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LETTERS

'Unconstitutional' taxation by provinces: SRB's response

I have read with great interest the article '"Unconstitutional' taxation by provinces" carried by the newspaper on Jan 3, 2020. The learned writers have chosen to express themselves in a rather pronounced tone on an issue that deserves circumspect and careful approach. We consider it appropriate to offer our views on the matter to dispel the misconception that the write-up might create in the minds of the valued readers of your esteemed daily.

The Supreme Court Judgment (2018 SCMR 802), cited by the writers, essentially relates to the provisions of labour-related laws on industrial relations e.g., Industrial Relation Act, 2012, Sindh Industrial Relations Act, 2013, etc., and does not relate specifically to taxation issues. The learned writers, relying solely on the aforesaid judgment have the temerity to declare. "The provincial assemblies therefore cannot enact any law that is extra-territorial in its application, for example imposing sales tax on services of entities having trans-provincial operation as well as on activities not performed or rendered in their geographical boundaries. Since their inception, the Sindh Revenue Board (SRB) and Punjab Revenue Authority have unconstitutional laws taxing services both at origination and termination as well as on entities having trans-provincial operations. The same is the position with Khyber Pakhtunkhwa and Balochistan". It appears that the learned writers have failed to distinguish between labour-related issues which were matters of concurrent legislative list in the Fourth Schedule to the Constitution of Pakistan prior to its 18th Amendment of 2010 and the sales tax related issues described in Part-I of the Federal Legislative List of the Constitution. It is pertinent to note that in paragraph 22 of the judgment dated 12-02-2018 in C.P. No. D-1313 of 2013 & Others the Honourable Sindh High Court decided the issue of provincial Legislation pertaining to Companies Profits (Workers' Participation) Act, 2015. The Honourable Court dealt with the term "trans-provincial" when reading the same with the earlier Judgment in the matter of M/s KESC. It was held that M/s KESC's Judgment pertained to the enforcement of the fundamental rights envisaged by the Constitution and did not specifically speak of tax or a fund, etc. On such basis, the Honourable Court distinguished the earlier Judgment and held as follows:-

"Insofar as the Full Bench of this Court, the KESC case, is concerned, with respect, in our view it has no application to the issue at hand. The learned Full Bench was there considering the (federal) Industrial Relations Act, 2012, in which "trans provincial" is a specifically defined term (see s. 2(xxxii)). The learned Full Bench upheld the challenged provisions on the ground that they related to the enforcement of a fundamental right (the right of association under Article 17), and it was thus within the Federal domain in terms of entry No. 58 of Part I of the Federal List. Here, there is no issue of any fundamental right. None was referred to or relied upon although we specifically invited assistance from learned counsel in this regard. Therefore, the decision is, with respect, distinguishable. ".

The learned writers have also ignored paragraph 23 of the Honourable Supreme Court's Judgment in the Civil Appeals No. 663 to 637 of 2007 & Others (PTCL 2018 CL 700) which held that "Thus, prior to the making of the 5th Amendment to the Constitution in 1976, Entry 49, being open ended was wide enough to comprehend both the sales of goods and also sales of services. The fact that sales tax on services was, or was not, imposed by the Legislature at that time is not relevant. However, after the 5th Amendment, the scope of the Entry, was narrowed down to goods and only goods. There is, therefore, no redundancy". Therefore, without putting any undue emphasis on the amendments made through the 18th Constitutional Amendment Act of 2010, one should clearly understand that sales tax on services is in the exclusive domain of the Provinces even since 13th September, 1976, in terms of the amendment made in Entry No.

49 of the Fourth Schedule to the Constitution vide the 5th Constitutional Amendment Act of 1976. This opinion is further strengthened by the Honourable Supreme Court Judgment dated 22 May, 2019, in the Civil Petitions No. 1069-K to 1071-K of 2018, the paragraph 15 of which states that "The Constitution also clearly states that the "sales tax on services" (item 49 to the Fourth Schedule) is within the exclusive domain of the provinces. The Sindh Sales Tax on Services Act, 2011 is to be interpreted keeping in sight these fundamentals... ." In the Honourable Supreme Court's Judgment dated 24th April, 2019, in Human Rights Case No. 18877 of 2018, paragraph 12 of thereof states that "We are also not persuaded to hold that the taxes were imposed without requisite legislation or that the six statutes contravened the Constitution. The recovery of the taxes may therefore be resumed." It is pertinent to note that the said "six statutes" include the 4 Provincial statutes i.e., the Sindh Sales Tax on Services, 2011, the Punjab Sales Tax on Services Act, 2012, the KP Finance Act, 2013 and the Balochistan Sales Tax on Services Act, 2015.

As for the Sindh sales tax collected by Sindh Revenue Board (SRB) under the Sindh Sales Tax on Services Act, 2011 (Sindh Act No. XII of 2011), we are of the opinion that it is intra-vires the provisions of the Constitution of Islamic Republic of Pakistan, read with the general consensus, as is apparent from Article 8 of the 7th NFC Award of 2010. The Sindh Act No. XII of 2011 and the rules made thereunder do not create any doubt or dispute on issue of origin or destination of taxable services. All services domestically provided or rendered in Sindh from a place of business in Sindh are taxable on origin basis and there is no requirement of SRB registration of taxpayers or of taxation of services not originating in Sindh or from Sindh. The Sindh Act No. XII of 2011 does not have any provision identical or analogous to the provisions of section 4 of the Punjab Sales Tax on Services Act, 2012 or section 20 of the KP Finance Act, 2013 or section 4 of the Balochistan Sales Tax on Services Act, 2015, although the reverse charge mechanism, as envisaged in the aforesaid three Provincial statutes (as are also prevalent in economies like in India and EU) are also not considered extra-territorial legislations. Sub-section (7) of the aforesaid sections of the three Provincial Statutes provides a mechanism for resolution of questions or disputes in terms of the "already recorded understanding between the Federal Government and Provincial Governments" (commonly known as "the Record Note of 2010"). As regards Sindh statute, the provisions of the Sindh Sales Tax on Services Act, 2011, are intra-vires the provisions of Articles 141 and 142(c) of the Constitution and there is no extra-territorial legislation in the Sindh Act No. XII of 2011. Such sales taxation on origin basis is practiced in several economies of the world including to the UAE, Saudi Arabia and even in the case of Federal Sales Tax on Goods in Pakistan. The opinion of the learned writers is not based on any evidence of judicial precedents in relation to Provincial taxation of services originating in the jurisdiction of a Province.

The Federal Government and the Provincial Governments have already agreed to (i) create a National Tax Council for harmonization of sales tax rules and procedures in Pakistan; (ii) develop a single portal and e-single tax return for the sales tax on goods and services; and (iii) facilitate in the provision of ease of doing business for the taxpayers. At this juncture of harmony amongst the Federation, Provinces, any attempt to create confusion or conflict may not be desirable.

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