JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR

JUDICIAL DEPARTMENT

Writ Petition No.1425/2010

JUDGMENT

Date of hearing……..29.5.2014…..……

Petitioner(s)……M/S Associated Industries Limited

Respondent(s)…The Govt. of Pakistan etc

YAHYA AFRIDI,J.- Through this single judgment, we propose to dispose of eight Writ Petitions, as they all have common questions of law involved therein. The particulars of the writ petitions are:-

1. **W.P.No.1425/2010,**
   (M/S Associated Industries Limited, Amangarh Industrial Area, Nowshera.).

2. **W.P.No.981/2012,**
   (M/S Saif Textile Mills Ltd: & 6 others..Vs..Federation of Pakistan and another).

3. **W.P.No.3420-P/2012,**
   (M/S Rehman Cottom Mills Ltd: Takht Bhai,
   Mardan..Vs..Federation of Pakistan & 4 others).

4. **W.P.No.3155-P/2013,**
   (M/S M.K.B.Enterprises Pvt Ltd..Vs..Federation of Pakistan).

5. W.P.No.3156-P/2013,
(M/S Cherat Cement Ltd: Distt: Nowshera..Vs..Federation of Pakistan & four others).

6. W.P.No.144-P/2014,
(M /S Lucky Cement Ltd:..Vs..Govt: of Pakistan and 4 others).

7. W.P.No.1139-P/2014,
(M/S Uthman Ghee Industries Pvt: Ltd:Industrial Estate Gadoon Amazai, Swabi).

8. W.P.No.579-P/2014,
(M/S Ecopack Ltd..Vs..Federation of Pakistan and another).

2. The common core issue requiring determination of the Court in these petitions is;

> ***"Whether the enhanced contribution by the Industrial Establishments to the Workers' Welfare Fund, was validly introduced in the Workers' Welfare Fund Ordinance, 1971, through Money Bills or otherwise?"***

3. In order to answer this crucial issue, we have to first understand the features of the ***Workers' Welfare Fund Ordinance, 1971*** ("**Ordinance"),** which was promulgated by the President of Pakistan on or about December 9th, 1971.

The "***Preamble***" of the Ordinance reads:-

> ***"Whereas it is expedient to provide for the establishment of a Workers' Welfare Fund, for providing residential accommodation and other facilities for workers and for matters connected therewith or incidental threto."***
>
> ***(Emphasis provided).***

Section 3 of the Ordinance established the Workers' Welfare Fund (**"Fund"**), and it reads as follows:

S.3 – Constitution of Workers' Welfare Fund.—

(1) There shall be constituted for the purposes of this Ordinance a Fund to be called the Workers Welfare Fund.

(2) The Fund shall consist of –
(a) an initial contribution of ten crores of rupees to be made by the [Federal Government]
(b) such moneys as may, from time to time, be paid by the industrial establishments under section 4 [and section 4-A]

(bb) the amount transferred to the Fund from time to time, under clause (d) of paragraph 4 of the scheme set out in the Schedule to the Companies Profits (Workers Participation) Act, 1968, (XII of 1968);
(c) voluntary contributions in the shape of money or building, land or other property made to it from time to time by any Government or by any person;
(d) income from the investments made a properties and assets acquired from out of the Fund, [and]
(e) proceeds of loans raised by the Government Body.

The term '**Industrial Establishment**' has been defined in Section 2(f) (***Supra)*** as;

(i) ***any concern owning or managing a factory, workshop or other establishment in which articles are produced, adapted or manufactured with the aid of electrical, mechanical, thermal, nuclear or any other form of energy transmitted mechanically and***

> ***not generated by human or animal agency;* and (ii) *any concern working a mine or quary or natural gas or oilfield.***

The mode of payments of contributions made by the Industrial Establishments is envisaged in Section 4 of the Ordinance. This Section has been the subject of controversy, as the contentious amendments introduced through Money Bills have amended the said section of the Ordinance.

Prior to the amendments, Section 4(1) and (3) of the Ordinance read as follows:

S. 4 – Mode of Payment by, and recovery from, industrial establishments. –

> ***(1) Every industrial establishment, the total income of which in any year of account commencing on or after the date specified by the [Federal Government] in the official Gazette in this behalf is not less than one lakh of rupees shall pay to the Fund in respect of that year a sum equal to two per cent of so much of its total income as is assessable under the [Ordinance] or would have been so assessable but for the exemption made by section thereof.***
>
> ***(3)The industrial establishment shall, on or before the date on which it is required to furnish a return of income under [section 55 of the Ordinance], pay the amount due from it under sub-section (1) calculated with reference to the total income reported in the said return.***

Thus, Section 4(1) of the Ordinance stated that every Industrial Establishment, whose income was not less than Rs.100,000/- was liable to contribute to the Fund a sum equal to 2% of the ***"total income assessable"*** under the Income Tax Ordinance, 2001.

