the duty of excise primarily and fundamentally was relatable only to production or manufacture of goods and that its scope could not be expanded to encompass matters which did not entail production or manufacture of goods. In support of this contention reliance was placed on law lexicons and some judgments of the Federal Court of India."

The Supreme Court observed that the expression "duties of excise" did not have any precise content (para 5). The various senses in which it could be used were set out. In the narrowest sense, duties of excise could be distinguished from customs duties, the former relatable only to goods manufactured or produced locally for home consumption while the latter related to the import of foreign produced goods. In a larger sense, duties of excise could include a levy at any stage between the production or manufacture of the goods and their sale to the ultimate consumer. Finally, and more broadly still, the expression could cover a variety of indirect taxes, which had no nexus with the manufacture or production of goods. The Supreme Court cited passages from *In Re: The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938* AIR 1939 FC 1 (herein after the "*CP & Berar* case") where Gwyer, CJ and Sulaiman, J had considered various meanings of "excise". A passage from *Corpus Juris Secundum*, from the entry relating to excise taxes, was also cited. It was observed that while in the cited decision, the Federal Court had concluded that

"duties of excise" had been used in the primary and fundamental (i.e., narrowest) sense, that Court had been considering the legislative entry in the GOIA. That entry (No. 45 of List I, the exclusive federal list) had stated in material part as follows: "Duties of excise on tobacco and other goods manufactured or produced in India…" The Supreme Court noted that in the subsequent constitutional dispensations (being, as relevant for *Hirjina*, the 1956 and 1962 Constitutions) the legislative entry had been worded differently. We may note that in the 1956 Constitution, the entry (No. 26 of the Federal List) had read in material part: "duties of excise…", i.e., there was no reference to goods being manufactured or produced in Pakistan. The 1962 Constitution had an identically worded entry (No. 43(b) of the Third Schedule). Given these differences in wording, the Supreme Court recalled with approval (in para 6) the caution expressed by Gwyer, CJ in the *CP & Berar* case, in words which were read out more than once before us:

> "But there are few subjects, on which the decisions of other Courts require to be treated with greater caution than that of Federal and Provincial powers, for in the last analysis the decision must depend upon the words of the Constitution which the Court is interpreting; and since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are the same in both cases; for a word or a phrase may take a colour from its context and bear different sense accordingly."

Given the differences, the Supreme Court concluded as follows (in para 7; emphasis supplied):

> "A comparison of the relevant entries in the Government of India Act and the Constitution of 1956 will show that under the latter Constitution *the Central Legislature had much a larger field in which to levy duties of excise*. With regard to power of taxation the Constitution of 1962 followed the scheme of 1956 Constitution (see clauses (b) and (f) of item 43 of the Third Schedule). *It is, therefore, difficult to subscribe to the contention of the appellants that under the dispensation of 1962 Constitution the Central Legislature could not levy duty of excise in areas which did not involve manufacture or production of goods*."

45. In our view, the First *Ratio* is encapsulated in the last sentence of para 7: in terms of the 1962 Constitution, the taxing power relatable to "duties of excise" appeared to include not just the taxing event of the production or manufacture of goods, but also the taxing event of rendering or providing of services. Since this taxing power was part of the Third Schedule, it appeared that it was exclusively within the Central domain to impose a levy on the rendering or providing of services. (As will emerge shortly, we use the word "appear" advisedly.) On this basis, the constitutional challenge to the Ordinance of 1969 was liable to be dismissed.

46. The consideration of the constitutional point did not of course end with the First *Ratio*. In the "bridging" para 8, the Supreme Court highlighted the fact that although in 1969, when the impugned changes were made in the Central Excises Act, 1944 ("1944 Central Act"), the country was under the Martial Law imposed by General Yahya Khan it was nonetheless being governed, "as nearly as may be", in terms of the 1962 Constitution. As the *Hirjina* judgment made clear, it was that Constitution that provided the constitutional backdrop for considering the validity of the Ordinance of 1969.

47. As noted above, the Second *Ratio* is covered by paras 9 to 11 of the judgment. In our view, the first sentence of para 9 is crucial to a proper understanding of the Second *Ratio* since it set out the premise on which the subsequent discussion was based. That premise was as follows (emphasis supplied):

> "The argument that the Central Legislative could not bring excisable services to tax *necessarily implies* that this subject fell within the Provincial field or in other words *it was the Provincial Legislature alone* which could levy a tax on excisable services."

The Supreme Court then referred (in paras 9 and 10) to those peculiar features of the 1962 Constitution in relation to the legislative competence of the Central legislature that have already been described in para 38 herein above. The conditions that had to exist for the Central legislature to enact laws in relation to a matter not in the Third Schedule were referred to and it was observed that it had not been challenged by the appellants that those conditions did not exist at the relevant time. It was observed as follows (para 10, pg. 1350): "We are, therefore, unable to hold that the Ordinance inasmuch as it brought the excisable services to tax was not a valid piece of legislation". In our respectful view, the Second *Ratio* can be stated in the following terms. Even the premise that the legislative power to impose a levy on the rendering or providing of services vested in the Provinces alone did not make the Central legislation (i.e., the Ordinance of 1969) *ultra vires* the 1962 Constitution. This was so because the Centre could in terms of that Constitution also legislate in respect of matters not included in the Third Schedule as long as the conditions laid down in Article 131(2) were fulfilled. Since the appellants had not challenged the legislation on this ground, and the Central legislature (which would include the President on account of the Ordinance promulgating power) could decide for itself as to the existence of the conditions, the Ordinance of 1969 was a validly enacted piece of legislation. Finally, the Supreme Court concluded, in para 11, by referring to developments after the lifting of Martial Law in 1972. Those provisions of the

Interim Constitution and the present Constitution (Articles 288 and 279 respectively) that provided for the continuance of taxation were referred to, and it was observed as follows (para 11; emphasis supplied):

> "In view of these provisions the *competence of the Federal Government to collect duty on excisable [services]* under the Ordinance cannot be challenged *till such time as the appropriate Legislature makes a provision to the contrary*."
>
> (We may note that in the law report, the word "goods" appears instead of the word placed in square brackets above ("services"). The word in the law report is clearly a typographical error.)

It is to be noted that in this passage the Supreme Court referred to the "appropriate Legislature" without specifically identifying whether that meant the Federation or the Provinces. Furthermore, it referred to the competence not of the Federal legislature to levy the duty but rather that of the Federal Government to "collect" it.

48. That each of the two *rationes decidendi* of *Hirjina* is a separate, independent basis that supported the Supreme Court's conclusion on the constitutional point can be easily demonstrated. If it is assumed that the judgment contained only the First *Ratio* (i.e., is read with paras 9 to 11 "omitted"), the conclusion would be that the Central legislature had the competence to impose a levy on the rendering or providing of services. But equally, if the judgment is read as though paras 4 to 7 (i.e., the First *Ratio*) were "omitted", i.e., that it contained only the Second *Ratio*, exactly the same conclusion would obtain. Thus, each is a *ratio decidendi* of the judgment. But, and this is also a crucial aspect which requires elaboration, in our respectful view, there is a tension between the two *Rationes*. This can be demonstrated most conveniently if the conclusion of the First *Ratio* and the premise of the Second *Ratio* are placed side by side:

First *Ratio*	Second *Ratio*
7. … It is, therefore, difficult to subscribe to the contention of the appellants that under the dispensation of 1962 Constitution the Central Legislature could not levy duty of excise in areas which did not involve manufacture or production of goods	9. The argument that the Central Legislative could not bring excisable services to tax necessarily implies that this subject fell within the Provincial field or in other words it was the Provincial Legislature alone which could levy a tax on excisable services….

