

IN THE HIGH COURT OF SINDH, KARACHI

Constitutional Petition No.D-1250 of 2013

along with Const. Petition Nos.D-2174 of 2012, 1251, 1545, 1723, 1724,1748, 1777, 1796,1833, 1834,1835, 1836,1906, 1935,1986, 2076, 2077, 2117, 2139,2140, 2141, 2179, 2180, 2181, 2182, 2183, 2241, 2256, 2313, 2314, 2340, 2467, 2468, 2469, 2525, 2571, 2692, 2709, 2710, 2711, 2713, 2733, 2734, 2770, 2921, 3006, 3510, 3547, 3582, 3583, 3744, 4367, 4461, 4536, 4537, 4953, 4965 & 4967 of 2013, **ITRA Nos.131 & 138 of 2013**, Const. Petition No.D-114, 1150, 1151, 1152, 1192, 1193, 1196, 1222, 1262, 1295, 1296, 1297, 1336, 1347, 1348, 1390, 1391, 1438, 1472, 1373, 1487, 1488, 1503, 1518, 1547, 1559, 1601, 1608, 1618, 1656,1657, 1658, 1692, 1700, 1701, 1702, 1703, 1732, 1733, 1812, 1886, 1922, 1924, 1925, 1926, 2031, 2041, 2053, 2059, 2154, 2155, 2162, 2163, 2164, 2199, 2200, 2256, 2302, 2303, 2304, 2305, 2320, 2321, 2340, 2375, 2474, 2562, 2563, 2564, 2565, 2566, 2567, 2594, 2607, 2662, 2663, 2664, 2685, 2715, 2721, 2769, 2783, 2806, 2807, 2830, 2832, 2845, 2847, 2851, 2855, 2864, 2868, 2906, 2946, 2972, 2988, 2993, 3040, 3041, 3180, 3267, 3298, 3317, 3322, 3485,3598, 3639, 3672, 3673, 3726, 3727, 4132, 4133, 4741, 4742, 4743, 4744, 4745, 4746, 4791, 5054, 5096, 5097, 5107, 5154, 5191, 5224, 5361, 5363, 5430, 5535, 5539, 5581,562, 5683, 5700, 5763, 5819, 5820, 5821, 5822, 5823, 5824, 5825, 5826, 5915, 5916, 5924, 6062, 6063, 6064, 6191, 6221, 6236, 6252, 6272, 6285, 645, 6528, 6538, 6539, 6540, 6541, 6675, 6676, 669, 6737, 784 & 865 of 2014, Const. Petition No.D-1015, 1030, 1035, 1066, 1143, 1352, 1355, 1361, 1378, 1391, 1392, 1459, 1474, 1519, 1589, 1945, 2013, 2091, 21, 22, 2180, 2222, 2269, 2270, 2271, 2272, 2277, 3375, 3376, 2473, 2567, 2569, 2699, 2800, 291, 3002, 3003, 3004, 3005, 3006, 3040, 341, 3798, 3916, 3917, 3918, 3919, 3927, 3929, 3970, 3971, 3972, 437, 5328, 5874, 693, 694, 695, 6986, 767, 908 & 941 of **2015, ITRA Nos.38 of 2015**, 1027, 1028, 1119, 1161, 2013, 2016, 2222, 2224, 2267, 2439, 2573, 2625, 2668, 2715, 2956, 2957, 2958, 2964, 3005, 3097, 3117, 3126, 3135, 3163, 3164, 3165, 3178, 3304, 340, 3450, 3674, 3840, 3914, 3915, 5063, 5064, 5375, 5581, 5582, 5692, 5804, 5805, 5806, 5807, 5996, 6130, 6131, 6198 & 716 of **2016, ITRA Nos.94, 95 & 96 of 2016.**

Present

Mr. Justice Aqeel Ahmed Abbasi.