4. The first amendment in the Ordinance was brought through the Finance Act, 2006, whereby the term "*total income*" was altered. *"Total income"* was originally defined in Section 2(i) of the Ordinance, which stated that it would have the same meaning as set out in the Income Tax Ordinance 2001. The Income Tax Ordinance 2001 defines ***"total income"*** in Section 10 as;

> ***"The Total Income for a person for a tax year shall be the sum of the person's income under each of the heads of income for the year.***

The amendment defined the term *'total income'* as follows:

> ***(a) 'total income' means –***
> ***(i.) where Return of Income is required to be filed under this Ordinance the profit (before taxation or provision for taxation) as per accounts or the declared income as per return of income whichever is higher; and***
> ***(ii.) where return of Income is not required to be filed, the profit (before taxation or provision for taxation) as per accounts or four percent of the receipt as per the statement filed under***

Section 115 of the Ordinance, whichever is higher.

Resultantly, the term *"total income"* for the purpose of the Ordinance was deemed to be declared income, before taxation or any benefit of depreciation or brought forward/carry forward losses of the Industrial Establishment, could be deducted, as was provided prior to the amendment. Thus, the quantum of contributions to be made by an Industrial Establishment to the Fund had increased, resulting in the common impugned grievance of the Industrial Establishments.

5. The next impugned amendments were brought about to Section 4 of the Ordinance by virtue of Section 8(2) of the Finance Act, 2008.

The amended Section 4(1) of the Ordinance thus reads: -

Every Industrial establishment, the total income of which in any year of account commencing on or after the date specified by the [Federal Government] in the Official Gazette in this behalf is not less than [five] lakh of rupees shall pay to the Fund in respect of that year a sum equal to two per cent of its total income.

Sub-section (7) of Section 4 of the Ordinance further explained that the payment made by Industrial Establishment to the Fund under sub

section (1) of Section 4 (ibid) shall be treated as '*expenditure*' for the purposes of assessment of income tax of the said Industrial Establishment.

6. More importantly, it is to be mentioned that under Chapter IX of the Income Tax Ordinance 2001, the person having paid contributions towards Fund is entitled to a deductible allowance for the said payment/contribution. Section 60A of Income Tax Ordinance, 2001reads:-

> ***"60A. Workers' Welfare Fund.- A persons shall be entitled to a deductible allowance for the amount of any Workers' Welfare Fund paid by the person in tax year under Workers' Welfare Fund Ordinance, 1971 (XXXVI of 1971)."***

7. Moving on to another important provision of the Ordinance is Section 6, which provides the **purpose** and **objects** of the Fund; for which the contribution from Industrial Establishments is collected. Because of its contents, Section 6 is a crucial provision of the Ordinance that elucidates its intention and reads as follows:

> ***S. 6 – Purposes to which moneys in the Fund may be applied. – Moneys in the Fund shall be applied to –***
> ***(a)the financing of projects connected with the establishment of housing estates or construction of houses for the workers;***

> ***(b) the financing of other measures for the welfare of workers;***
> ***(c) the meeting of expenditure in respect of the cost of management and administration of the Fund;***
> ***(d) the repayment of loans raised by the Governing Body; and***
> ***(e) Investment in securities approved for the purpose by the [Federal Government].***
>
> ***(emphasis provided)***

And so, it is clear from Sub-Sections (a) and (b) of Section 6, when read with the Preamble of the Ordinance that the **main purpose of the Fund is the welfare of the workers of the Industrial Establishments.** The disbursements from the Fund are primarily used to provide residential accommodations for the workers, who are the apparent beneficiaries.

8. Having considered the relevant provisions of the Ordinance, we have to now review the challenge made by the petitioners to the validity of the levy on the touchstone of its constitutionality. The Constitution of Islamic Republic of Pakistan, 1973 (**"Constitution")** envisages Federal legislation to be initiated by introduction of a "***Bill***", in respect of any matter enumerated in the Federal and Concurrent Legislative Lists, in either of the two Houses; National Assembly or Senate. And in case, if the Bill is passed by one House, it is transmitted to

the other House and in case the "***Bill***" is passed without any amendment by the said House, it is to be presented to the President of Pakistan for assent.

The procedure of the '*Bill'*, the conditions precedent, the various stages of its passage for the two Houses and if rejected by either of the House, the steps to be taken before its culmination into a valid law on the Presidential assent, has been clearly provided in Article 70 of the Constitution. As the impugned levy was introduced and passed by the Parliament, prior to ***Constitution (Eighteenth Amendment) Act, 2010*** **("18th Amendment")**, it would be appropriate to adjudge the same under the then prevalent provisions of the Constitution. The same then read as under:-

> ***"70.(1) A Bill with respect to any matter in the Federal Legislative List or in the Concurrent Legislative List may originate in either House and shall, if it is passed by the House in which it originated, be transmitted to the other House; and, if the bill is passed without amendment, by the other House also, it shall be presented to the President for assent.***
> ***(2) If a Bill transmitted to a House under clause (1) is rejected or is not passed within ninety days of its receipt or is passed with amendment, the Bill, at the request of the House in which it originated, shall be [referred to a Mediation Committee constituted under Article 71 for consideration and resolution thereon.]***
> ***(3) Where a Bill is referred to the Mediation Committee under clause (2), the Mediation***