The First *Ratio* led to the result that the taxing power vested in the Central legislature alone. The Second *Ratio* was premised on the said power vesting in the Provinces alone. In our respectful view, it is clear from the above that there is an underlying tension between the two *Rationes*. How

could this tension be resolved? In our view, it was the peculiar features of the 1962 Constitution that allowed both *Rationes* to co-exist. But, and this in our respectful view is also an important aspect of the judgment, for both to co-exist as *rationes decidendi* meant that the Supreme Court did not definitively rule in favor of either *Ratio*. The reason for this is had it done so, that would have at once reduced the other *Ratio* to an *obiter dictum*. Thus, if the Supreme Court had ruled definitively that the taxing power to impose a levy on the rendering or providing of services vested in the Centre alone (i.e., in favor of the First *Ratio*) that would have reduced the Second *Ratio* to an *obiter dictum*. Conceivably, there could then have been no room even to state the premise of the Second *Ratio*. Equally, if the Supreme Court had ruled definitively that the said taxing power vested in the Provinces alone, there would then have been no room left for the conclusion arrived at in the First *Ratio*. But, as has been demonstrated above, each *Ratio* is precisely that: a *ratio decidendi* that independently supports the conclusion on the constitutional point. In our respectful view, the Supreme Court did not rule definitively in favor of either *Ratio* because it did not need to. It was the peculiar features of the 1962 Constitution, highlighted by the Supreme Court itself that allowed both *Rationes* to co-exist notwithstanding the underlying tension between the two. It is for this reason that, in para 45, we used the word "appear". It is for this reason that in the conclusion to the First *Ratio*, the Supreme Court used words ("difficult to subscribe") that were less than definitive. And, finally, it is for this reason that in concluding its consideration of the Second *Ratio* (in para 11) the Supreme Court referred to the "appropriate Legislature" in the post-Martial Law scenario rather than identifying any particular legislature, and spoke only of the Federal Government's (continued) competence to "collect" the duty rather than the competence of any particular legislature to levy the same. In our respectful view, the conclusion is inescapable: the Supreme Court deliberately cast the judgment in terms only of the constitutional dispensation obtaining under the 1962 Constitution and based it in important part on the peculiar features thereof, which allowed for the existence of two *rationes decidendi* that were clearly in tension.

49. The present is of course governed by the 1973 Constitution and we are required to decide the issue before us in terms thereof. How then does the *Hirjina* judgment apply in terms of the present Constitution? In our view, in order to properly address this question, one has to divide the analysis into the position obtaining before and after the 18th Amendment. We begin with the former, and go back to the commencing day of the present Constitution, i.e., 14.08.1973. Article 268(1) provided that all laws existing on that date were to continue in force "until altered, repealed or amended by the appropriate Legislature". It will take us too far afield to undertake a detailed analysis of

this provision. For present purposes, it suffices to note that what it meant was that each "existing law" stood allocated to one or the other of the legislatures created by the Constitution (i.e., Majlis-e-Shoora (Parliament) on the one hand and the Provincial Assemblies on the other) and till such time as the relevant legislature chose to alter, repeal or amend it, the law continued in force in the form it had on the commencing day. But how was this allocation to be made? How was it to be decided that a particular "existing law" fell to the lot of the Federation or the Provinces? In our view, given the federal structure and scheme of the Constitution, the allocation could be only on the basis of the well known test of "pith and substance". The pith and substance of each "existing law" had to be determined, and here it is important to remember that the legislative source or origin of the statute in any previous constitutional dispensation was irrelevant. In other words, it was irrelevant whether the "existing law" in question would have been regarded as a federal or provincial statute when enacted in terms of whichever constitution was then prevailing. The "existing law" had to be considered simply as a law in its own right, and its pith and substance determined. If the pith and substance was relatable to any entry on the Federal Legislative List or the Concurrent Legislative List (both Lists of course existed on the commencing day) then the "existing law" stood allocated to the Federation. If the pith and substance was not relatable to any enumerated power then it stood allocated to the Provinces.

50. The 1944 Central Act, in its pith and substance, was of course clearly relatable to entry No. 44 of the Federal Legislative List and accordingly stood allocated to Parliament. What however of the provisions relating to the levy on the rendering or providing of services? How was that levy to be allocated? In the event, the provisions passed, as it were, *sub silentio* to Parliament since they were part of the 1944 Central Act. However, the crucial question for our purposes is, how would the allocation of those provisions have been made keeping the *Hirjina* judgment in mind? With *Hirjina* (decided on 07.10.1991) providing the hindsight, would the same result have obtained on the commencing day? In our respectful view, the answer to this question depends on a comparison of the constitutional dispensations under the 1962 and 1973 Constitutions. It has already been noted above that the constitutional dispensation relevant for the Second *Ratio* was peculiar to the 1962 Constitution. It had no equivalent in the 1973 Constitution and certainly none on the commencing day. On this basis, in our respectful view the Second *Ratio* had no relevance for purposes of the 1973 Constitution. What of the First *Ratio*? During the course of arguments, we invited submissions as to whether there was any difference in the dispensations of the two Constitutions as would be relevant for the First *Ratio*. Although some of the learned counsel sought to argue that the dispensations were different, they were unable to

satisfy us that this was so. In our view, the constitutional dispensations were the same in the context of the First *Ratio*. It must be remembered that that context was the relevant legislative entry in the Third Schedule to the 1962 Constitution. It will be recalled that the Supreme Court found it to be identical to the relevant entry in the 1956 Constitution and markedly different from that in the GOIA. Entry No. 44 of the Federal Legislative List is identical to the entries in the 1956 and 1962 Constitutions, as can be seen from the following table:

Constitution	Entry
1956	26. … duties of excise (including duties on salt, but excluding alcoholic liquor, opium and other narcotics), ...
1962	43. Duties and taxes, as follows: … (b) duties of excise (including duties on salt, but not including duties on alcoholic liquor, opium and other narcotics)….
1973	44. Duties of excise, including duties on salt, but not including duties on alcoholic liquors, opium and other narcotics.

It follows that in our view the First *Ratio* of the judgment in *Hirjina* would apply to the 1944 Central Act when considered as an "existing law" for purposes of the 1973 Constitution. In its pith and substance, even in respect of the levy on the rendering or providing of services, the law was relatable to entry No. 44. Put differently, for purposes of the 1973 Constitution, the First *Ratio* is to be regarded as definitive. It was therefore the Federation alone that had the sole legislative competence to impose a levy on the rendering and providing of services. It will be seen the taxing power contained in entry No. 44 thus included (at least) two distinct, even disparate taxing events, one being the manufacture or production of goods and the other the rendering or providing of services.

51. The next stage in the analysis, and one that also falls before the 18th Amendment, is the year 2000, when the Provinces levied sales tax on services, the law in this Province being the 2000 Provincial Ordinance. This sought to tax the rendering or providing of such services as were set out in the Schedule thereto (which contained only a limited number of services). An obvious question that arises is whether these Ordinances were constitutionally valid, given that, as we have just concluded, the power to tax the providing or

