

**IN THE HIGH COURT OF SINDH AT KARACHI**

**Present:**  
**Mr. Justice Muhammad Shafi Siddiqui**  
**Mr. Justice Mahmood A. Khan**

C.P. No. D-5791 of 2016

Zona Pakistan (Pvt.) Ltd.

Versus

Province of Sindh & others

Along with 77 other petitions and  
 17 Sindh Sales Tax Reference Applications  
 (As per Category-wise list Annexure 'A' to this judgment)

Date of Hearing: 02.11.2021, 16.11.2021, 09.12.2021,  
 21.12.2021 and 24.12.2021

Petitioners in CPs and private applicants in some SSTRAs: Through M/s Muhammad Yousuf, Imran Ahmed, Khadim Ali Kaka, Jehanzeb Awan, Muhammad Rashid Khan Mahar, Ms. Anum, Muhammad Aizaz Ahmed, Ms. Lubna Perwez, Zubair Abro, Arshad Hussain, Nadir Hussain Abro, Ajeet Kumar, Zafar Khokhar, Gharib Shah, Faiz Durrani, Ghulam Mohammad, Uzair Qadir Shoro, Anwar Kashif Mumtaz, Usman Alam, Fazal Mehmood Sherwani, Iftikhar Hussain, Abdul Rahim Lakhani, Jabbar Mallah, Atta Muhammad, Gazain Magsi, Shahab Usto, Taha Soomro, Hanif Faisal Alam, Naseer Nehal Hashmi, Muneer Iqbal, Haider Naqi, Ahmed Ali Hussain, Umer Akhund, Qazi Umair Ali, Muhammad Inzimam Sharif, Muhammad Iqbal, Muhammad Aleem, Jawad Qureshi, Taimur Ahmed, Shams Mohiuddin, Darvesh K. Mandhan, Abdul Latif Chandio Advocates.

Department respondents in petitions and applicants in some SCRA: being Through M/s. Shamshad Ahmed, Muhammad Idrees Jakhrani, Mr. Javed Ali Sangi Advocates, Mr. Zulfiqar Ali Bhutto, Law Officer and Mr. Zamir Khalid, Commissioner Sindh Revenue Board along with Mr. Zainul Abidin, Deputy Commissioner, in person.

Respondent Federation: Through Mr. Kafeel Ahmed Abbasi, Deputy Attorney General and Mr. Hussain Bohra, Assistant Attorney General.

Respondent Province of Sindh: Through Mr. Saifullah, Assistant Advocate General.

## J U D G M E N T

**Muhammad Shafi Siddiqui, J.**- This bunch of cases consists of four categories. Category 'A' is a bunch of references filed by the alleged indenters against the order of the Tribunal bringing them within the frame of Sindh Sales Tax on Services Act, 2011 (SSTA 2011). The second category "B" includes those references which are filed by the department against same judgment of the Tribunal in respect of a portion that concerns with fine/penalty only. Category 'C' is a bunch of petitions which are filed by the alleged indenters who, apart from filing the petitions, have also exhausted statutory remedy under SSTA 2011, and their References are attached as category 'A', as above. The next category 'D' is of cases/petitions which have directly been filed, without undergoing process of statutory determination. All these categories of cases have been bunched together as primarily common questions are arising out of them, which questions shall be answered and decided by this common judgment and hence we propose to do the same. Such category-wise list is attached as Annexure-A.

2. In order to understand the controversies involved in above referred cases, we may sum up the possible questions that may originate from the proceedings in consideration of the propositions of the counsel, which are as under:-

- I) Whether the business activities of the petitioners/applicants, who are identified as indenters are covered by SSTA 2011?
- II) Whether the Province of Sindh has legislative competence to tax the services of the indenters serving in this province and hence are liable to be registered under SSTA 2011?
- III) Whether under the provisions of SSTA 2011, it is the service providers/indenters who are required to be taxed without being passed on to the recipients of the goods?

IV) What could be the value of services for the purposes of SSTA 2011?

V) Whether the business activities of the indenters constitute import and export of goods and/or extra territorial application and hence the Province of Sindh lacks competence in legislating the subject law?

VI) Whether the tax under question is tax on income of the indenters?

VII) Whether fine/penalty was rightly reduced by the Tribunal?

3. We have heard all counsels and amongst them leading counsel were Muhammad Yousuf and Jehanzeb Awan who have substantially led the arguments and followed by almost all the counsel with some minor additions. In the same way Mr. Zameer Khalid, Commissioner Sindh Revenue Board has substantially led the arguments on behalf of respondents, ably supported by Mr. Saifullah, Assistant Advocate General.

4. It is the indenters case that they do not have any contractual relationship with the local parties receiving the goods from foreign exporters and hence in the first instance it may be a transaction of direct import by the local party through foreign entity and any understanding between foreign principal and the indenters does not come within the clutches of at least the subject provincial statute SSTA 2011. Conversely privity of contract between applicant/indenters and foreign principal is a document which are governed by foreign laws including foreign arbitration. These indenters claimed to have been paid fixed emoluments by principal and that too on the conclusion of sale of goods to the local party by its foreign principal.

5. It is claimed that since the amount is received in foreign exchange as remittance through banking channels, it is only federation which could impose tax on such foreign remittance which is otherwise covered

in terms of Section 154 of Income Tax Ordinance, 2001. It is thus a tax which cannot be recovered from the foreign principal by the indenters as it becomes a direct tax and hence constitutionally not permitted through provincial legislation. It is argued that the province lack the competence to legislate on the subject on the touchstone that it is in relation to extra territorial jurisdiction and SSTA 2011 cannot encroach upon the subject of extra territorial jurisdiction in terms of Article 141 of the Constitution as it is with the parliament to legislate and make laws in reference therewith.