> ***Committee shall, within ninety days, formulate an agreed Bill which is likely to be passed by both Houses of the Majlis-e-Shoora (Parliament) and place the agreed Bill separately before each House, and if both the Houses pass the Bill, it shall be presented to the President for assent.***
> ***(4) In this article and the succeeding provisions of the Constitution, "Federal Legislative List" and "Concurrent Legislative List" means respectively the Federal Legislative List and the Concurrent Legislative List in the Fourth Schedule."***

9. What is important to note is that under the Constitution, the general procedure of Legislation, as explained above and provided under Article 70 of the Constitution, has an exception, which is related to specified expressed matters provided under Sub-Article (2) of Article 73 of the Constitution. This special procedure of legislation is provided in Article 73 of the Constitution, which prior to 18th Amendment, read as follows:-

> ***"73. (1) Notwithstanding anything contained in Article 70, a Money Bill shall originate in the National Assembly:***
> ***Provided that simultaneously when a Money Bill, including the Finance Bill containing the Annual Budget Statement, is presented in the National Assembly, a copy thereof shall be transmitted to the Senate which may, within seven days, make recommendations thereon to the National Assembly.***
>
> ***(1A) The National Assembly shall, consider the recommendations of the Senate and after the Bill has been passed by the Assembly***

with or without incorporating the recommendations of the Senate, it shall be presented to the President for assent.

(2) For the purposes of this Chapter, a Bill or amendment shall be deemed to be a Money Bill if it contains provisions dealing with all or any of the following matters, namely:-

(a) the imposition, abolition, remission, alteration or regulation of any tax;

(b) the borrowing of money, or the giving of any guarantee, by the Federal Government, or the amendment of the law relating to the financial obligations of that Government;

(c) the custody of the Federal Consolidated Fund, the payment of moneys into, or the issue of moneys from, that Fund;

(d) the imposition of a charge upon the Federal Consolidated Fund, or the abolition or alteration of any such charge;

(e) the receipt of moneys on account of the Public Account of the Federation, the custody or issue of such moneys;

(f) the audit of the accounts of the Federal Government or a Provincial Government; and

(g) any matter incidental to any of the matters specified in the proceeding paragraphs.

(3) A Bill shall not be deemed to be a Money Bill by reason only that it provides-

(a) for the imposition or alteration of any fine or other pecuniary penalty, or for the demand or payment of a license fee or a fee or charge for any service rendered; or

(b) for the imposition, abolition, remission, alteration or regulation of any tax

> ***by any local authority or body for local purposes.***
>
> ***(4) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the National Assembly thereon shall be final.***
>
> ***(5) Every Money Bill presented to the President for assent shall bear a certificate under the hand of the Speaker of the National Assembly that it is a Money Bill, and such certificate shall be conclusive for all purposes and shall not be called in question".***
>
> ***(Emphasis provided)***

10. Comparing the two procedures of legislation, it is noted that a special procedure is provided for express fiscal and monetary matters enumerated in Sub-Article (2) of Article 73 of the Constitution. And, the '*bill*' which carries the said proposed legislation is known as the "*Money Bill*". It is but clear that this procedure of passage of a bill is an exception to the general procedure of legislation provided under Article 70; it has a time bound procedure provided for its passage, where the upper House of the Parliament, the Senate has only a recommendatory role before the Presidential assent is rendered thereto. The "***rationale***" behind this time bound summary procedure is to ensure that matters relating to fiscal and monetary issues, which are urgently needed for the economic viability and

sustainability of the Country, is not delayed or entangled with the rigors of parliamentary procedure.

11. Now, when we have a clear and expressed mandate provided under Sub-Article (2) of Article 73 of all issues, which can be introduced through a ***Money Bill***, it would be appropriate for this Court to again focus on the core issue before us;

> ***"Whether the impugned amendments in the Ordinance could be brought in through a "Money Bill" or otherwise. To be more precise, whether the contribution of Industrial Establishments, enhanced through the impugned amendments fall within the six stipulated matters provided under Sub-Article (2) of Article 73 or otherwise."***

12. The Federation and Revenue insisted that the contribution to the Fund is a "***tax***", while the Industrial Establishments claimed the same to be otherwise; emphasizing it to be a "***fee***" rather than a "***tax***". The former relied upon the judgments rendered by the Sindh High Court, while the latter sought reliance upon the judgments of the Lahore High Court.

13. The Sindh High Court has adjudged the impugned "***levy***" to be a "***tax***", hence validating introduction and passage thereof through a "***Money Bill***"; **M/S Mutual Funds' case (2010 PTD 1924)**

and M/S Shahbaz's case (2013 PTD 969). The latter being a judgment passed by a full Bench of the Hon'ble Sindh High Court.

While the Lahore High Court in its judgment rendered in **East Pakistan Chrome Tannery's case (2011 PTD 2643)** and later in **M/S Azgard's case (PLD 2013 Lahore 282),** has declared the impugned levy to be a "***fee***" and not a "***tax***" and, thus, struck down the legislation to be ultra vires.

14. This Court had the great privilege of being enlightened by the well researched, reasoned and articulate judgments rendered by our brother Judges of the two High Courts. At the cost of repetition and fearing our comments thereon does not convey the high intellectual discourse rendered therein, this Court submits the gist of the conclusion drawn by our brother Judges in the two High Courts.