rendering of services vested in the Federation alone. It may be noted that although the Ordinances were promulgated during the period of the General Musharraf Martial Law, the country was even then being governed as nearly as may be in terms of the 1973 Constitution (which remained suspended during the interregnum). Following the lead provided by the Supreme Court in *Hirjina*, we are of the view that, as relevant here, the constitutional dispensation that provided the context for the 2000 legislation was clearly the present Constitution and hence the Ordinances had to be regarded as provincial statutes. It will be recalled that learned counsel had pointed out that the *vires* of the Ordinances were challenged in a number of cases, being *Defence Authority Club, Karachi and others v. Federation of Pakistan and others* 2007 PTD 398 (SHC; DB), and certain decisions of the Lahore High Court, being *Nafees Dry Cleaners v. Government of Punjab and another* 2001 PTD 2018, *Hafeezullah Malik & Co. v. Province of Punjab and others* 2003 PTD 1852 and *Gurgson Dry Cleaners v. Sales Tax Officer Rawalpindi* 2004 PTD 1987. The statutes were found to be constitutionally valid. We have carefully examined these decisions. In three of them there was no mention of the *Hirjina* judgment and its application to the 1944 Central Act in terms as stated above. Certainly, the applicability of the First *Ratio* was never considered. Only in one judgment (the third in the list above) was there any reference to *Hirjina*. In *Nafees Dry Cleaners*, the challenge was on the basis of discrimination, and with reference to entry No. 49. It was held that the entry (which was in its pre-18th Amendment form) had nothing to do with services. While it was observed that a matter not enumerated in either of the Lists fell in the domain of the Provinces, the High Court was not referred to *Hirjina* nor was any challenge mounted on the basis thereof. As to discrimination, it was held that dry cleaners constituted a class by themselves for tax purposes. The petition was dismissed. *Gurgson Dry Cleaners* was also a case involving a dry cleaner. Interestingly, in this case the petitioner challenged a federal Ordinance (of 2001), which was to the same effect as the Provincial Ordinances, but applied only in the Islamabad Capital Territory. For obvious reasons the position in relation to Islamabad is materially different from that prevailing in the Provinces. In respect of the national capital the Federation has plenary legislative powers, i.e., it can act in relation to both matters listed and those not enumerated. The issue that arises in the petitions before us cannot therefore arise in respect of Islamabad. The petition was dismissed. All that need be noted is that *Hirjina* was not referred to.

52. This brings us to *Hafeezullah Malik & Co.*, where the petitioner was a customs agent, and which is the only judgment where reference is made to *Hirjina*. A learned Single Judge of the Lahore High Court dismissed the writ petition, and the Intra-Court Appeal also failed. It is the latter judgment that is

reported, but it sets out the material part of the decision of the learned Single Judge. Since the learned Division Bench simply affirmed what had been said by the learned Single Judge, it suffices to consider only his decision. In the course of his judgment, the learned Single Judge observed as follows (emphasis supplied) (pp. 1853-4):

> "Item 44 refers to duties of excise and it has been held by the Honourable Supreme Court in the case titled Hirjina & Co. v. Islamic Republic of Pakistan and another (1993 SCMR 1342) that excise duties can be levied on services also. *This circumstance[], however, by itself does not mean that a tax on the sale of services cannot be levied by the Provincial Legislature*.
>
> It is not disputed that the petitioner is selling his services to various importers and exporters. The sale of such services, as distinct from the sale of goods, falls within the Provincial domain because it has not been specified in any of the items included in the Federal Legislative List.
>
> The Distinction between services and goods is obvious. Even the Central Excise Act refers to goods and services separately.
>
> However, in the Federal Legislative List taxes in respect of sales are only mentioned in Item 49 of the Federal Legislative List and the same is confined to goods only.
>
> In view of the above discussion, it becomes apparent that the Provincial Government is constitutionally authorized to levy a tax on the sale of services notwithstanding the fact that Federal Government may levy an excise duty on such services by virtue of Item 44 of the Federal Legislative List. In this view of the matter, I find that the Punjab Sales Tax Ordinance, 2000 is not ultra vires the Constitution. As a consequence, this petition is dismissed."

With respect, we are unable to agree with the reasoning adopted by the learned Single Judge. *Hirjina* was, with respect, not properly appreciated. There was no detailed analysis of the judgment, nor any appreciation that it had two *rationes decidendi*, nor any assessment of the nature and effect thereof (and especially of the First *Ratio*). In particular, the observation emphasized in the extract above is untenable and, with respect, clearly contrary to what the Supreme Court held and how, in our respectful view, the judgment applied in the context of the 1973 Constitution. The learned Single Judge, with respect, erred materially in his understanding of *Hirjina* and the learned Division Bench erred equally in affirming his decision.

53. In *Defence Authority Club*, the decision of a learned Division Bench of this Court, there was also no reference to or consideration of *Hirjina*. By this decision, two sets of petitions were disposed off together. In one set (three petitions), the petitioners were clubs. In the second set (two petitions), the petitioners were clearing agents, as had been the situation in *Hafeezullah Malik & Co.*, a decision to which the learned Division Bench did refer. The

primary challenge considered by the learned Division Bench was that mounted by the clubs and the discussion was in relation to entry No. 49. The learned Division Bench observed as under (pg. 404):

> "In our view sales tax on services does not from part of Entry No.49 of Fourth Schedule of the Constitution and as such provincial Legislature has authority to legislate law in this regard."

We have carefully considered this observation. The first part of the observation was unexceptionable in the pre-18th Amendment scenario. However, the second part (i.e., the conclusion drawn from the first that the Provinces could legislate in relation to services) is problematic and, in our respectful view, must be regarded as *per incuriam*. For the reasons stated above, this part of the observation is, with respect, contrary to *Hirjina* and obviously it is the latter that must prevail. As noted, the learned Division Bench was not referred to and did not consider that judgment. It is however interesting (indeed, intriguing) to note that immediately after the observation referred to above, the learned Division Bench had observed as follows (*ibid*; emphasis supplied):

> "*However in our tentative assessment taxable events in the case of duties of "excise on services" and "sales tax on services" [are] the same* unlike sales tax on goods sold where the taxable event is sale of goods."

Thus, the learned Division Bench did (tentatively) reach the conclusion arrived at (firmly) herein above, namely that the taxable event on the rendering or providing of services is the same whether the levy is regarded as a federal duty of excise or a provincial sales tax. It is a matter of regret that the learned Division Bench did not follow up this line of reasoning, and this may well have been because its attention was not drawn to *Hirjina*. The petitions of the clubs were partially allowed, on a basis that is not relevant for present purposes. Insofar as the clearing agents' petitions were concerned, they were dismissed in the following terms:

> "In the case of Hafeezullah Malik and Co. (supra), demand on services rendered by the customs agents were called in question as in Constitution Petitions Nos. D-1432 and D-1433 of 2000 and Hon'ble Lahore High Court dismissed the petition holding that the service is covered by the schedule to the Ordinance, which has already been held valid law."

We have carefully considered this observation. The manner in which *Hirjina* came to be referred to in *Hafeezullah Malik & Co.* has already been stated. We have also set out our view that the observations in relation thereto of the learned Single Judge (affirmed in Intra-Court Appeal) were not correct. The question that needs to be considered is whether the learned Division

Bench of this Court, in the passage just extracted, can be said to have adopted the view taken by the Lahore High Court in its entirety and thus (and more crucially) endorsed, albeit indirectly, the observation regarding *Hirjina*? The reason why this question arises is of course the rule that the *ratio decidendi* of the judgment of one Division Bench binds another Division Bench of the same High Court. We have carefully considered the point. In our respectful view, the question just posed must be answered in the negative. An erroneous understanding and application of a Supreme Court judgment cannot, with respect, be regarded as forming part of the *ratio decidendi* of another judgment in such a roundabout and indirect manner, especially where, as here, the Supreme Court decision is not even referred to. There is also another aspect to this matter. One of us (Munib Akhtar, J) while sitting singly had occasion, in *Pak Turk Enterprises (Pvt) Ltd. v. Turk Hava Yollari* 2015 CLC 1, to consider the question as to the binding effect of a Division Bench judgment, which purported to follow and apply a decision of the Supreme Court, but erred in its understanding of the latter. It was observed as follows (pp. 20-21):