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

7. Learned counsel in this regard relied upon a judgment of this Court passed in CP No.D-4778 to 4780 of 2021 i.e. case of Pakistan Mobile Communication<sup>1</sup> (being unreported till date). They further relied upon the case of Imperial Tobacco<sup>2</sup> where the aforesaid concept was discussed that above interpretation could be given effect where statute abrogates international law and the language used therein reached to

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<sup>1</sup> CP No.D-4778 to 4780 of 2021 - Pakistan Mobile Communication Ltd. v. Pakistan & others (unreported)

<sup>2</sup> PLD 1958 Supreme Court Pakistan 125 (Imperial Tobacco Co. of India v. Commissioner of Income Tax)

such results. In support of above, They also relied upon the case of Sui-Southern<sup>3</sup>, KESC<sup>4</sup>, Murri Brewery<sup>5</sup>.

8. On the basis of above conclusions drawn by benches of Hon'ble Supreme Court and Lahore High Court as well as of this Court, it is urged that the activities across the country and beyond territorial limits of a province could only be governed by Article 141 of the Constitution and hence being of extra territorial limits of this province, the SSTA 2011 lacks its application over the subject and province lacks competence to legislate.

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

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

11. Learned counsels have also relied upon Entry No.32 that relates to international treaties, conventions and agreements and International arbitration. Thus, geographical stretch of the business under consideration claimed to have taken it away, beyond the territorial limits of province, as alleged, and either goods or services, could not be

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<sup>3</sup> 2018 SCMR 802 (Sui-Southern Gas Co. Limited v. Federation of Pakistan)

<sup>4</sup> PLD 2014 Sindh 553 (KESC v. NIRC)

<sup>5</sup> PLD 2017 Lahore 230 (Murri Brewery Company Limited v. Province of Punjab)

squeezed down to a restricted area of province of Sindh alone. It is thus concluded in terms of the aforesaid entries of the Federal Legislative List that the parliament has exclusive powers to make laws on the subjects enumerated in the Federal Legislative List and the parliament is only restricted to make laws with respect to matters not enumerated thereunder.

12. Next question that was argued by the learned counsels is doctrine of repugnancy and occupied field. These arguments are made, notwithstanding the above submissions that if the relationship of indenters, economic activities and the services being rendered, comes within the confluence of the legislative powers of both federation and the province, the subject matter is still covered by the legislative competence of federation in terms of Article 143 of the Constitution as there is serious inconsistency even within the domains of both federation and province and since the field has already been occupied in terms of earlier legislation (with reference of entries relied upon), there is no room or scope left with the provincial legislature to enter into such regime. Even if the field of legislation is not occupied, as argued, and provincial legislature made an attempt to venture or attempt to legislate all such unoccupied terrain, then also the federal legislation within constitutional frame, shall push aside the provincial law to the extent it is in conflict with the federal law and it is at this point of time where doctrine of repugnancy would come into play. For this submission learned counsel for petitioners have relied upon the case of Quetta Textile<sup>6</sup>.

13. It is argued that in terms of Section 154 of Income Tax Ordinance, 2001 the foreign remittance and foreign proceeds received by the indenters as commission should be final and conclusive tax to be

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<sup>6</sup> PLD 2005 Karachi 55 (Quetta Textile Mills v. Province of Sindh)

deducted on such receipt. He further argued that the foreign exchange Manual in its Chapter 21 titled as “Repatriation of Invisible Earnings of Foreign Exchange” specifically deals with the indenting houses/agents as is covered by Entry 9 of Federal Legislative List of Fourth Schedule of Constitution and hence is out of the provincial domain as far as the levy on repatriated amount is concerned. In relation to Entries he referred above of Federal Legislative List, he submitted that these entries are to be expressed and interpreted widely and broadly rather than giving them a narrow finding, as discussed in the case of *Atta Muhammad*<sup>7</sup> and *Hirjina*<sup>8</sup>.

14. Replying to the above submission of counsel appearing for indenters/petitioners/ applicants, Mr. Zamir Khalid, Commissioner SBR, gave us an overall view of the history and more importantly the legislative competence of the province particularly after 18<sup>th</sup> Amendment to the Constitution. He has taken us to Entry 49 of Federal Legislative List which, in terms of 18<sup>th</sup> Amendment, excludes the federation to levy taxes on services as previously Entry 49 has been catering for both kinds of levies.

15. Learned Commissioner further submitted that the agreements between (indenters and foreign principals) which may either have been disclosed or concealed by the indenters from this Court, are in their nature independent of sale of goods as it is the concept of services that is being selected and touched upon by SSTA 2011, which is different from additional concept of sale of goods to the proposed buyers in Sindh or any part, which may or may not be within the province of Sindh. Foreign principal receives the services from the indenters serving within the territorial limits of Province of Sindh provided by the Constitution and SSTA 2011. On maturity of such transaction, the indenters get their

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<sup>7</sup> PLD 1971 SC 401 (*Atta Muhammad v. Ahmad Bakhsh*)

<sup>8</sup> 1993 SCMR 1342 (*Hirjina & Co. v. Islamic Republic of Pakistan and another*)

commission and perhaps determine the value of service/consideration, as stipulated in terms of Section 5(1) of SSTA 2011.

16. In relation to the liability to be borne by the ultimate consumer, learned Commissioner submitted that the local buyer in the matter of import indenters and also local manufacturer in a matter of export indenters has nothing to do with a service provided to the foreign principal and hence element of passing of service tax does not come in the transaction. He submitted that there is no hard and fast rule in the event of indirect taxes, that the same must be passed on to end consumer. It may be a general concept but carries exception as long as statute requires it differently.