Lahore High Court

(I) ***Messrs Azgard Nine LTD. Versus Pakistan through Secretary and others*** **[PLD 2013 Lahore 282].**

(II) ***East Pakistan Chrome Tannery (Pvt) Ltd..Vs..Federation of Pakistan and others.*** **(2011 PTD 2643)**

The Honourable Judges of the Lahore High Court were of the opinion that the Fund and the

contributions made to it was not a '*Tax*' but a '*Fee*' and that it does not fall within the sphere of influence of Article 73 of the Constitution *in order to be levied, modified or enhanced by a Money Bill.* This was so for following reasons:

> ***(i) Though there may be no direct quid pro quo, there is an indirect quid pro quo since the workers are the beneficiaries of the disbursements made from the Fund to which the Industrial Establishments contribute;***
>
> ***(ii)The Workers' Welfare Fund has a dedicated purpose, i.e. to utilize the contributions made to the Fund by providing residential accommodations for workers and to tend to their welfare; and***
>
> ***(iii) The Fund exists independently from the Federal Consolidated Fund and the Public Account of the Federation.***

Sindh High Court

(I) ***Messrs Mutual Funds Association of Pakistan (MUFAB)..Vs..Federation of Pakistan*** **(2010 PLC 306).**

(II) ***Messrs Shahbaz Garments (Pvt) Ltd. and others Versus Pakistan through Secretary Ministry of Finance, Revenue Division, Islamabad and others*** **[PLD 2013 Sindh 449].**

The Honourable Judges of the Sindh High Court elucidated the following:

> **(i)** ***Tax is a compulsory exaction of money by public authority for public purposes enforceable by law. In contrast, a fee is a sort of consideration for services rendered, which necessitates that there should be an element of quid pro quo,*** **and**
>
> **(ii)** ***The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. On the other hand, a fee is generally defined to be a charge for special service rendered on individuals by some governmental agency.***
>
> ***(iii)No doubt both tax and fee are compulsory extractions, but the difference between the two lies in the fact that the tax is not correlated to a particular service rendered but is intended to meet the expenses of the Government and a fee is meant to compensate the Government for expenses incurred in rendering services to the person from whom fee is collected.*** **Moreover, it went on to state that Section 6 of the Ordinance** ***does not define the purpose of imposition of Workers' Welfare Fund itself, on the contrary it only refers to the purpose to which entire money in the Fund may be applied.*** **Thus, the collected amount is** ***in no manner spent for the purposes of providing any benefit to its payer, i.e. Industrial Establishment. Therefore, the element of quid pro quo is totally missing in case of the Workers' Welfare Fund.***

The Sindh High Court commenting upon the judgment rendered by the Lahore High Court in ***East Pakistan Chrome Tannery's case*** **(*Supra*),**

differed on the conclusion drawn essentially for the reasons:-

> ***" While holding the Worker Welfare Fund is a fee and not a tax the learned judge has given more emphasis to one of the attribute i.e special purpose, whereas he could not appreciate that the other two basic ingredients, i.e fee is charged for providing services and reciprocate benefits to its payers are totally missing in the case of Worker Welfare Fund" It was further held that the learned single judge also overlooked that in terms of section 6 of Worker Welfare Ordinance , the application of the moneys received in the fund is for the benefits of the workers and not even remotely for the benefits of its payers"***

15. Having given our most anxious consideration to the issue in hand, this Court has come to the conclusion that the impugned levy is not a ***"Tax"*** or any other matter provided in Sub-Article (2) of Article 73 of the Constitution, so as to validly introduce through a '*Money Bill*' provided under Article 73 of the Constitution. Hence, the impugned levy is declared '*ultra vires*', for the reasons that:-

Firstly, it has to be noted that the term '*tax*' has not been defined in the Constitution. However, the same has been a matter of great legal discourse in various pronouncements rendered by the apex Court of our jurisdiction. The most authoritative

pronouncement expounding the basis, scope and characteristic of a ***tax*** was discussed in ***Sheikh Muhammad Ismail's case*** **(PLD 1966 S C 388),** wherein the apex Court while dilating upon the distinguishing feature of a "***tax***" with that of a "***fee***" described the same to be compulsory levy of the State through legislation, as part of the common burden. This description of tax was further explained by the apex Court in ***Sheikh Spilling Mills' case*** **(1999 SCMR 1402),** wherein the apex Court after considering the definition of the term so rendered in various English and legal dictionaries, precedents of our and foreign Courts, opined that:-

> ***"On the other hand the nature of tax is entirely different. The term "tax" was defined by Chief Justice Lathem of the High Court of Australia in Mathews V. Chicory Marketing Board (1960 CLR 263). The learned Chief Justice held that tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for service rendered. A fee may be generally defined to be a charge for a special service rendered to individuals by some governmental agency. In Muhammad Ismail & Co.'s case (supra), it was also observed that a fee may be compulsorily levied as well as tax, but the distinction between them lies primarily in the fact that a tax is levied as part of the common burden while a fee is a payment for special benefit or privilege. The same view was followed by this Court in the case of M/S. Sohail Jute Mills Ltd.Vs.Federation of Pakistan and M/S Nishat Textile Mills Ltd.Vs.Federation of Pakistan (supra)."***

Thus, it can safely be stated that "***tax***" is a compulsory extraction by the State through legislation for meeting the needs of all organs of the State and for the well being of the people. The purpose and aim of levy of ***taxation*** is always general and undefined, the final decision for its actual allocation rests solely with the State. In fact, taxation, in the present day and age, is not only a source of raising money to meet government expenditure, but has matured into a fiscal tool to achieve fiscal, monetary and social objectives including reduction of inequalities and endeavoring to fulfill the goals laid down in the ***Principles of Policy*** ordained in Articles 29 to 40 of the Constitution.