Mr. Justice Muhammad Junaid Ghaffar

M/s. A.F. Ferguson and others.....Petitioners

Versus

Province of Sindh and othersRespondents

Date of hearing 19.12.2016

Date of order 19.12.2016

Dr. Farogh Naseem & M/s. Pooja Kalapna, Munawar Hussain, Nasir Latif & S. Ziauddin, advocates for the petitioners in C.P.Nos.D-1250/13, 2174/12, 1251, 1748, 2139, 2140, 2141, 2256, 2340, 4536 & 4537 of 2013, 1222, 1391, 1438, 1472, 1601, 1618, 1657, 1658, 2721, 5363, 5819, 5820, 5821, 5822, 5823, 5824, 5825, 5826, 6252 & 669 of 2014, 1474 & 3798 of 2015, 2222, 2956, 2957 & 2958 of 2016.

M/s. Naveed A. Andrabi, Anwar Kashif Mumtaz, Muhammad Ammar Athar Saeed & Usman Alam, advocates for the petitioners in C.P.Nos.D-3134 of 2010, 231, 344, 345, 346 & 347 of 2011, 1833, 1834, 1835, 1836, 1796, 1935, 2710, 2711 & 2713 of 2013, 1473, 1503, 2769, 2868, 3251, 3598, 3727 & 5361 of 2014, and 5693 of 2016.

Mr. Abid H. Shaban, advocate for the petitioners in C.P.Nos.D-1545, 1724, 2241 & 3744 of 2013, 1196, 1886, 2031, 6272 & 5430 of 2014, 1361, 2091 & 2699 of 2015, 2625, 3126, 3450, 1559 & 1608 of 2014.

M/s. Abdul Rahim Lakhani & Abdul Jabbar Mallah, advocates for the petitioners in C.P.Nos.D-2525, 2692, 4367, 6461, 4953 & 3583 of 2013, 2562, 2563, 2564, 2565m 2566, 2567, 4132, 4133, 6675, 6676, 1150, 1151, 1295, 1296, 1297 & 1518 of 2014, 2270, 2271, 2272, 5328, 3002, 3003, 3004, 3005 & 3006, 2439, 2668, 3097 & 3178 of 2016 AND **ITRA No.13 of 2013.**

M/s. Muhammad Aleem & Muhammad Mustafa Raheem, advocates for the petitioners in C.P.Nos.D-2921 of 2013, 1700, 1701, 1702, 1703, 2972, 4741, 4742, 4743, 4744, 4745, 4746, 6538, 6539, 6540 & 6541 of 2014, 3916, 3917, 3918 & 3919 of 2015, 5063, 5064, 5581, 5582, 5804, 5805, 5806, 5807, 6130 & 6131 of 2016.

Mr. Jawaid Farooqi, advocate for the petitioners in C.P.Nos.D-3970, 3971, 3972, 3660, 3661, 3662, 3663, 3664 & 5853 of 2015.

Mr. Aminuddin Ansari, advocate for the petitioners in C.P.Nos.D-21, 22, 2277, 2375, 2376, 1945 & 1589 of 2015, 1027 & 1028 of 2016 AND **ITRA No.38 of 2015.**

Mr. Shakeel Ahmed, advocate for the petitioners in C.P.Nos.D-6062, 6063, 6064 & 6252 of 2014.

Mr. Ghazanfar Ali Jatoi, advocate for the petitioners in C.P.No.D-6062, 6063, 6064, 5763, 5683, 5539, 2845, 2340, 1692 & 784 of 2014, 3005 & 2715 of 2016.

Mr. Emad-ul-Hassan, advocate for the petitioners in C.P.No.D-2783, 2855, 6236 of 2014 & 437 of 2015.

Mr. Ali Aziz along with Mr. Sami-ur-Rehman, advocate for the petitioners in C.P.No.D-1119, 4699 & 5696 of 2016.