17. With reference to the value of service for the purposes of SSTA 2011, learned Commissioner submitted that the commission received by both kind of indenters is separable from the sale of goods and the value is identifiable and calculable. The Board has the prerogative under the law to fix value inclusive or exclusive of the tax which could be determined within frame of SSTA 2011 and the Rules framed thereunder. He thus concluded that this exactly is not the principle on which the parties are litigating. It is rather the concern of indenters that province lacks competence, which is seriously expressed by the petitioners.

18. It is argued that the petitioners have made an attempt to mislead the Court that indenters are in fact importers and exporters of goods and hence are covered by relevant entries in the Federal Legislative List (4<sup>th</sup> Schedule). The Commissioner emphasized that as far as sale of goods are concerned in terms of Section 2(13) of Sales Tax Act, 1990 it could be a subject matter thereunder as being a person who imports the goods into Pakistan other than import indenters and for the purposes of export indenters it is the manufacturer of goods within Pakistan who could come within the definition of exporter of goods but the indenters do not



come in the picture as they are neither importers nor exporters of the goods.

19. In the similar way, Section 154 of Income Tax Ordinance 2001 read with Division IV Part-III of the First Schedule to ibid law it is apparent that only an authorized dealer of the bank was required to deduct notified amount of the income tax from the commission received by the indenters. It does not lead to conclude that this deduction is only meant to consider the recipient of such amount as being importer and exporter of the goods.

20. The foreign remittance, discussed is the one which is exempted from such taxes as received under section 111(4) of the Income Tax Ordinance 2001 subject to certain conditions and limitations. This is not applicable to the remittances received by the indenters from their foreign principal and hence distinguishable from kind of remittances brought for consideration of this Court under section 111(4) of Income Tax Ordinance. Tax on service and tax on income both are separate and distinct and for the purpose of rendering services the provinces are competent to legislate and levy taxes.

21. We have heard the learned counsels appearing for petitioners and the department as well as learned Deputy Attorney General and Assistant Advocate General and with their assistance have perused material available on record.

22. The dispute commenced when show-cause notices were issued by the Assistant Commissioner, Sindh Revenue Board requiring the indenters to be registered with Sindh Revenue Board under section 24B of SSTA 2011 with consequential penal action under Serial No.1 of Table provided in Section 43 of SSTA 2011 on violation and breach of Section 24 of the Act read with Rules of Chapter II of Sindh Sales Tax On Services Rules, 2011.

23. Petitioners in substance have challenged the definition 2(51A) provided by SSTA 2011 whereas in two of the petitions Rule 41B of Sindh Sales Tax on Services Rules 2011 are sought to be declared ultra vires the Constitution which provide tax benefit in relation to passing on issue. By definition under 2(51A), the indenter is defined to be a person who is representative of a non-resident person or non-resident company or of a foreign product or a foreign service. The indenters get their consideration in the shape of commission, remuneration or royalty on a transaction, irrespective of whether the transaction has taken place out of his effort, consent or otherwise. This is a universal definition and simply by challenging a definition of indenter nothing could be achieved by the petitioners. This definition is claimed to be confiscatory and claimed to be hit by doctrine of occupied field in terms of entries relied upon and/or having been catered by Chapter 21 of Foreign Exchange Manual and Section 154 of Income Tax Ordinance, 2001 which shall be discussed later for the purposes of considering whether challenge to this definition could still be of any benefit. The petitioners have challenged PCT Heading 9819.1200 to the First Schedule of SSTA 2011 being ultra vires to the Constitution as contrary to referred entries of Federal Legislative List that deals with foreign exchange, import/export and extra territorial limits, being within the domain of federation. The petitioners/ applicants have further sought declaration that the impugned show-cause notices which seek registration of these indenters, to be declared ultra vires to the Constitution in view of above.

24. Followed by 18<sup>th</sup> Amendment to the Constitution, Province of Sindh promulgated Sindh Sales Tax on Services Act, 2011. Its constitutionality discussed in Freight Forwarders<sup>9</sup> and Pakistan Mobile (Supra) and no further discussion is required as far as provincial

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<sup>9</sup> 2017 PTD 1 (Pakistan International Freight Forwarders Association v. Province of Sindh & others)

competence to legislate on the subject is concerned. Only thing that requires consideration is whether the event of rendering services to foreign principal is covered by relied entries and hence provincial competence to legislate on the subject. The relevant definitions of indenters, resident, service/services, which may be relevant for the purposes of concluding the list are as under:-

*“2. Definitions.--In this Act, unless there is anything repugnant in the subject or context—*

*(1) ....*

*.....*

*(51A) “indenter” means a person who is a representative for a non-resident person or a non-resident company or a foreign product or service and who gets a consideration in the shape of commission, fee, remuneration or royalty on a transaction, irrespective of whether the transaction has taken place out of his effort, consent or otherwise;*

*.....*

*(73) “resident” means-- (a) an individual who, in a financial year, has—*

*(i) a place of business, whether whole or part thereof, in Sindh in any mode, style or manner; or*

*(ii) his permanent address, as listed in the individual’s national identity card, in Sindh; or*

*(iii) a permanent representative to act on his behalf or to provide service on his behalf in Sindh;*

*(b) an association of persons or a company which, in a financial year, has—*

*(i) its registered office is in Sindh; or*

*(ii) its place of business, whether whole or part thereof, in Sindh in any mode, style or manner; or*

*(iii) a permanent representative to act on its behalf or to provide service on its behalf in Sindh; or*

*(iv) the control or management of the association of persons or the company, whether whole or part thereof, situated in Sindh at any time during the financial year;*

*....*

*(79) “service” or “services” means anything which is not goods and shall include but not limited to the services listed in the First Schedule of this Act.*

*....*

*(96) “taxable service” shall have the meaning given under section 3.”*

25. As stated above, after 18<sup>th</sup> Amendment the scope of tax on services was excluded from the federal domain which paved its way to the provincial government subject to legislative competence within the frame of Constitution, as it stood.