It is by now settled that one of the most core essential of a '*tax*' is that the final authority remains with the State to decide how the collected ***Taxes*** are to be utilized. In the present case, impugned levy has a specific purpose; that the contribution of Industrial Establishments to the Fund is essentially for the well being of the workers, employed in the Industrial Establishment, as provided in the Preamble and Section 6 of the Ordinance. What is pertinent to note

is that the State has no discretion to utilize the contribution made by the Industrial Establishment to the Fund other than the specific purpose, as has been provided in the Ordinance. This specification of the purpose and ultimate use of the contribution and its defined purpose renders the same to be outside the scope of a '*tax*'.

Secondly, in the present day and age, it would not be appropriate to form strict criteria or compartments, categorizing levies to be ***tax*** or ***fee***. In fact, it is to be noted from the facts and circumstances of each levy, whether in "***pith and substance***" the levy is a "***tax***" or a "***fee***". In this regard, guidance may be sought from the essential characteristics of imposition of a ***tax*** described in ***'Constitution of India'*** by **V.N.Shukla** (10th Edition), which sets down the three condition precedents;

> ***"Firstly the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the taxpayers' consent and the payment is enforced by law.***
>
> ***Secondly, taxation is an imposition made for a public purpose without reference to any special benefit to be conferred on the payer of the tax. The tax once collected forms part of the public revenues of the State, and there is no element of quid pro quo between the taxpayer and the public authority. Taxation***

> ***is for a public purpose even if particular persons receive more benefit from the use of tax proceeds than others, such as tariff duties for encouragement of manufacturers or licence fee with a view to regulate a particular trade or industry.***
>
> ***Thirdly, taxation is a part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay."***
>
> ***(Emphasis provided)***

Thus, each levy has to be adjudged on the touchstone of the three tests stated hereinabove. It is only when the levy substantially fulfills the three tests, the same can safely be termed as a ***tax*** to be introduced and passed through a ***Money Bill*** under Article 73 of the Constitution. When we put the impugned Contribution to the three tests, it can be safely stated that the same does not pass the same, as the essential conditions precedent for a levy to be termed as a ***Tax*** are not fulfilled**.**

Thirdly, Article 78 of the Constitution has very clearly stated how all the *Revenue* received, monies received as repayment of loans, and loans raised by the Federal Government are to form part of **Federal Consolidated Fund**. While all monies received by or on behalf of the Federal Government or received by or deposited with the Supreme Court or any other Court established shall be credited to

the **Public Accounts of the Federation**. It would be appropriate to review the said Article more closely. It reads:

> ***"78. Federal Consolidated Fund and Public Account.***
>
> ***(1) All revenues received by the Federal Government, all loans raised by that Government, and all moneys received by it in repayment of any loan shall form part of a consolidated fund, to be known as the Federal Consolidated Fund.***
>
> (2) ***All other moneys-***
>
> ***(a) received by or on behalf of the Federal Government; or***
> (b) ***received by or deposited with the Supreme Court or any other Court established under the authority of the Federation;***
>
> ***shall be credited to the Public Account of the Federation."***

The bare reading of the aforementioned Article provides that all taxes collected by the State, being Revenue would thus, form part of the Federal Consolidated Fund. While "***all other moneys***", provided in sub-Article-2 (ibid), would include the impugned levy, as the same is collected and received by the Federal Government through the Income Tax Department in **Public Account of the Federation** and thereafter shall have to be transferred to the Fund established under the Ordinance. What is most important is that the impugned contribution once it

forms part of the Public Account of the Federation would not require the Constitutional sanction for its disbursement, as is necessary for all revenues including "***taxes"*** received by the Federation, under Articles 82 to 84 of the Constitution. Accordingly, the impugned levy would thus fall outside the scope of a "***tax***".

In this regard, the Indian Supreme Court in ***Jagannath Ramanujdas's case*** **(AIR 1954 SC 400)** and later in ***H.H Sudhindar Thirtha Swaniar's Case*** **(AIR 1963 SC 966),** held that one of the distinguishing essential features of a *fee* was that it did not require to be merged in the general Revenue of the State to be spent for the general public purposes. This view was, however, modified in ***Zenith Lamp's case*** **((1973)1 SCC 162),** wherein the Supreme Court ruled that the Constitution of India did not expressly provide for a *fee* to be placed in a separate fund and not in the Consolidated Fund. With utmost respect to the wisdom in finding so rendered in the aforementioned judgment of the Supreme Court of India, it is noted that under our Constitution, all Revenues including taxation are to merge into the Federal Consolidated Fund and its disbursement are to take place with the legal

sanction of the provisions provided under Article 82 to 84 of the Constitution. While, *Moneys*, such as the impugned contribution, which is collected by the Income Tax authorities under the Ordinance, initially forms part of the Public Accounts of the Federation and not the Federal Consolidated Fund.

