**Provinces and unconstitutional taxation**

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Any provincial assembly that imposes legislation that includes levy of any tax or duty — yielding extra-territorial impact and involving entities operating on trans-provincial — patently contravenes Article 141 of the Constitution. Similarly, any National Legislative Assembly that encroaches upon the rights of provinces in violation of Article 142 of the Constitution will be ultra vires of the supreme law of land, hence, void ab initio.

Article 141 provides:

141. Extent of Federal and Provincial laws. Subject to the Constitution, Majlis-e-Shoora (Parliament) may make laws (including laws having extra-territorial operation) for the whole or any part of Pakistan, and a Provincial Assembly may make laws for the Province or any part thereof.

[underlined by us for emphasis]

The Supreme Court of Pakistan in the case of Messers Sui Southern Gas Ltd & Others v Federation of Pakistan & Other 2018 SCMR 802 explained the post-Eighteenth Amendment [passed vide the Constitution (Eighteenth Amendment) Act, 2010], position vis-à-vis legislative competence of federation and federating units as under:

The Islamic Republic of Pakistan is a democratic State (Federation) with its Federating Units (Provinces) and the Constitution of the Islamic Republic of Pakistan, 1973 (Constitution) recognises and creates a balance between the authority of the Federation and the autonomy of the Provinces, which recognition has been given an iron cladding by virtue of the Eighteenth Amendment, passed vide the Constitution (Eighteenth Amendment) Act, 2010. This Amendment to the Constitution has inter alia introduced a drastic enhancement in the legislative authority of the Provinces by deleting the Concurrent Legislative List (CLL), whereby previously both the Parliament and the Provincial legislatures could legislate on the subjects enumerated therein. The omission of the CLL, left only a single Legislative List in the Constitution which exclusively list subjects that can be legislated upon by the Parliament alone, and by virtue of Article 142(c) of the Constitution any subject not enumerated in these two lists would subject to the Constitution, be within the legislative competence of the Provinces.

Provincial assemblies cannot enact any law that is extra-territorial in application, for example imposing sales tax on services of entities having trans-provincial operation

The Supreme Court, in the above judgement categorically held that “. . . in terms of Article 141 of the Constitution, a Provincial Legislature does not possess extra-territorial legislative competence and therefore, cannot legislate with regard to a subject which in its application has to transcend the provincial boundaries”.

While dealing with any subject assigned/devolved to provinces relating to extraterritoriality and trans-provincial establishment in Para 23 (1) & (2) the Supreme Court in Messers Sui Southern Gas Ltd & Others v Federation of Pakistan & Other 2018 SCMR 802  held as under:

 “(1) the Federal Legislature has extra-territorial authority but no such extra-territorial authority has been conferred to the Provincial Legislature by the Constitution;

  (2) the Federal legislature does, but the Provincial Legislature does not have legislative competence to legislate to regulate the trade unions functioning at trans-provincial level”.

The Supreme Court in Messers Sui Southern Gas Ltd & Others v Federation of Pakistan & Other 2018 SCMR 802 observed as under:

“We are in agreement with the observation made by the learned High Court that though in a Federal system, provincial autonomy means capacity of a province to govern itself without interference from the Federal Government or the Federal legislature, but as the Provincial legislature does not possess extra-territorial legislative authority i.e. it cannot legislate regarding the establishments operating beyond the territorial boundaries of that province”.

[underlined by us for emphasis]

In terms of Article 189 of the Constitution, the above principles settled by the Supreme Court including any obiter dictum as explained in Shahid Pervaiz v Ejaz Ahmad and others 2017 SCMR 206 are to be implemented by all organs of State, including the provincial assembles.

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 Sind Revenue Board (SRB) and Punjab Revenue Authority has 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.

Applying the principle(s) established by the Supreme Court in 2018 SCMR 802, the collection of sales tax on services in terms of Entry 49, Federal Legislative List, Part I, Fourth Schedule to the Constitution, which is in the domain of provincial assemblies after the 18th Amendment, cannot be:

(a) In respect of any services rendered or performed  beyond the territorial boundaries of a province; and

(b) In respect of any entity operating at trans-provincial level.

Since many taxpayers operating on trans-provincial level are receiving notices both from the Federal Board of Revenue (FBR) and provincial revenue authorities (Sindh Revenue Board, Punjab Revenue Authority, Khyber Pakhtunkhwa Revenue Authority and Balochistan Revenue Authority) in respect of services rendered and performed within various territories, it is advisable that the matter may be referred by all the governments to the Supreme Court of Pakistan having exclusive jurisdiction in the matter under Article 184(1) & (2) that read as under:

184. Original jurisdiction of Supreme Court.-(1) The Supreme Court shall, to the exclusion of every other Court, have original jurisdiction in any dispute between any two or more Governments.

Explanation.-In this clause, “Governments” means the Federal Government and the Provincial Governments.

(2) In the exercise of the jurisdiction conferred on it by clause (1), the Supreme Court shall pronounce declaratory judgments only.

The authoritative declaratory judgement of Supreme Court in the matter will settle the present tug of war between the federal and provincial governments and provide certainty to taxpayer where to pay the tax.

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