26. An attempt has been made to create an impression that indenters are in fact importers and exporters of the goods and thus are ousted from purview of the provisions of services and have relied upon several entries of Federal Legislative List of Fourth Schedule of the Constitution and Section 154 of Income Tax Ordinance, 2001, read with Chapter 21 of Foreign Manual 2012.

27. Sale of Goods is an independent transaction as compared to the services provided by the indenters to a foreign principal. It cannot be equated or kept at par with the goods being supplied to a local buyer or to a foreign principal, as the case may be, as both the export indenters and import indenters are being subjected to similar provisions under consideration. Both categories of indenters i.e. either import and/or export indenters provide services under an agreement or arrangement to foreign principal and hence it is this event which formed part of consideration as far as SSTA 2011 is concerned and not the goods or value of the goods. It is the foreign principal who receives services from these specialized and qualified entities calling themselves as indenters in Sindh under agreement(s) and are not agreement(s) of import and export of the goods. These services by indenters provide special assistance to foreign principals on account of their better understanding of goods' description and its requirement, utility and their marketing skills, as the case may be, in terms of understanding between indenters and foreign principal.

28. The consideration and commission for such service matures at the time of maturity of sale but this itself is not sufficient to loop this

transaction with import and export of goods and the value of service to be dealt with in terms of Section 5 of the SSTA 2011. The definition provided under subsection (51A) of Section 2 of SSTA 2011 thus covers the event disclosed above. It means a person who is representative of a non-resident person or a non-resident company or a foreign product or service and who gets a consideration in the shape of commission, fee, remuneration or royalty on a transaction, irrespective of whether the transaction has taken place out of his effort, consent or otherwise. (This definition is stretched for the benefit of authorized indenters in case they are bypassed, but has nothing to do with issue in hand.). It does not count that the goods are being supplied by principal to a buyer who may be operating from a place beyond territorial limits of this province for the purposes of tax under consideration.

29. Conditions set forth for application upon the representative defined above for that particular financial year are that he/she must have (i) a place of business, whether whole or part thereof, in Sindh in any mode, style or manner; or (ii) his permanent address, as listed in the individual's national identity card, in Sindh, (iii) a permanent representative to act on his behalf or to provide service on his behalf in Sindh.

30. So far as association of a person or company is concerned, the resident means (i) its registered office must be in Sindh, (ii) its place of business, whether whole or part thereof, in Sindh, (iii) a permanent representative to act on its behalf or to provide service on its behalf in Sindh and (iv) the control or management of the association of persons or the company, whether whole or part thereof, situated in Sindh at any time during the financial year.

31. The indent by the indenters may be of goods likely to be imported or exported out of services rendered by them, but these goods

themselves count nothing for the event under consideration. The elements in it i.e. certain services being rendered to the foreign principal with regard to the nature of goods sought to be imported or exported and/or its marketing/promotions etc. distinguished it from each other. It is also immaterial for the purposes of service/services under consideration in this province that the goods are being supplied to an area beyond the territorial limits of a particular province i.e. Sindh. Material consideration is that services once rendered in Sindh and materializes within the condition stipulated above, it constitutes an event for SSTA 2011.

32. The subject of external affairs, implementation of treaties etc. agreements that concerns with education, culture promote and/or extradition may be the exclusive domain of federation but it does not spill over entries such as Entry 49 after its amendment, meant for imposition of taxes which entry consciously excludes tax on service after 18<sup>th</sup> Amendment. Similarly Entry 27 and 32 in the Federal Legislative List of Fourth Schedule enabled Federation to regulate such laws to which there is no cavil however it does not overpower Entry 49 with its exclusion so far as sales tax on services are concerned. Expounding the entries widely and liberally does not mean that the scope of entry could also be altered. Regulations as far as identified subjects, such as import, export external affairs, implementation of treaties, educational and cultural issues etc. are concerned, federal government regulates them in terms of policies framed, however, Entry 43-53 of Federal Legislative List deals with levy of tax which cannot be subjected to any other entries in the Federal Legislative List of Fourth Schedule of the Constitution. We may conclude that sales tax on services cannot be subjected to entries such as, 3, 9, 27 and 32 of Federal Legislative List of Fourth Schedule.

33. The subject controversy is of sales tax on services, which, for the purposes of taxes should have been fallen within Entries 43 to 53, as settled in the cases of Durrani Ceramics<sup>10</sup> and Sapphire Textile<sup>11</sup>.

34. Similarly, the case of Pakistan Mobile Communication (Supra) discussed the meaningful arrangement of these entries and that the subject of imposition of taxes/duties find its way within the entries 43 to 53 of the Federal Legislative List hence the applicability of the referred entries by petitioners such as Entries No.3, 9, 27 and 32 is inconsequential. The relevant paragraph of the Pakistan Mobile Communication (Supra) is as under:-

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

35. Now for the purposes of taxable service, Section 3 of SSTA 2011 provides taxable service or services listed in Second Schedule to this Act. The Second Schedule of SSTA 2011 under a Tariff Heading 98.19 gives the description of service provided or rendered by a specified persons or businesses which include indenters with its suffix 1200 i.e. 9819.1200.

36. Sub-heading 9819.1200 describing the indenters was in existence in the First Schedule ever since the SSTA 2011 was promulgated in 2011 however later it was added in the Second Schedule in the year 2015 effective from July 2015.