Fourthly, this Court is alive of the fact that the contribution levied upon the Industrial Establishments is collected by the Income Tax officials under the Ordinance, yet this mode of recovery would not colour the same to be a "***tax***". In similar circumstances, the Supreme Court of India in a case titled ***The Hingir-Rampur Coal Co.'s case*** **(AIR 1961 SC 459),** held that

> ***"…… Nor can the method prescribed by the legislature for recovering the levy by itself alter its character. The method is a matter of convenience and, though relevant, has to be tested in the light of other relevant circumstances……***
> ***It is not correct to say that the method implied by the impugned act for realizing the cess was a mere method of quantification and did not affect its character, which was that of a fee. In the present case, the very mode of levy of the cess is nothing other than the levy of a duty of excise, and, therefore, the principle of quantification of a fee could not be so extended so to convert what was in pith and substance a tax into a fee."***
> ***(Emphasis provided)***

Fifthly, as discussed hereinabove, Contribution has been mandated under section 4(7)

of the Ordinance read with section 60A of the Income Tax Ordinance, 2001 to be an "***expenditure***" of the Industrial Establishments, while computing its income tax. This adjustment of the impugned contribution clearly reveals the intention of the legislature. Had the impugned Contribution been a "***tax***", the legislature would have clearly declared the same to be a "***tax***" or in case the intention was to deem it as one, appropriate "***tax credit***" would have been provided for the same to the Industrial Establishments under the enabling legal taxation regimes. In absence of any clear provision, the impugned levy would thus not fall within the scope of a "***tax***".

Sixthly, the view of this Court is that as the impugned Contribution has been challenged on the sole ground that it could not be introduced through a ***Money Bill*** as it was neither a "***tax"*** nor was it any of the other specified items provided under sub-Article (2) of Article 73 of the Constitution, thus, the controversy of whether the impugned Contribution is not a "***fee***" is rather mis-placed, if not irrelevant. The essential and core issue remains; whether a ***Money Bill*** could carry the said levy through Finance Act or otherwise. The main thrust of the

Federation and the Revenue upholding the validity of the impugned levy through a ***Money Bill*** was that the Contribution did not have the essential attributes of a "***fee***", as it lacked the *'quid pro quo'* between the *payer* and the special benefits accruing therefrom. It was this line of argument, which was addressed before the Court to declare the levy to be a tax, as the same was not a "***fee***". Surely, this line of arguments in itself is misconceived, if not self contradictory. Our Constitution expressly provides the matters, which can be carried through a Money Bill. Thus, the mere fact that the impugned levy is not a "***fee***" would not render it to be a "***tax***" under the Constitution to be introduced and finally passed through a ***Money Bill***. In fact, sub-Article (3) of Article 73 has clearly mandated that a ***fee*** could not be introduced as a Money Bill.

In this regard, the apex Court in ***Mir Muhammad Idris's case (*****PLD 2011 SC 213),** relying with approval the *dicta* laid down in ***Sindh High Court Bar Association's case*** **(PLD 2009 SC 879),** has clearly provided what can be carried through a ***Money Bill*** in terms that;

> ***"Article 73 (2) of the Constitution reproduced above, reflects that a bill or amendment shall be deemed to be a Money***

> ***Bill if it contains provisions dealing with all or any of the matters enumerated in clauses (a) to (g) of paragraph 2 of this Article. In our opinion, reappointment of Chairman, the President and other members of the Board of NBP does not fall within ambit of clauses (a) to (g) ibid. Thus, it is crystal clear that the amendment in question could not have been introduced in clause (d) of subsection (3) of section 11 of the Act of 1974 by way of Finance Act, 2007, as it lacked constitutional requirement envisaged by Article 70 of the Constitution, i.e. approval by two Houses of Parliament."***

Finally, for the completeness of the decision in hand, this Court would also deal with the issue raised by the Federation and the Revenue that the impugned levy being not a "***fee***" as it lacks the essential attribute of the '*quid pro quo*' between the payer and the special benefits accruing therefrom. This issue was initially discussed in our jurisdiction in ***Abdul Majid's case*** **(PLD 1960 Dacca 502).** In the said case, registration fee on hotels and restaurants was levied through East Pakistan Finance Act of 1957, which was struck down on the ground that;

> ***"The learned Advocate has been candid enough to say that there is nothing in the Act or in the Rules to show that this fee was levied for some services to be rendered by the State to the hotels, restaurants, etc. The preamble clearly mentions that the purpose of the Act is to raise funds for the augmentation of the revenues of the Province. Further, the fee that has been levied under section 5 has been made to***

> ***depend upon the capacity of the payee. Furthermore, the hotels which have income of less than Rs.500 are excluded from the liability to pay any fee. In the words of the Supreme Court of India, these are "undoubtedly some of the characteristics of taxes, and imposition bears a close analogy to income-tax". Lastly, the fact that no part of this fee is ear-marked or specified for rendering services to the payee negates the theory of 'fee'. We, therefore, agree with Mr.Chowdhury that the fee levied under section 5 is a tax and not a fee, and consequently it was beyond the power of the Provincial Legislature to enact that provision." (Emphasis provided)***