Mr. Mansoor-ul-Arfin, advocate for the petitioner in C.P.No.D-2864 of 2014. M/s. Arshad Tayebaly, Amel Kanshi, Khurram Ashfaq & Nahl Chamdia, advocates for the petitioner in C.P.No.D-2830 of 2014.

Mr. Khalid Jawed Khan, advocate for the petitioner in C.P.No.D-1015 of 2015.

M/s. Abid S. Zuberi, Ahmed Ali Hussain & Naheed Elahi, advocates for the petitioner in C.P.No.D-3304 of 2016.

M/s. Muhammad Anas Makhdoom, Ahmed Farhaj & Hassan Hammad Makhdoom, advocates for the petitioner in C.P.No.D-1812 of 2014.

M/s. Shahzad Raheem & Qazi Ajmal Kamal, advocates for the petitioners in C.P.No.D-2799 & 2800 of 2015.

Mr. Nadeem Ahmed, advocate for the petitioner in C.P.No.D-3674 of 2016.

M/s. Faiz Durrani & Samia Faiz Durrani, Ghulam Muhammad, advocates for the petitioner in C.P.No.D-1352 of 2015, C.P.Nos.D-1732, 1733, 2988, 2162, 2163 & 2164/2014, C.P.Nos.D-2013 & 2573 of 2016.

Mr. Kazim Hasan, advocate for the petitioner in C.P.No.D-2179, 2180, 2181, 2182 & 2183/2014, 2594 & 5924/2014.

Mr. Ravi R. Pinjani, advocate for the petitioner in C.P.No.D-2715 of 2014.

Mr. Mustafa Lakhani, advocate for the petitioners in C.P.Nos.D-2222 of 2011 & 2864 of 2015.

Ms. Lubna Pervez, Advocate for the petitioner in C.P. No.D-1545, 1723 & 1724 of 2013, C.P.No.D-3726, 5191 & 5224 of 2014, Const. Petition No.D-1355, 1391, 1392, 1459 & 3929 of 2015 and ITRA Nos.94, 95, 96 of 2016.

Ms. Sofia Saeed, Advocate for the petitioner in C.P.No.D-2117, 2733, 3347, 2468, 2077, 2313, 2734, 2469, 2467, 2571, 1906, 1777, 2076 & 2314 of 2013, Const. Petition No.D-1547, 1347, 2375, 1390, 1193, 2993, 114, 2807, 2806, 6737, 865 & 404 of 2014, Const. Petition No.D- 2180, 3927, 5627, 5628 & 2269 of 2015. Const. Petition No.D- 2267, 716, 1161, 2016, 340 & 3135 of 2016.

Petitioner Muhammad Ashraf in person in C.P.No.D-6198 of 2016.

Mr. Kafil Ahmed Abbasi, advocate for the respondent/FBR in C.P.No.D-2013, 2573, 3163, 3164 & 3165 of 2016.

Mr. Amjad Javed Hashmi, advocate for the respondent.

Mr. M. Sarfaraz Ali Metlo, advocate for the respondent.

Dr. Shahnawaz, advocate for the respondent in C.P.No.D-5363/2014.

Mr. Salman Talibuddin, Additional Attorney General of Pakistan along with Mr. Meer Hussain, Standing Counsel.

J U D G M E N T

Aqeel Ahmed Abbasi, J: Learned counsel for the petitioners/applicants in the above cases, at the very outset submit that in view of the recent judgment of the Hon'ble Supreme Court of Pakistan dated 27.09.2016, passed in Civil Appeals No.1049 to 1055 of 2011 (and several other connected Civil Appeals) in the case of Workers Welfare Fund (WWF), Ministry of Human Resources Development, Islamabad through Secretary Employees Old Age Benefits Institution through its Chairman and another v. East Pakistan Chrome Tannery (Pvt.) Ltd. through its G.M. Finance, Lahore and others, whereby, Hon'ble Supreme Court of Pakistan has been pleased to declare that Worker's Welfare Fund is not a tax, hence, the amendments introduced through Finance Act, 2006 and 2008 are ultra-vires to the Constitution, the above petitions may be allowed, whereas, reference applications may be disposed of in terms of the decision of the Hon'ble Supreme Court by holding that levy of WWF pursuant to amendments introduced through Finance Act, 2006 and Finance Act, 2008 are illegal.