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<sup>10</sup> 2014 SCMR 1630 (Federation of Pakistan v. Durrani Ceramics)

<sup>11</sup> 2021 PTD 971 (Sapphire Textile Mills Limited v. Federation of Pakistan)

37. Thus, in view of above, followed by 18<sup>th</sup> Amendment on applicability of Article 270AA, the Province of Sindh had the constitutional mandate and we consider the levy under consideration to be within the competence of the province under present enactment i.e. SSTA 2011

38. The explanation of subsection (96) of Section 2 of SSTA 2011 clears the ambiguity, if any, as questioned by the petitioners' counsel that this service provided by the registered person is regardless of the fact whether the services are being provided to a resident person or a non-resident person. The economic activity in relation to both the categories of indenters, either originated or terminated (rendering of services), in Sindh and this is perhaps the original requirement of the Statute and is irrespective of the ultimate destination of the goods/commodities. The sales tax on service has nothing to do with the ultimate destination of the goods.

39. Similarly, the sale and consumption of the goods being imported and exported is beyond the purview of this levy under consideration. All that is required is that the indenters must be resident persons as defined above and are providing a taxable service. Having place of business in Sindh is also defined under subsection (64) of Section 2 which means that a person owns, rents, shares or in any other manner occupies a space in Sindh from where it carries on an economic activity whether wholly or partially or carries on an economic activity through any other person such as an agent, associate, franchisee, branch, office, or otherwise, in Sindh or through virtual presence or a website or a web portal or through any other form of e-Commerce, by whatever name called or treated, but does not include a liaison office.

40. For the purposes of show-cause notice, which was basically challenged, section 24 of SSTA 2011 requires a person providing taxable



service to be registered on its own which is termed as voluntary registration whereas Section 24B empowers the officer of SRB to compulsorily register a person who fails to make its registration under section 24 of the Act.

41. Above debate and discussion should sum up some of the fundamental questions raised by counsel for petitioners regarding their registration however petitioners have also raised a significant question as to the passing of such tax liability as it amounts to a direct levy of tax and since foreign principal is beyond territorial jurisdiction of this Court, therefore, it could not be passed on to it. Hence, the very levy was also challenged under the aforesaid consideration.

42. It may be noted that Rule 41B(4) of SST Rules 2011 restrains/restricts them from doing so as it provides that the Commission received by the registered person shall be tax-inclusive value. In addition, it may also be noted that service recipients in both the categories of indenters are foreign principal as the indenters are acting for and on behalf of these foreign principals under the agreement and not for local manufacturer or buyer of the goods, therefore, it is the local buyer or local manufacturer, as the case may be, who may be burdened with such liability in case the indenters so require however the law and rules framed thereunder dealt with the issued differently with indenters. Rule 41B of Rules 2011 gave the indenters special privilege. 41B reads as under:-

**41B. Services provided or rendered by indenters and commission agents.--**(1) *The provisions of this rule shall apply to the persons providing or rendering the services of indenters and of commission agents.*

(2) *Every indenter and every commission agent shall be registered under section 24 of the Act, read with the provisions of the rules in Chapter-II of these Rules.*

(3) *The value of the services provided or rendered by an indenter or a commission agent shall be the gross amount of consideration, including the commission or fee or remuneration or royalty on a transaction, received by an*

*indenter or a commission agent whether from the person whom he represents or from the person to whom he provides or renders his services.*

*(4) Where an indenter or a commission agent receives any consideration, including commission or fee or remuneration or royalty on any transaction, from a person resident in a country other than Pakistan, such a consideration shall be treated as the tax inclusive value and the amount of tax shall be worked out by the indenter or the commission agent on the basis of tax fraction formula.*

*(5) Every person providing or rendering the services of an indenter or a commission agent shall deposit the amount of tax, in the prescribed manner, by the 15th day of the month following the tax period to which it relates and shall also file the return within 3 days from the due date for payment of tax:*

*Provided that in case of transactions covered by sub-rule (4) of this rule, the due date for payment of tax shall be the 15th day of the month following the month in which the consideration, including commission or fee or remuneration or royalty, is received by the indenter or the commission agent.*

*(6) The indenter and the commission agent shall maintain the records as prescribed in section 26 of the Act and subrule (2A) of rule 29 of these rules. The indenter and the commission agent shall also maintain record of the indents issued and also of all the agreements or contracts under which he acts as an indenter or as a commission agent.*

43. This tax fraction is defined as 2(93A) of SSTA, 2011 which means the amount worked out in accordance with such formula is the rate of tax applicable to such services in terms of Section 8 of SSTA, 2011 which worked out to be less than in normal course, had it not been available, hence benefit is being drawn and provided to the indenters in terms of such calculation under law-fraction formula, which is:

$$\frac{a}{100 + a}$$

“a” is the rate of tax applicable to the services in terms of Section 8 of SSTA 2011.”

By virtue of this formula, the indenters getaway with lesser amount of tax than in normal way in the absence of such formula.

44. Secondly the general principle of passing on value added tax (VAT) to the end consumer is not an absolute principle for any legislation

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

45. Rule 41B of Rules 2011 read with Section 5 of SSTA 2011 authorizes the Board to fix any other value of service or class of service where it deems appropriate in the facts and circumstances of the transaction and thus for this reason the *ibid* rule has deviated the general principle.