The "***dicta***" laid down hereinabove, has consistently been followed to propound the principle that there has to be a *'quid pro quo'* between the *payer* of the levy and the special benefit accruing therefrom, for the same to be considered and termed as a "***fee***". The essential attribute being the co-relation between the *payer* and the benefit accruing therefrom. In our jurisdiction, this traditional co-relation of a '*quid pro quo'* has progressed in time but in a manner diluting the exactness and precision of the said co-relation. In ***Sheikh Spinning Mills's case (Supra),*** the apex Court, while commenting on the facts of ***Muhammad Ismail's case (Supra),*** held that

> ***"the levy was a fee for services to be rendered, found that the occupiers of the Cotton Ginning Factories were benefited if***

> ***not directly, at least indirectly by the measures taken for the improvement of cotton under the Act."***

Surely, the aforementioned observation is '*obiter dicta'*. However, this issue was earlier in ***Rahimullah's case (1992 SCMR 750),*** discussed in detail and after citing various judgments of the superior Courts of our and the Indian jurisdiction, the apex Court came to the conclusion that the levy of a fee on Saw Mills was a valid "***fee***", despite the '***quid pro* quo**' between the Saw Millers, who paid the fee and the benefit accruing therefrom was not direct. It was noted that *fee* was for insuring and preservation of forestation, which would indirectly but ultimately benefit the Saw Millers. The "***fee***" so imposed was to cater for the expenses to maintain staff to ensure that illegal installation of Saw Mills did not take place and was thus discouraged. This indirect benefit to the Saw Millers was considered sufficient by the apex Court to validate the levy to be a "***fee***". In view of the above, it can be safely stated that the ***'quid pro quo'*** between the *payer* of the levy and the special benefit accruing therefrom need not be *direct* or with *arithmetical* precision.

Similarly, in Indian jurisdiction, the Supreme Court of India in ***Delhi Cloth and General Mills***

Co.Ltd.'s case **(AIR 1971 Supreme Court 344),**

has observed:-

> ***"A levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have direct relation to the actual services rendered by the authority to individual who obtains the benefit of service. If with a view to provide a specific service, levy is imposed by law and expenses for maintaining the service are met out of the amounts collected there being a reasonable relation between the levy and the expenses incurred for rendering the service, the levy would be in the nature of a fee and not in the nature of a tax……***
> ***……***
> ***……***
> ***6. As far back as 1954 it was laid down in Sri Jagannath Ramanuj Das..Vs..State of Orissa, 1954 SCR 1046=(AIR 1954 SC 400) that the contributions levied for the expenses of the Commr. And his staff who were to exercise effective control over the trustees of the Maths and the temples was to be regarded as a fee and not a tax. Two reasons were given for this: (1) The payment was demanded only for the purpose of meeting the expenses of the Commissioner and his staff which is the machinery set up for due administration of the affairs of the religious institution. (2) The collections made were not merged in the general public revenue. Similarly in Ratilal Pananchand Gandhi..Vs.. State of Bombay, 1954 SCR 1055= (AIR 1954 SC 388) the contributions imposed under the Bombay Public Trusts Act was held to be fee and not tax. It was stated that in the first place these contributions were to be created***

to the public Trusts Administration Fund which was a special fund and were not to be merged in the general revenue. Secondly, it was not necessary that services should be rendered only at the request of particular people and it was enough that payments were demanded for rendering services which the State considered beneficial in the public interest and which the people had to accept whether they were willing or not. The following observations in H. H. Sudhindra Thirtha Swamiar, 1963 Supp (2) SCR 302= (AIR 1963 SC 966) may be referred to with advantages:

"A levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have direct relation to the actual services rendered by the authority to individual who obtains the benefit of service. If with a view to provide a specific service, levy is imposed by law and expenses for maintaining the service are met out of the amounts collected there being a reasonable relation between the levy and the expenses incurred for rendering the service, the levy would be in the nature of a fee and not in the nature of a tax". According to Mr.H. R. Gokhale the present case is of the type which would fall squarely within the decision in Liberty Cinema case, (1965) 2 SCR 477= (AIR 1965 SC 1107). It is difficult to agree. In each case where the question arises whether the levy is in the nature of a fee the entire scheme of the statutory provisions, the duties and obligations imposed on the inspecting staff and the nature of work done by them will have to be examined for the purpose of determining the rendering of the services which would

> ***make they levy a fee. It is quite apparent that in the Liberty Cinema case it was found that no service of any kind was being or could be rendered and for that reason the levy was held to be a tax and not a fee. In our judgment the present case falls within the other class of cases to which reference has been made in which contributions for the purpose of maintaining an authority and the staff for supervising and controlling public institutions like Maths etc., were held to be fee and not tax."***

The *'ratio decidendi'* of the aforementioned judgments has been consistently upheld by the Indian Supreme Court. In fact, the judicial development regarding the issue of *'quid pro quo'*, which has taken place over time, has been noted in ***Thachambalath Sadasivam's case*** **(AIR 1985 SC 756)** in terms that;