> "36. This brings me to the final, but no less important, aspect, which is that while sitting singly, I am differing with what has said by a Division Bench of this Court. The normal rule is of course well established: a single Bench of a High Court is bound by a Division Bench of that Court. Indeed, even a Division Bench is bound by a judgment of an earlier Division Bench. This is the established rule of precedent. I have very carefully considered the matter. In my respectful view, the present situation is one of the exceptions to the normal rule of precedent, and in order to explain the point, I must turn to English law, because the issue now at hand has been dealt with under that law, and the rules of precedent that we follow derive much assistance from English authority. As is well known, the English Court of Appeal applies the same principle as noted here: a later Court of Appeal is bound by a decision of an earlier Court of Appeal. This was the rule established by the well known decision of *Young v. Bristol Aeroplane Co. Ltd.* [1944] 2 All ER 293. However, as is equally well known, there are certain exceptions to this rule. What if the earlier Court of Appeal purported to follow and apply a decision of the House of Lords, and in fact misunderstood and misinterpreted that decision? Would a later Court of Appeal simply be bound by what the earlier Court of Appeal had said or done, or was it, being bound by the House of Lords decision, be bound to apply the latter correctly and properly? This issue arose in *Holden v. Crown Prosecution Service* [1990] 1 All ER 368 ("*Holden*"). The Court of Appeal was there confronted with its own earlier decision in *Sinclair Jones v. Kay* [1988] 2 All ER 611, which had interpreted and applied a House of Lords decision in *Myers v. Elman* [1939] 4 All ER 484. The Court of Appeal concluded in *Holden* that the earlier Court of Appeal had misinterpreted and misapplied the House of Lords decision. Was it however, nonetheless, bound by its earlier decision? To this, a negative answer was given in the following terms (at pg. 374):
>
> > "Ordinarily the rule in *Young v. Bristol Aeroplane Co. Ltd.* ... applies only to the subsequent decisions of the House of Lords

which are inconsistent with the previous decisions of the Court of Appeal.

What is the position when the court is of the opinion that a decision of the Court of Appeal is inconsistent with the previous decisions of the House of Lords, which had been cited to that court and wrongly distinguished? This is described by Lord Wright in *Noble v. Southern Railway Co.* [1940] AC 583, 598, as a problem of some difficulty. He inclined to the view that our duty is to follow the law as we believe it to have been laid down in the previous decision of the House of Lords."

The same view was taken by the Court of Appeal in another case, *Rickards v. Rickards* [1989] 3 All ER 193. In the House of Lords decision cited in the extract above, Lord Wright had observed as follows:

"What a Court should do when faced with a decision of the Court of Appeal manifestly inconsistent with the decisions of this House is a problem of some difficulty in the doctrine of precedent. I incline to think it should apply the law laid down by this House and refuse to follow the erroneous decision."

37. In my respectful view, the foregoing observations correctly lay down an exception to the rules of precedent as they apply in this country as well. I am bound first and foremost by decisions of the Supreme Court. If a decision of a larger Bench of this Court is on any point "manifestly inconsistent" with a prior decision of the Supreme Court on account of having misunderstood or misapplied it, then that which binds me is the latter and not the former. Of course, this exception to the rules of precedent would only apply in rare circumstances and only where the inconsistency is clear and direct, and no other conclusion is reasonably possible. It is after a very careful consideration of what the learned Division Bench said in *United Bank* that, with the utmost respect, I have come to the conclusion that it is manifestly inconsistent with the Supreme Court decisions in *Australasia Bank* (and *Central Bank of India*) and *Khan of Mamdot*. I am bound to apply the latter and therefore I have respectfully ventured to differ from the learned Division Bench."

In our respectful view, even if the observation of the learned Division Bench in *Defence Authority Club* made with reference to *Hafeezullah Malik & Co.* could be regarded as indirectly or implicitly endorsing the erroneous view formed by the Lahore High Court in respect of *Hirjina*, it would be manifestly inconsistent with the latter on account of having misunderstood and misapplied it. We are bound by the *Hirjina* judgment and would remain so bound notwithstanding anything to the contrary that may have been said indirectly, implicitly or impliedly (or even, which of course is not the case here, directly), by the learned Division Bench in *Defence Authority Club*.

54. It is of course well settled that if a challenge as to the *vires* of a statute fails on one ground that does of itself preclude a subsequent challenge on another ground. The fact therefore that in the foregoing decisions, the 2000 statutes were found to be constitutionally valid on grounds other than in

relation to *Hirjina* is not conclusive. The one decision that did take the Supreme Court decision into account was not, with respect, correctly decided and is, in any case, only of persuasive value for us. As is clear from the foregoing we are, with respect, not persuaded. In our respectful view, the 2000 Provincial Ordinance (and its sister statutes in the other Provinces) were clearly *ultra vires* the Constitution. The taxing power in respect of the taxing event vested in the Federation alone. This was the clear conclusion that emerged from the First *Ratio* of *Hirjina*.

55. The Ordinances of 2000 were also constitutionally suspect in another aspect. The manner in which tax under these Ordinances was collected was as though it were a sales tax in terms of the (federal) Sales Tax Act, 1990. That applied in relation to goods. Under the 2000 Ordinances, the service tax was collected by the CBR (now FBR). It will be recalled from the submissions made by the learned Additional Attorney General that the revenues collected under the Provincial Ordinances were pooled and then shared in terms of a National Finance Commission ("NFC") Award issued under Article 160 of the Constitution. Clause (2) of this Article provides that the NFC is, inter alia, to make recommendations regarding the distribution between the Federation and the Provinces of the tax revenues mentioned in clause (3). Now, this latter clause lists the various taxes that fall within the ambit of Article 160, but clearly states that those are the taxes "raised under the authority of Majlis-e-Shoora (Parliament)". We are at a loss to understand how the revenues raised under the Provincial Ordinances of 2000 could be made subject to Article 160. Those taxes were not raised under Parliament's authority. They were raised under the authority of the Provinces. Simply because the provincial laws provided that the tax was to be collected on the same basis as though it were a federal tax, and the collection was made by a federal agency (i.e., CBR) did not mean that the tax was raised under Parliament's authority. Therefore, the entire exercise of pooling such tax revenues and then sharing them under an NFC Award was, prima facie, unconstitutional.

56. In our view therefore, the 2000 Provincial Ordinance was ultra vires the Constitution as it sought to impose a tax that lay exclusively in the Federal domain by reason of the application of the First *Ratio* of *Hirjina* to entry No. 44. Furthermore, the treatment of the tax collected under the 2000 Provincial Ordinance was also constitutionally suspect for reasons just stated.

57. This brings us to the next (and last) stage, namely the situation created by the 18th Amendment in 2010. For ease of reference, entry No. 49, as amended, is again set out: "Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed, *except sales tax on*

services." How does the "exception" apply and what is its effect? 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. In our view, in order to properly appreciate the "exception" one can usefully turn to the principles of interpretation developed in relation to provisos. These principles are well known and need not be set out in detail. What is relevant for present purposes is that it is well accepted that sometimes a proviso is not to be regarded as a "true" proviso but rather as an independent substantive provision in its own right. Such an interpretation of a proviso is rare but recognized and supported by authority. Thus, in *Commissioner of Income Tax v. Phillips Holzman A.G. Ameejee Valeejee & Sons* PLD 1968 Kar. 95, 1968 PTD 73, a learned Full Bench observed as follows (pp. 102-3; emphasis supplied)

> "9. … the law is quite clear and the rule is well established that the proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment a portion which, but for the proviso, would fall within the main enactment. In this connection, the Supreme Court of Pakistan, in *East and West Steamship Company v. Pakistan* (PLD 1958 SC (Pak.) 41), while dealing with the question as to how a proviso may be construed, observed:
>
> > "The effect of a proviso is to except something out of the preceding portion of the enactment or to qualify something enacted therein which, but for the proviso, would be within it. The words of a proviso are to be construed strictly and confined to the special case which its words enact."
>
> …

> *It may, however, be added that there may be cases in which the language of the statute is so express and clear that a proviso may be construed as a substantive clause*."