46. In order to support the above proposition, we have also been assisted by Mr. Zamir Ali Khalid, learned Commissioner, who placed before us directives of Council of European Union where same principle was applicable in the EU VAT system where, if the services or goods are received by a non-taxable persons located in another member State, that supplier or provider of service is liable to pay the tax and the recipients are discharged for not being in territorial jurisdiction. For the purposes of convenience we have taken on record a copy of such directive. Hence, although there is no logical challenge to this Rule 41B of Rules 2011, yet we are of the view that this is neither *ultra vires* nor is a rule which could be discarded as being beyond the structural framework of SSTA 2011. Reliance is also placed on the case of *Chhota Bhai*<sup>12</sup>. It provides that:

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<sup>12</sup> AIR 1962 Supreme Court 1006 (*Chhotabhai Jethabhai Patel & Co. v. Union of India*)

*“...the sales tax may be an indirect tax on the consumer but legally in need not be so ... This also makes it clear that the sale tax is not to be passed on the purchaser and this fact does not alter the real nature of the tax which, by the expressed provisions of law, is cast upon the seller...”*

47. Considering another aspect of the arguments that the indenters are associated with the import of goods and hence would attract the provisions of Section 154 of Income Tax Ordinance, 2001 read with Chapter 21 of the Foreign Exchange Manual 2012, we may conclude this controversy by observing that it is purchaser of the goods who can be said to be importer under section 2(13) of Sales Tax Act, 1990 which defines the term “Importer” of any goods of import indenter whereas in the matter of export it is manufacturer of goods who could be called “exporter”. In both the situations the indenters are neither termed as importer nor exporter. Perusal of entire provisions of Section 154 read with Division IV Part III of the First Schedule of Income Tax Ordinance, 2001 takes us to the conclusion that when it talks about indenter all it requires is that authorized dealer of the bank may deduct a required percentage of the remittances as commission received by the indenters. There is nothing to show in the context of the said provisions for a treatment that the very activity of indenters is either import or export of goods.

48. As relied by petitioners’ counsel, a harmonious reading of Chapter 12 and 13 (Export/Import) of Foreign Exchange Manual 2012 provides that nowhere in the context or subject it talks about or infer the activity of indenters to be that of an importer and exporter, nor it could. It is the foreign remittances received in Pakistan under section 111(4) of Income Tax Ordinance, 2001 which are catered thereunder, subject to certain conditions and limitations. There is no exemption on the intending commission (business receipts against services rendered) received in terms of Section 154(2) of Income Tax Ordinance, 2001. As a

matter of fact the authorized bank (authorized dealer) is required under section 154 read with Division IV Part III of First Schedule of Income Tax Ordinance, 2001 to withhold tax at the fixed rate provided on the commission received. If that receipt is to be kept at par with the “remittances” received, the exemption must have been provided by the Federal Board of Revenue whereas to the contrary there is no such challenge made by the petitioners that it being a remittance is exempted from such levy, withheld at the prescribed rate and that being an income tax on the receipts. Some software or IT based system development consultants were given exemption in a classified tariff Heading 9815.6000 but such exemption to the consultants is given by the legislature on its own and the indenters cannot be kept at par as they have no statutory exemption nor are of a similar class to be at par with, as in the case of software or IT based system development consultants, available.

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

50. As regards the question as to fee and penalty, the assessment officer had imposed penalty of Rs.100,000/- under Serial No.1 of Table of Section 43 of SSTA 2011 for non-registration. The relevant provision (Section 43) provides that it can be imposed if any person who is required to apply for registration under the Act fails to make application for registration before providing or rendering taxable service, is consequently liable to pay penalty of Rs.10,000/- or 5% of the amount of sales tax. Learned counsel for the department/Commissioner has not argued at all while challenging the conclusion drawn in paragraph 28 of the Tribunal's judgment where the maximum fine of Rs.100,000/- was reduced to Rs.10,000/-. Even before the Tribunal they were not able to make out a case as to which penalty is of lesser or higher degree i.e. Rs.10,000/- or 5% of the sales tax, as perhaps it was pre mature stage since only show-cause notices were issued without any amount of sales tax disclosed/determined therein hence we do not find to interfere this conclusion as well.

51. In view of above we answer the proposed questions No.(I), (II), (III) and (VII) in affirmative whereas questions No.(IV) accordingly and (V) and (VI) in negative, all against petitioners/indenters and in favour of Sindh Revenue Board. The result of above discussion is that all Sindh Sales Tax Reference Applications and petitions, Categorized as 'A', 'B', 'C' and 'D', are dismissed with no orders as to costs.

Dated:10.01.2022

**Judge**

**Judge**

BEFORE MR. JUSTICE MUHAMMAD SHAFI SIDDIQUI, MR. JUSTICE MAHMOOD A. KHAN

## CLASSIFICATION OF CASES IN CP.D 5791 of 2016

<b>Categories</b>	<b>A</b>	<b>Those private parties, who filed reference applications after exhausting remedy under statute</b>
	<b>B</b>	<b>Department( SRB) filed Reference Applications</b>
	<b>C</b>	<b>Those private parties, who filed petitions alongwith reference applications after exhausting remedy under statute</b>
	<b>D</b>	<b>Those who did not availed remedy under statute and filed petitions challenging provisions to be ultra vires</b>