> ***"The traditional concept of quid pro quo in a fee is undergoing transformation. Though the fee must have relation to the services rendered, or the advantages conferred, it is not necessary to establish that those who pay the fee must receive direct or special benefit or advantage of the services rendered for which fee is being paid. If one who is liable to pay receives general benefit from the authority levying the fee the element of service required for collecting fee is satisfied."***

Recently, the Supreme Court of India in ***M/S Dewan Chand Builder's case*** **(2008 SCR 117),** wherein a challenge was made to the validity of a '*cess*', as it lacked the legislative competence, on the

ground that the *'cess'* was a "***tax***" made for public purpose, without reference to any special benefit for the payer of the said *'cess'*, hence, the co-relation between the payee of the *'cess'* and the services rendered did not exist and, therefore, the levy was in fact, a "***tax***". The impugned levy of *'cess'* was introduced through the ***Building and other Construction Workers (Regulation of Employment and Condition of Service) Act, 1996*** **("Act of 1996")**, and the Rules made thereunder, whereby Contractors engaged in buildings and other construction work in the National Capital Territory of Delhi were to pay the same. The main scheme of the Act of 1996 was to create a welfare board, which was to monitor social security scheme and other welfare measures for the benefit of the building and other construction workers. In this regard, the contractors, who were to employ construction workers were to pay the impugned *'cess'* at a notified rate of the cost of a construction of a Government or Public Sector undertakings, which was to be collected in advance by the local authority and the proceeds thereof were finally to form part of the Fund created under the Act of 1996, exclusively for the workers employed by the Contractors.

As in the present case, the main challenge made to the levy was that the *'cess'* was not a "***fee***" but a "***tax***", as the *'quid pro quo'* essential for a "***fee***" was lacking between the payer of the *'cess'* and benefits accruing therefrom. This issue was resolved by the Indian Supreme Court in ***M/S. Dewan Chand Builder's Case*** ***(Supra)*** wherein it was noted in terms that;

> ***"……17. Recently in State of W.B..Vs..Kesoram Industries Ltd. & amp; Ors.3, the Constitution Bench of this Court was faced with a challenge to the Constitutional validity of the levy of Cesses on coal-bearing lands; tea plantation lands and on removal of bricks earth. Relying on the decision in Hingir Rampur Coal Co.Ltd (supra), speaking for the majority, R.C. Lahoti, J. (as His Lordship then was), explained the distinction between the terms 'tax' and 'fee' in the following words:-***
>
> ***18. The term 'Cess' is commonly employed to connote a Tax with a purpose or a tax allocated to a particular thing. However, it also means an assessment or levy.3 (2004) 10 SCC 201. Depending on the context and purpose of levy, cess may not be a tax; it may be a fee or fee as well. It is not necessary that the services rendered from out of the Fee collected should be directly in proportion with the amount of Fee collected. It is equally not necessary that the services rendered by the Fee collected should remain confined to the person from whom the fee has been collected. Availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fee charged.***

> ***19. There is no doubt in our mind that the Statement of Objects and Reasons of the Cess Act, clearly spells out the essential purpose, the enactment seeks to achieve i.e. to augment the Welfare Fund under the BOCW Act. The levy of Cess on the cost of construction incurred by the employers on the building and other construction works is for ensuring sufficient funds for the Welfare Boards to undertake social security schemes and welfare measures for building and other construction workers. The fund, so collected, is directed to specific ends spelt out in the BOCW Act. Therefore, applying the principle laid down in the aforesaid decisions of this Court, it is clear that the said levy is a 'fee' and not 'tax'. The said fund is set apart and appropriated specifically for the performance of specified purpose; it is not merged in the public revenues for the benefit of the general public and as such the nexus between the Cess and the purpose for which it is levied gets established, satisfying the element of quid pro quo in the scheme. With these features of the Cess Act in view, the subject levy has to be construed as 'fee' and not a 'tax'. Thus, we uphold and affirm the finding of the High Court on the issue……"***
>
> ***(Emphasis provided)***

Thus, keeping in view the *'ratio decidendi'* of the aforementioned judgments of our and Indian jurisdiction, it is time for us to move forward from the traditional view of requiring a strict *'quid pro quo'* between the payer of the levy and the special benefits accruing therefrom. Accordingly, keeping in view the legal discourse discussed hereinabove, it is but apparent that the Industrial Establishments paying the impugned contribution would benefit,

though indirectly, if the workforce employed by it is provided the essential accommodation and other facilities from the impugned contributions. Thus, the requisite *"**quid pro quo**"* between the payer of the impugned contribution and the benefit accruing therefrom is not *direct* but is *reasonably* and *substantially* established.

Accordingly, for the reasons stated hereinabove, all the petitions are **accepted** in terms that the impugned levy of contribution introduced in the Ordinance through the Finance Act of 1996 and 2009 lacks the essential mandate to be introduced and passed through a Money Bill under the Constitution, hence are declared ***'ultra vires'***.

Dt. 29.5.2014.

JUDGE

JUDGE

"M.Gul"