Reference may also be made to *Commissioner of Stamp Duties v. Atwill* [1973] AC 558, [1973] 1 All ER 576, where it was observed by the Privy Council as follows (pg. 561):

> "The decision of the majority of the High Court [of Australia] was thus based on the view that the proviso was a true proviso limiting or qualifying what preceded it.
>
> Their Lordships are not able to agree with this conclusion. *While in many cases that is the function of a proviso, it is the substance and content of the enactment, not its form, which has to be considered, and that which is expressed to be a proviso may itself add to and not merely limit or qualify that which precedes it.*"

Turning to India, reference can be made to *Hiralal Ratanlal v. State of UP and another* AIR 1973 SC 1034, where it was observed as follows (pp. 1039-40; emphasis supplied):

> "21. … Ordinarily a proviso to a section is intended to take out a part of the main section for special treatment. It is not expected to enlarge the scope of the main section. *But cases have arisen in which this Court has held that despite the fact that a provision is called proviso, it is really a separate provision and the so called proviso has substantially altered the main section*….
>
> 22. In *State of Rajasthan v. Leela Jain* AIR 1965 SC 1296, [1965]1 SCR 276, this Court observed:
>
> > 'The primary purpose of the proviso now under consideration is, it is apparent, to provide a substitute or an alternative remedy to that which is prohibited by the main part of Section 4(1). There is, therefore, no question of the proviso carving out any portion out of the area covered by the main part and leaving the other part unaffected. What we have stated earlier should suffice to establish that the proviso now before us is really not a proviso in the accepted sense but an independent legislative provision by which to a remedy which is prohibited by the main part of the section, an alternative is provided. *It is further obvious to us that the proviso is not coextensive with but covers a field wider than the main part of Section 4(1).*'"

And in *Dattatraya Govind Mahajan and Ors. v. State of Maharashtra and another* AIR 1977 SC 915, Krishna Iyer, J. observed: "An independent provision may occasionally incarnate as a humble proviso." (pg. 940)

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

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.

59. The second effect of the "exception", though not directly relevant for present purposes, may also be adverted to. Entry No. 49 is concerned with, inter alia, the sale of goods. The taxing power in relation thereto vests solely in the Federation. The taxing power in relation to the rendering or providing of services now vests solely in the Provinces. However, in the real world, transactions and events cannot be divided so neatly and placed in watertight compartments, one relatable solely to goods and the other to services. There are many transactions that have elements of both. The point can be illustrated with a simple example, which was in fact discussed threadbare during the

course of submissions. Consider a restaurant, and for convenience suppose that it is a pizza restaurant. A family goes and has a meal at the restaurant. Is that a service or a sale of goods? Most would say that it is the providing of a service and taxable only by the Province, even though it clearly has elements of a "transfer" of "goods" (the pizza consumed by the family). Now vary the facts slightly. Suppose the family goes to the restaurant and finds that there is a long waiting time. Rather than wait, it does a "takeaway", i.e., it orders the pizza but has it packed for taking away and does not eat it in the restaurant. Is that a service or a sale of goods? Most would say that this is a sale of goods, taxable only by the Federation. Vary the facts again. Suppose that the restaurant offers a home delivery service, and the family rather than eating out simply orders a pizza for delivery at home. Is that a sale of goods alone, or a sale transaction coupled with the "service" of home delivery? If the latter, which element is determinative, that of the goods or the service? Or is it that each of the Federation and the Province can separately tax its own element? As this simple example shows, the boundary between a "pure" sale of goods and "pure" service event and a "hybrid" transaction is fluid and may, on occasion, be surprisingly difficult to determine. That this is so is indicated by the fact that these points have had to be considered at the highest levels in other jurisdictions, albeit in contexts rather different from those at hand. Reference may be made, e.g., to *Dr Beynon and Partners v. Customs and Excise Commissioners* [2004] UKHL 53, [2004] 4 All ER 1091, a decision of the House of Lords and *Card Protection Plan Ltd v Customs and Excise Commissioners* (Case C-349/96) and *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C-231/94), decisions of the European Court of Justice. (The latter decision, incidentally, involved meals at restaurants.)

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. It should be kept in mind that such an exercise, while relatively new to the 1973

Constitution, is well established in those constitutions, such as Canada and India, where there are powers exclusively enumerated for each legislature. The principles enunciated in terms of those Constitutions will, no doubt, now be explored, considered and developed by our Courts in relation to entry No. 49.

61. In our view therefore, the placement of the "exception" in entry No. 49 is not a mere happenstance. It will be recalled that the learned Additional Attorney General had sought to refer to certain parliamentary debates that had preceded the passage of the 18th Amendment in order to explain the rationale behind the "exception" and its placement in entry No. 49. Mr. Atifuddin, learned counsel for SRB, had opposed consideration of any such material. In our view, the objection taken by learned counsel for SRB is well merited. We are therefore, with respect, unable to accept the invitation by the learned Additional Attorney General to consider any such material. In our view, the reason and rationale is ascertainable from the relevant provisions, and is as explained herein above.

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.

63. This does not however, quite end the matter. The 18th Amendment took effect from 19.10.2010. The Amendment also substituted Article 270AA. It is now necessary to examine clause (7) thereof. It may be noted that Article

270AA has gone through three versions: firstly, as inserted into the Constitution by the Legal Framework Order, 2002 (with effect from 21.08.2002); secondly, as substituted by the 17th Amendment (with effect from 31.12.2003); and thirdly, as substituted by the 18th Amendment. The first two "versions" did not have any provision equivalent to clause (7), which provides as follows:

> "Notwithstanding anything contained in the Constitution, all taxes and fees levied under any law in force immediately before the commencement of the Constitution (Eighteenth Amendment) Act, 2010, shall continue to be levied until they are varied or abolished by an Act of the appropriate legislature."

It will be seen that this provision is (in our view designedly) similar to Article 279 of the present Constitution. Its insertion was made necessary because the 18th Amendment made many express changes in the taxing powers contained in the Federal Legislative List, with only one of which we are directly concerned. Other changes included the omission of entry Nos. 45 ("duties in respect of succession to property") and 46 ("estate duty in respect of property"). It will be recalled that in *Hirjina*, while considering the Second *Ratio*, the Supreme Court had observed (in para 11) on the basis of the aforementioned Article that "the competence of the Federal Government to collect duty on excisable [services] under the [1969] Ordinance cannot be challenged till such time as the appropriate Legislature makes a provision to the contrary". In our view, this observation is apt in relation to clause (7) as well. As so applied, it means that the Federal Government continued to have the competence to collect duty on services under the 2005 Federal Act till such time as the Provinces enacted their respective statutes. In Sindh, this meant the 2011 Provincial Act, which came into effect on 01.07.2011.

64. The position that emerges can therefore be stated as follows. The power to levy a tax on the providing or rendering of services vested exclusively in the Federation from the commencement day (14.08.1973) till the coming into force of the 18th Amendment (19.10.2010). Thus (as presently relevant), the 1944 Central Act validly continued as an existing law in the Federal domain, and the 2005 Federal Act was validly enacted by the Federation. The 2000 Provincial Ordinance trenched directly upon the Federal field and was therefore ultra vires the Constitution. With effect from 19.10.2010, the power to levy the tax vested exclusively in the Provinces, but by reason of clause (7) of Article 270AA, the Federation continued (insofar as this Province is concerned) to have the competence to collect the excise duty till 30.06.2011. When the 2011 Provincial Act came into force on 01.07.2011, those provisions of the 2005 Federal Act that related to the levy of excise duty on the rendering or providing of services became ultra vires the Constitution.

(It could perhaps be said that those provisions became ultra vires on 19.10.2010 and ineffective on 01.07.2011. However, nothing really turns on this distinction.) Thereafter (but subject to what is stated below), it was only the Province that could validly levy the tax on services.