## A- Those private parties, who filed reference applications after exhausting remedy under statute

#	Case Number	Case Title	Remarks
1	Spl:Sales Tax Ref: A. (D) 255/2019	M/s. Premier Trading Corporation Sindh Revenue Board & others	Petition Filed Const. P. (D) 2742/2019 SRB filed SSTRAs against applicant
2	Spl:Sales Tax Ref: A. (D) 256/2019	M/s. Brothers Trading Corporation Sindh Revenue Board & others	Petition Filed Const. P. (D) 2742/2019
3	Spl:Sales Tax Ref: A. (D) 257/2019	M/s. F. Rabbi & Company Sindh Revenue Board & others	Petition Filed Const. P. (D) 2742/2019
4	Spl:Sales Tax Ref: A. (D) 258/2019	M/s. Al-Abd Corporation Sindh Revenue Board & others	Petition Filed Const. P. (D) 2742/2019 SRB filed SSTRAs against applicant
5	Spl:Sales Tax Ref: A. (D) 259/2019	M/s. Allied Impex Corporation Sindh Revenue Board & others	Petition Filed Const. P. (D) 2742/2019
6	Spl:Sales Tax Ref: A. (D) 260/2019	M/s. Shahsika Pakistan (Pvt) Limited Sindh Revenue Board & others	Petition Filed Const. P. (D) 2742/2019
7	Spl:Sales Tax Ref: A. (D) 261/2019	M/s. Trans Continental Agencies Sindh Revenue Board & others	Petition Filed Const. P. (D) 2742/2019 SRB filed SSTRAs against applicant
8	Spl:Sales Tax Ref: A. (D) 262/2019	M/s. Imrooz Traders Sindh Revenue Board & others	Petition Filed Const. P. (D) 2742/2019
9	Spl:Sales Tax Ref: A. (D) 263/2019	M/s. Shabbir International Sindh Revenue Board & others	Petition Filed Const. P. (D) 2742/2019
10	Spl:Sales Tax Ref: A. (D) 264/2019	M/s. Atherton & Imrooz Sindh Revenue Board & others	Petition Filed Const. P. (D) 2742/2019
11	Spl:Sales Tax Ref: A. (D) 265/2019	M/s. Al-Riaz Chemicals Sindh Revenue Board & others	Petition Filed Const. P. (D) 2742/2019
12	Spl:Sales Tax Ref: A. (D) 279/2019	M/s. Health Care Products Sindh Revenue Board & others	Petition Filed Const. P. (D) 2742/2019
13	Spl:Sales Tax Ref: A. (D) 70/2021	M/s. Progressive Traders (Pvt) Ltd The Sindh Revenue Board & Others	Petition Filed, Const. P. (D) 3255/2021
14	Spl:Sales Tax Ref: A. (D) 125/2021	M/s Analytical Measuring system (pvt.) Ltd. VS Assistant Commissioner Unit-30 SRB	No petition Filed

## B- Department( SRB) filed Reference Applications after exhausting remedy under statute

#	Case Number	Case Title	Remarks
1	Spl:Sales Tax Ref: A. (D) 282/2019	Sindh Revenue Board M/s. Premier Trading Corporation	<b>All of three respondents filed SSTRAs as well</b>
2	Spl:Sales Tax Ref: A. (D) 283/2019	Sindh Revenue Board M/s. Al Abd Corporation	
3	Spl:Sales Tax Ref: A. (D) 286/2019	Sindh Revenue Board M/s. Trans Continental Agencies	

## C- Those private parties, who filed petitions alongwith reference applications after exhausting remedy under statute

#	Case Number	Case Title	Remarks
1	Const. P. (D) 2742/2019	M/s Shabbir International & Ors Province of Sindh & Others	12 petitioners in one CP who also filed SSTRAs No: 255 to 265 & 279 /2019
2	Const. P. (D) 3255/2021	M/s Progressive Traders Province of Sindh and Others	Filed SSTRAs No 70/2021

## D- Those who did not availed remedy under statute and filed petitions challenging provisions to be ultra vires

#	Case Number	Case Title	Remarks
1	Const. P. (D) 103/2020	M/s SBR & Co. of Pakistan (Pvt) Ltd Province of Sindh & Others	
2	Const. P. (D) 1153/2020	M/s Sohail Ahmed and Co. Province of Sindh and Others	
3	Const. P. (D) 1238/2020	M/s Technobiz (Pvt) Ltd Province of Sindh & Ors	
4	Const. P. (D) 1239/2020	M/s Intertrade Distributors Province of Sindh & Ors	
5	Const. P. (D) 1512/2020	M/s Yousufi & Sons Province of Sindh & Ors	
6	Const. P. (D) 1573/2017	M/s Nazar & Co. Province of Sindh and ors	
7	Const. P. (D) 1574/2017	M/s Al-Ameen Trading Province of Sindh and Ors	
8	Const. P. (D) 170/2020	M/s Mantech International Province of Sindh & Others	
9	Const. P. (D) 1881/2020	Metal Engineering Works Pvt Ltd Province of Sindh & Ors	