65. We turn now to consider the other legislative entry from the Federal Legislative List that was relied upon, i.e., entry No. 53. For ease of reference, this entry is reproduced again: "Terminal taxes on goods or passengers carried by railway, sea or air; taxes on their fares and freights". It will be recalled that the entry was invoked by those petitioners who were shipping agents or freight forwarders (or their respective associations). It can, if at all, apply only in relation to them. It will also be recalled that in relation to this entry, one judgment of the Federal Court was considered in particular, being *Punjab Flour and General Mills Co., Ltd., Lahore v. Chief Officer, Corporation of The City of Lahore and another* AIR 1947 FC 14. The following observation from this judgment remained the focus of attention (emphasis supplied):

> "The [terminal] taxes must be (a) terminal (b) confined to goods and passengers carried by railway or air. They must be chargeable at a rail or air terminus and be *referable to services (whether of carriage or otherwise) rendered or to be rendered by some rail or air transport organisation*."

The Federal Court was concerned with entry No. 58 of the Federal List (List I) of the Seventh Schedule in the GOIA: "Terminal taxes on goods or passengers carried by railway or air; taxes on railway fares and freights." It will be seen that, other than the addition of carriage by sea, this entry was similar to entry No. 53. It was for this reason that the observation made by the Federal Court appeared, prima facie, to be directly relevant. If the (exclusively federal) terminal tax is to be referable to the services rendered or to be rendered by some rail or air (or sea) transport organization, then prima facie, the tax sought to be levied by the Province on the services provided or rendered by shipping agents or freight forwarders could be unconstitutional. It will be recalled that Ms. Umaimah Khan, learned counsel for SRB had argued that the reference to "organization" in the Federal Court's observation was limited to public sector type entities only. With respect, we are unable to agree. Entry No. 53 (like entry No. 58 of the GOIA) is a field of legislative power, which must be construed and applied in the broadest terms possible. Prima facie, "organization" would seem to include shipping agents and freight forwarders, like the relevant petitioners before us.

66. We begin by noting that the 1956 and 1962 Constitutions also had entries similar to entry No. 53 (see entry No. 26 and entry No. 43(g) of their respective lists). The position under those Constitutions was however

somewhat complicated. Under the 1956 Constitution the federal entry related to only carriage by sea or air, and entry No. 89 of the (exclusive) provincial list related to carriage by railway. (Again, incidentally, we see that a taxing power has been divided but not shared.) Under the 1962 Constitution, the entry enumerated only terminal taxes on carriage by sea or air; carriage by railways was not an enumerated matter. Furthermore, it must be kept in mind that terminal taxes go back to before even the GOIA. Prior thereto the situation was regulated by the Government of India Act, 1915 under a somewhat complicated scheme. The result is that most of the cases deal with issues that are, with respect, not directly on point insofar as the present petitions are concerned. We were referred to two decisions of the Supreme Court where terminal taxes were considered, one in relation to the 1956 Constitution and the other the 1962 Constitution. These decisions were *Pakistan Textile-Mill Owners' Association and others v. Administrator of Karachi and others* PLD 1963 SC 137 and *Pakistan Tobacco Co. Ltd. v. Karachi Municipal Corporation* PLD 1967 SC 241 respectively. We have carefully considered the decisions. While illuminating they do not, with respect, shed any light directly on the question at hand. It is not necessary therefore to refer to these decisions in detail. In our respectful view, the description of terminal taxes given by the Federal Court is a clear statement of the scope and extent of the taxing power, and we agree with what has been said, although we would like to note that the description is by no means exhaustive. In our view, there is a lot more that can be said about this taxing power but for reasons that will shortly become clear, it is not necessary to carry out that exercise here.

67. As noted, the sales tax levied under the 2011 Provincial Act prima facie appears to (at least) overlap the taxing power contained in entry No. 53. In order to ascertain whether this is so, we intend to look not at the legislative entry but rather to the manner in which shipping agents and freight forwarders are taxed under the 2011 Provincial Act. The scheme of this Act, as presently relevant, is that services which are listed in the Second Schedule thereto are brought to tax. The Act defines "shipping agent" and "freight forwarding agent" in clauses (80) and (47) of s. 2 and even a cursory glance shows that these terms are defined in an all inclusive manner. Reference should also be made to the terms "ship management services" and "stevedore", defined in clauses (82) and (89) respectively. These have also been defined broadly. The Second Schedule then simply lists these terms, "shipping agents" being heading 9805.1000, "stevedores" heading 9805.2000, "ship management service" heading 9805.2100 and "freight forwarding agents" heading 9805.3000. Taking all of the foregoing together there can be little doubt that the 2011 Provincial Act seeks to tax the services provided or rendered by

shipping agents, etc. in a comprehensive and all embracing manner. However, there can also be little doubt that in doing so the Provincial legislature appears to have overreached itself. Even a cursory examination of the definitions shows that many of the services therein referred to would fall squarely within the description given by the Federal Court and hence come within the scope of terminal taxes. Thus, the 2011 Provincial Act has clearly encroached and directly trenched upon a legislative field reserved exclusively for the Federation. In our view, there can be no doubt that on the definitions as they stand and the placement of the terms in the Second Schedule, the provincial statute is unconstitutional and is liable to be declared as such, being an encroachment on the taxing power contained in Federal entry No. 53.

68. The description given by the Federal Court ought not to, of course, be regarded as exhaustive. But there is another aspect that must be considered. The commercial, transportation and shipping world has changed beyond recognition since 1947, and practices in relation thereto continue to develop and evolve both in respect of international trade and commerce within the country. The containerization of trade and the use of combined (i.e., multimodal) bills of lading are but a few examples of these far reaching changes. Now, it could be that some of these changes are such that the relevant taxing event, i.e., the service being rendered or provided, does not fall within the scope of entry No. 53. If so (and we expressly leave this point open) then it could be that that particular service may fall within the legislative competence of the Provinces. The reason why we bring up this point is that it is a well established principle that if possible a statutory provision may be "read down" in order to make it constitutional. Is it therefore possible to "read down" the definitions used in the 2011 Provincial Act and/or the Second Schedule in such manner as limits the scope thereof to such services as would not fall within entry No. 53? In our view, even if such a conclusion were possible (a point expressly left open), the definitions as they stand are so general and broad that such an exercise cannot be carried out in any meaningful manner. It will be rather speculative to try and "read down" the definitions. Therefore, if the Province can at all legitimately tax a service provided or rendered by shipping agents etc. in such manner as it does not amount to a terminal tax (and we again emphasize that this point is being left open), the Province must craft its law appropriately. If such a statute or provision is enacted, and is then challenged, that will have to be considered and decided on its own merits. For the present, our view is as has been stated above: the relevant definitions in s. 2 and headings in the Second Schedule to the 2011 Provincial Act are unconstitutional.

69. There is however yet another aspect of the matter that requires consideration, this time from the Federal perspective. Again, we draw attention to the description given by the Federal Court of terminal taxes. Now, the 2005 Federal Act, in Table II of the First Schedule, brings to tax services provided by shipping agents (entry No. 5), without however defining this term. We have of course held that the provisions of the 2005 Federal Act as relate to the providing or rendering of services have become ultra vires the Constitution. Might however, entry No. 5 nonetheless remain valid, not as an excise duty on services but as a terminal tax relatable to entry No. 53? The terminal tax is a federal taxing power and the 2005 Federal Act is a federal law. In this way, the tax on shipping agents would be "saved". We have considered this point, but in the end conclude that this is not possible. The reason is similar to, and in a sense the obverse of, why the definitions and entries in the 2011 Provincial Act cannot be read down. It is possible, in relation to the Federal law, that certain services as provided or rendered by shipping agents may be of such a nature that a tax on them does not amount to a terminal tax. As long as this remains possible (and we emphasize that the point is being left open) it would be unsafe to allow the federal levy to stand in relation to shipping agents.

70. The position that emerges from the foregoing discussion and analysis may therefore be stated as follows. Subject to what is further stated below in this judgment:

a. The First *Ratio* of the *Hirjina* judgment, as applicable to the present Constitution, vested the power to impose a levy on the providing or rendering of services solely in the Federation, the taxing power being contained in entry No. 44. Both the 1944 Central Act and the 2005 Federal Act were therefore valid as federal laws. However, the provisions in the 2005 Federal Act as relate to the providing or rendering of services became ultra vires the Constitution in relation to this Province with effect from 01.07.2011.

b. The 2000 Provincial Ordinance was ultra vires the Constitution as it directly trenched and encroached upon a taxing power that was then exclusively in the Federal domain.

c. Subject to what is stated in sub-para (d) below, the 18th Amendment shifted and transferred the power to impose a levy on the providing or rendering of services exclusively to the Provinces, due recognition being given to this on the

constitutional plane by the "exception" added to entry No. 49. The "exception" is an independent provision in its own right and not something akin to a proviso in the ordinary sense. It is as though the premise of the Second *Ratio* of the *Hirjina* judgment has become applicable, divested however of the peculiar features of the 1962 Constitution. Clause (7) of Article 270AA, as substituted by the 18th Amendment, allowed the relevant provisions of the 2005 Federal Act to remain in the field till such time as the Provinces enacted their respective laws. In Sindh the 2011 Provincial Act was enacted with effect from 01.07.2011 and from that date onwards, the relevant provisions of the 2005 Federal Act became ultra vires the Constitution.

d. The provisions of the 2011 Provincial Act as relate to shipping agents, etc. (being the definitions in s. 2 and relevant headings in the Second Schedule) are however, ultra vires the Constitution since they (to say the least) include and hence purport to tax the rendering or providing of services as fall within the exclusive Federal domain, on account of being terminal taxes within the meaning of entry No. 53.

71. We now turn to another important aspect, which requires careful consideration. A High Court judgment, especially in the exercise of jurisdiction under Article 199, can operate at two levels. Firstly, it operates *in personam*, i.e., in relation to the persons party to the petition. Secondly, it can have effect throughout the Province not only in respect of courts subordinate to the High Court but also in relation to any law (Federal or Provincial) that is applicable in the Province and also any Government, authority or agency acting or exercising powers within the Province or which have reach therein. This second effect may have far reaching consequences especially if the judgment makes declarations relating to the constitutionality of a law or statutory provision. In its second aspect, the judgment (always subject to any applicable decision of the Supreme Court) may be described as constituting binding authority for the Province concerned. It is this second aspect that is, in the context of this judgment, of particular concern to us. This is so for the following reasons. Ordinarily, when a law or a statutory provision is declared unconstitutional, it is also declared as being void and of no legal effect. The result is that, as a matter of law, it is as though the law or provision were never enacted (or at least ceased to have effect from a certain date), with attendant consequences. We have held the 2000 Provincial Ordinance to be unconstitutional. We have also held that the relevant provisions of the 2005

Federal Act became unconstitutional with effect from 01.07.2011. Even in relation to shipping agents and freight forwarders, where we have found the relevant provisions of the 2011 Provincial Act to be unconstitutional, we have held the levy of excise duty under the federal law to be inapplicable. Now, excise duty and provincial tax has been collected on the basis of these statutes for a number of years. If therefore the "normal" consequences of declaring these provisions to be unconstitutional or inapplicable were to follow, this could have seriously disruptive consequences. The Federation and the Province could face huge claims for refunds and this could have severe budgetary consequences. The Federation could face such claims with effect from 01.07.2011, and the Province in relation to tax collected under the 2000 Provincial Ordinance. The fact that that revenue was shared and pooled is yet another complication. At the same time we are also mindful of the fact that this judgment is being given at a time when the financial years of both the Federal and Province are drawing to a close and their budgets for the next year are under preparation. Keeping all of these factors in mind, we are of the view that it would be undesirable if the declarations that must necessarily follow from the analysis and conclusions above are made without taking into account the fiscal consequences thereof. What this means is that in our view it is appropriate if there is also a declaration that this judgment, is its aspect as constituting binding authority, will take effect from a specified (future) date and certain attendant matters are also taken into consideration. (It may be clarified that the determination of the date on which this judgment is to take effect as binding authority is a matter different from the suspension of the judgment in order to give any aggrieved person an opportunity to appeal to the Supreme Court. This distinction should be kept in mind at all times.)

72. We therefore direct that this judgment (and in particular the declarations made in para 73), when operating in its aspect as binding authority in the sense described above, shall have and take effect in the following manner (but it is clarified that this paragraph is without prejudice, and does not apply in relation, to para 74 below):

a. In respect of federal excise duty or provincial tax actually paid in the normal course (i.e., without protest or objection) up to 30.06.2016 under the 2005 Federal Act (with effect from 01.07.2011 onwards), the 2000 Provincial Ordinance or the 2011 Provincial Act (in respect of shipping agents, freight forwarders and the like), this judgment shall have no effect. It shall be irrelevant for purposes of this sub-paragraph if, in respect of any excise duty or provincial tax actually paid in the

above terms, any proceedings are launched at any time by the taxpayer after the date of this judgment.

b. In respect of federal excise duty or provincial tax actually paid up to the date of this judgment, but under protest or objection (which must have been taken expressly in writing at the time of payment), this judgment shall have effect from the date hereof but only if appropriate legal proceedings are launched between the date hereof and 30.06.2016. Otherwise, this judgment shall have no effect in respect of any such payment. It is clarified that if such protest or objection was not taken in express terms as noted, then the duty or tax paid shall be deemed to be covered by sub-para (a) above.

c. In respect of federal excise duty or provincial tax actually paid from the date of this judgment up to 30.06.2016, this judgment shall have no effect even if such payment is made under protest or objection unless by or before 30.06.2016 legal proceedings are actually launched by the aggrieved person. If such legal proceedings are launched, then this judgment shall have due effect in relation to the duty or tax actually paid.

d. In respect of federal excise duty or provincial tax as to which there are any proceedings pending as on the date of this judgment (and regardless of whether any duty or tax has been actually paid or not, and whether under protest or objection or otherwise) this judgment shall have effect from the date hereof. For purposes of this sub-paragraph, “proceedings” includes any litigation in any Court (whether suit, petition, reference, appeal or otherwise), any appeal pending before any Tribunal, any departmental proceedings or appeal, whether by way of recovery or otherwise, any appealable order made, or any show cause notice, demand notice or recovery notice that has been issued, whether responded to or not, or any recovery action or proceedings.

e. In respect of federal excise duty or provincial tax as to which any proceedings are launched by any federal or provincial authority (such as any officer of the Inland Revenue Department, FBR or SRB) between the date of this judgment and 30.06.2016 (and regardless of whether any duty or tax has been actually paid or not) this judgment shall have effect from

the date hereof. For purposes of this sub-paragraph, "proceedings" includes the issuance of any show cause notice, demand notice or recovery action or proceedings.

f. In respect of any matter not covered by any of the above sub-paras, this judgment shall have and take effect from 01.07.2016.

g. In case any matter appears to fall within more than one of the sub-paras of this paragraph, the one most beneficial to the aggrieved person shall be deemed to apply.