10	Const. P. (D) 2317/2016	M/s Gudia Pvt Ltd Province of Sindh and Ors	
11	Const. P. (D) 2610/2020	M/s MWK & Sons Province of Sindh and Others	
12	Const. P. (D) 2690/2018	M/s Dyster Pakistan (Pvt) Ltd Province of Sindh and Others	
13	Const. P. (D) 2977/2017	M/s Helperco (Pvt) Ltd Province of Sindh and Ors	
14	Const. P. (D) 2978/2016	M/s Apparel Merchandising Services and Ors S.R.B and Ors	
15	Const. P. (D) 3537/2016	Chem-N-Finishes(Pvt) Ltd & another Prov of Sindh & Others	
16	Const. P. (D) 3708/2019	M/s Arfeen International (Pvt) Ltd and Ors Province of Sindh & Others	
17	Const. P. (D) 3723/2019	Reliance Commercial Association Province of Sindh & Others	
18	Const. P. (D) 376/2020	M/s Chase International Province of Sindh & Others	
19	Const. P. (D) 3974/2020	M/s Creative Textile & Apparel Service Province of Sindh & Ors	
20	Const. P. (D) 517/2020	M/s KEN KORPORATION Province of Sindh & Others	
21	Const. P. (D) 5375/2019	ATC Holdings (Pvt) Ltd Province of Sindh & Others	
22	Const. P. (D) 5755/2019	Muhammasd Fahim Province of Sindh & Others	
23	Const. P. (D) 577/2020	M/s Veer Corp and Ors Province of Sindh & Others	
24	Const. P. (D) 5791/2016	Zona Pakistan (Pvt) Ltd Province of Sindh and Ors	
25	Const. P. (D) 5876/2017	M/s AJCL (Pvt) Ltd Province of Sindh and Ors	
26	Const. P. (D) 6252/2018	M/s East West Commercial Enterprises Province of Sindh & Others	
27	Const. P. (D) 6300/2019	M/s Khawaja Basir Ahmed Province of Sindh & Others	
28	Const. P. (D) 6426/2019	Abdul Razzaq Province of Sindh & Others	
29	Const. P. (D) 6442/2019	M/s Sheikh Javed Ahmed & Ors Province of Sindh & Others	
30	Const. P. (D) 6562/2019	M/s Fair & Exhibition Province of Sindh & Others	
31	Const. P. (D) 6563/2019	M/s Javed (Pvt) Ltd Province of Sindh & Others	
32	Const. P. (D) 6564/2019	M/s S Ejazuddin & Co. Province of Sindh & Others	
33	Const. P. (D) 6565/2019	M/s Nuricon Union (Pvt) Ltd Province of Sindh & Others	
34	Const. P. (D) 6566/2019	M/s Indusmen Corp Province of Sindh & Others	
35	Const. P. (D) 6567/2019	M/s International Trading Co Province of Sindh & Others	
36	Const. P. (D) 6659/2019	M/s Pak-Oleo Chemical & Ors Province of Sindh & Others	
37	Const. P. (D) 6700/2017	M/s Tri Brothers Province of Sindh & Ors	
38	Const. P. (D) 6702/2019	M/s Shakoo (Pvt) Ltd Province of Sindh & Others	
39	Const. P. (D) 6733/2019	M/s National Engineering & Packaging Co. Province of Sindh & Others	
40	Const. P. (D) 6734/2019	M/s Emad Trade House Province of Sindh & Others	
41	Const. P. (D) 6798/2019	M/s Zakeria Trading Co. & Ors Province of Sindh & Others	
42	Const. P. (D) 6860/2019	M/s Sayeed International Province of Sindh & Others	
43	Const. P. (D) 6912/2016	M/s Khudabux Ind. Pvt Ltd Province of Sindh & Ors	
44	Const. P. (D) 6955/2018	M/s International Aeradio Pakistan (Pvt) Ltd Province of Sindh & Others	
45	Const. P. (D) 6962/2019	M/s Silver Bell Corp Sindh and Others	
46	Const. P. (D) 6963/2019	M/s International Business Corp Sindh and Others	
47	Const. P. (D) 6964/2019	M/s Al-Riaz Agencies (Pvt) Ltd Sindh and Others	
48	Const. P. (D) 6994/2019	M/s Dadacom International Province of Sindh & Others	
49	Const. P. (D) 7007/2019	M/s Al-Tariq Traders Province of Sindh & Others	
50	Const. P. (D) 7033/2019	Shahid Ali Khan Province of Sindh & Others	



51	Const. P. (D) 7064/2019	M/s Lucky Commodities Pvt Ltd Province of Sindh & Others	
52	Const. P. (D) 7070/2019	M/s Flecbon Corp Province of Sindh & Others	
53	Const. P. (D) 7071/2019	M/s Rafi International Province of Sindh & Others	
54	Const. P. (D) 7105/2019	M/s Avon Commercial Corp Province of Sindh & Others	
55	Const. P. (D) 7126/2019	M/s Textstyle Corp (Texttrading) Province of Sindh & Others	
56	Const. P. (D) 7130/2019	Ms. Fredrika Margit Christina Province of Sindh & Others	
57	Const. P. (D) 7177/2018	Chaudhri Nauman Nabi Ahmed Province of Sindh & Others	
58	Const. P. (D) 7195/2019	M/s Marketing International Services (Pvt) Ltd Province of Sindh & Others	
59	Const. P. (D) 7198/2019	M/s Chemcentre Province of Sindh & Others	
60	Const. P. (D) 7246/2019	M/s Pacific Exim Pvt Ltd Province of Sindh & Others	
61	Const. P. (D) 7247/2019	M/s Tabani Global Province of Sindh & Others	
62	Const. P. (D) 7248/2019	M/s Top Line Securities Ltd Province of Sindh & Others	
63	Const. P. (D) 7295/2019	M/s Indus Valley Enterprises Province of Sindh & Others	
64	Const. P. (D) 7456/2019	M/s Unipak Province of Sindh & Others	
65	Const. P. (D) 7457/2019	M/s Unique Sales Corp Province of Sindh & Others	
66	Const. P. (D) 7533/2019	M/s Noshad Trading Province of Sindh & Others	
67	Const. P. (D) 7573/2019	M/s HNF Trading Engineers Province of Sindh & Others	
68	Const. P. (D) 7593/2019	M/s Tex Flow Buying Haws Pvt Ltd Province of Sindh & Others	
70	Const. P. (D) 7794/2018	M/s Al-Ameen Services Province of Sindh & Others	
71	Const. P. (D) 7823/2019	M/s Dada Sons Province of Sindh & Others	
72	Const. P. (D) 7841/2019	STAHL Pakistan Pvt Ltd Province of Sindh & Others	
73	Const. P. (D) 7879/2019	M/s H.R International Province of Sindh & Others	
74	Const. P. (D) 8147/2019	M/s Indus Basin Co Province of Sindh & Others	
75	Const. P. (D) 8208/2019	M/s Bhattra Sons Province of Sindh & Others	
76	Const. P. (D) 9007/2018	M/s Gets Pharma (Pvt) Ltd Province of Sindh & Others	