73. In light of the discussion and analysis undertaken in this judgment, the following declarations are made:

a. The provisions of the Federal Excise Act, 2005, insofar as they relate to the providing or rendering of services, were valid when enacted (01.07.2005) since at that time the exclusive power to impose a levy on the rendering or providing of services vested in the Federation alone. However, on account of the 18th Amendment to the Constitution (and in particular by reason of the addition of the "exception" to entry No. 49 of the Federal Legislative List), the said provisions are declared to be *ultra vires* the Constitution, with effect from 01.07.2011 in relation to the Province of Sindh.

b. It is declared that the Sindh Sales Tax Ordinance 2000 was *ultra vires* the Constitution.

c. It is declared that on account of the 18th Amendment to the Constitution (which took effect from 19.10.2010) the Provinces alone have the legislative power to levy a tax on the rendering or providing of services, but this is subject to Article 270AA(7) of the Constitution (as substituted by the said Amendment), and by reason thereof the legislative competence has manifested in the Province of Sindh from 01.07.2011 onwards, the date on which the Sindh Sales Tax on Services Act, 2011 came into force.

d. Subject to sub-para (e) below, the Sindh Sales Tax on Services Act, 2011 is validly enacted and *intra vires* the Constitution.

e. The provisions of the Sindh Sales Tax on Services Act, 2011 as relate to shipping agents etc. (being clauses (47), (80), (82) and (89) of s. 2 and heading Nos. 9805.1000, 9805.2000, 9805.2100 and 9805.3000 of the First and Second Schedules thereof) are *ultra vires* the Constitution, being a direct encroachment on the exclusive federal taxing power contained in entry No. 53 of the Federal Legislative List.

74. Insofar as the petitions that are being disposed off by this judgment are concerned, the foregoing declarations and the following further orders shall have and take effect from the date of this judgment:

a. Any notices issued, proceedings taken or pending, orders made, duty recovered or action taken under the 2005 Federal Act in respect of the rendering or providing of services (to the extent as challenged in any relevant petition) are hereby quashed and set aside.

b. Subject to sub-para (c) below, any notices issued, proceedings taken or pending, orders made, tax recovered or action taken under the 2011 Provincial Act (to the extent as challenged in any relevant petition) are hereby declared to be validly issued, taken, made etc. on the constitutional plane. However it is ordered that nothing in this sub-paragraph shall prevent any aggrieved person from challenging or contesting any such notice, proceeding, order etc. before any appropriate forum, officer, authority or tribunal under the 2011 Provincial Act (or, as appropriate, in any reference filed in the High Court under the said Act) on any ground that may otherwise be available to such person, and whether or not such ground was taken in any petition being disposed off by this judgment. It is clarified that any orders made in any petition staying or suspending any notice, proceedings or action under the 2011 Provincial Act stand recalled and vacated.

c. Any notices issued, proceedings taken or pending, orders made, tax recovered or action taken under the 2011 Provincial Act in respect of the rendering or providing of services (to the extent as challenged in any relevant petition) as are covered by para 73(e) above are hereby quashed and set aside.

75. This judgment disposes off the petitions listed in the Appendix, in terms as stated above. There shall be no order as to costs.

76. In order to give any aggrieved person an opportunity to prefer an appeal to the Supreme Court, the operation of this judgment is suspended till 30.06.2016. In order to maintain parity, any interim orders that were earlier made in the petitions being disposed off by this judgment shall continue in force, insofar as the said petitions are concerned, till 30.06.2016.

JUDGE

JUDGE

IN THE HIGH COURT OF SINDH, KARACHI

C.P. No. D-3184/2014

(and connected petitions)

APPENDIX: LIST OF CASES

S.No.	Case No. & Year	Parties
1.	C.P. D- 3778/2015	Blue Pak Shipping v. Pakistan and ors.
2.	C.P. D- 2662/2013	Indus Motor Company Ltd v. Federation of Pakistan & Ors.
3.	C.P. D- 1176/2014	Ocean Express Agencies Pvt Ltd v. Pakistan and Ors.
4.	C.P. D- 1948/2014	Maersk Pakistan (Pvt) Ltd v. Sindh and others
5.	C.P. D- 3184/2014	Pakistan International Freight Forwarders Assn. v. Province Of Sindh and ors.
6.	C.P. D- 3185/2014	General Maritime Pvt Ltd v. Province Of Sindh and ors.
7.	C.P. D- 3186/2014	Universal Freight System Pvt Ltd v. Province Of Sindh and ors.
8.	C.P. D- 3187/2014	Nashrah Shipping & Logistics Pvt Ltd v. Province Of Sindh and ors.
9.	C.P. D- 3188/2014	M.A.Z Shipping & Consolidation v. Province Of Sindh and ors.
10.	C.P. D- 3189/2014	Union Cargo Pvt Ltd v. Province Of Sindh and ors.
11.	C.P. D- 3190/2014	Seagull Shipping & Logistic Pvt Ltd v. Province Of Sindh and ors.
12.	C.P. D- 3191/2014	Ayhan Shipping & Logistics Pvt Ltd v. Province Of Sindh and ors.
13.	C.P. D- 3192/2014	Al Hamza Maritime International v. Province Of Sindh and ors.
14.	C.P. D- 3193/2014	Pakistan Ships Agent Ass v. Province Of Sindh and ors.
15.	C.P. D- 3194/2014	M/s Global Shipping Lines v. Province Of Sindh and ors.
16.	C.P. D- 3195/2014	General Shipping Agency v. Province Of Sindh and ors.
17.	C.P. D- 3196/2014	Delta Transport Pvt Ltd v. Province Of Sindh and ors.
18.	C.P. D- 3197/2014	Bena Co. v. Province Of Sindh and ors.
19.	C.P. D- 3198/2014	Riazeda Pvt Ltd v. Province Of Sindh and ors.
20.	C.P. D- 3763/2014	M/s Maritime Agencies v. Asst: Commissioner II And ors.
21.	C.P. D- 4182/2014	Indus Motor Company limited v. Fed. Of Pakistan and ors.
22.	C.P. D- 4720/2014	Pak Suzuki Motors Co Ltd v. Pakistan and Ors.
23.	C.P. D- 4923/2014	Jaag Broadcasting System Pvt Ltd v. Province of Sindh and Ors.
24.	C.P. D- 5280/2014	Mitsui O.S.K Lines Pakistan v. Fed. of Pakistan and Ors.
25.	C.P. D- 5281/2014	Marine Services (Pvt) Ltd v. Fed. of Pakistan and Ors.
26.	C.P. D- 5313/2014	M/s Universal Shipping and Ors v. Fed. of Pakistan and Ors.
27.	C.P. D- 5387/2014	Shell Pakistan v. Fed. of Pakistan and Ors.
28.	C.P. D- 769/2014	Maritime Agencies Pvt Ltd v. Assistant Commission -II and ors.
29.	C.P. D- 975/2014	CMA CGM Pakistan v. Pakistan and Ors.
30.	C.P. D- 2966/2015	United Arab Shipping v. Province of Sindh and Ors.
31.	C.P. D- 348/2015	OOCL Pakistan Pvt Ltd v. Fed. Of Pakistan and ors.
32.	C.P. D- 3777/2015	Green Pak Shipping v. Pakistan and ors.
33.	C.P. D- 1272/2016	Standard Chartered Bank (Pvt) Ltd v. Pakistan and Ors.
34.	C.P. D- 1482/2016	M/s Damco Pakistan v. Deputy Commissioner I.R and Ors.
35.	C.P. D- 1877/2016	Allied Rental Modaraba v. Asst: Commissioner I.R and Ors.
36.	C.P. D- 1878/2016	Allied Rental Modaraba v. Asstt: Commissioner I.R and Ors.
37.	C.P. D- 1998/2016	Barrett Hodgson v. Fed. of Pakistan and Ors.
38.	C.P. D- 2150/2016	Continental Biscuit v. Fed. of Pakistan and Ors.
39.	C.P. D- 2153/2016	Sherman Securities Pvt Ltd v. Fed. of Pakistan and Ors.
40.	C.P. D- 385/2016	Getz Pharma (Pvt) Ltd v. Fed. of Pakistan and Ors.
41.	C.P. D- 546/2016	APL Pakistan Pvt Ltd v. Province of Sindh and Ors.
42.	C.P. D- 2862/2016	Atlas Honda Ltd. v. Pakistan and others
43.	C.P. D- 2497/2016	Saao Capital Securities (Pvt) Ltd. v. Federation of Pakistan a/oths