2. Learned counsel for the petitioners/applicants have placed the copy of the aforesaid judgment and have readout the relevant finding of the Hon'ble Supreme Court as contained in paragraph 22 & 23, which reads as follows:-

"22. As we have established from the discussion above that none of the subject contributions/payments made under the Ordinance of 1971, the Act of 1976, the Act of 1923, the Ordinance of 1968, the Act of 1968 and the

Ordinance of 1969 possess the distinguishing feature of a tax, i.e. a common burden to generate revenue for the State for general purposes, instead they all have some specific purpose, as made apparent by their respective statutes, which removes them from the ambit of a tax. Consequently, the amendments sought to be made by the various Finance Acts of 2006, 2007 and 2008 pertaining to the subject contributions/payments do not relate to the imposition, abolition, remission, alteration or regulation of any tax, or any matter incidental thereto (tax). We would like to point out at this juncture that the word 'finance' used in Finance Act undoubtedly is a term having a wide connotation, encompassing tax. However not everything that pertains to finance would necessarily be related to tax. Therefore merely inserting amendments, albeit relating to finance but which have no nexus to tax, in a Finance Act does not mean that such Act is a Money Bill as defined in Article 73(2) of the Constitution. The tendency to tag all matters pertaining to finance with tax matters (in the true sense of the word) in Finance Acts must be discouraged, for it allows the legislature to pass laws as Money Bills by bypassing the regular legislative procedure under Article 70 of the Constitution by resorting to Article 73 thereof which must only be done in exceptional circumstances as and when permitted by the Constitution. The special legislative procedure is an exception and should be construed strictly and its operation restricted. Therefore, we are of the candid view that since the amendments relating to the subject contributions/payments do not fall within the parameters of Article 73(2) of the Constitution, the impugned amendments in the respective Finance Acts are declared to be unlawful and ultra vires the Constitution.

23. *There is another aspect of the matter which requires due attention. No doubt the feature of having a specific purpose is a characteristic of a fee, which the subject contributions /payments possess as discussed in the preceding portion of this opinion. However, there are certain other characteristics of a fee, such as quid pro quo, which must be present for a contribution or payment to qualify as a fee. This was the main argument of the learned counsel who categorized the subject contributions in the nature of a tax, that they (the contributions) lacked the element of quid pro quo or in other words the benefit of the contribution did not go the payers. The industrial establishments or employers etc. were liable to pay the contribution but they were not the beneficiaries of the purpose for which such contributions were being made; the beneficiaries were their employees or workers etc. Mr. Rashid Anwar attempted to argue that the benefit need not be direct and can be indirect, therefore although the employees were directly benefited by contributions made to the Employees' Old-Age Benefit Fund as they received the disbursements, the employers received an indirect benefit in that this results in happier employees which ultimately leads to greater productivity. Whilst this may be true, albeit a strained argument, the attempt of the learned counsel*

challenging the legality of the amendments in the Finance Acts has all along been to categorize the contributions/payments as a fee, which would mean that they were not a tax. While a fee is obviously not a tax, there was absolutely no need to try and squeeze the contributions/payments into the definition of a fee, when all that is required is to take them out of the ambit of a tax. We may develop this point further; although Article 73(3)(a) of the Constitution states that a Bill shall not be a Money Bill if it provides for the imposition or alteration of a fee or charge for any service rendered, this does not mean that if a particular levy/contribution does not fall within Article 73(2) it must necessarily fall within Article 73(3). Sub-articles (2) and (3) are not mutually exclusive. There may very well be certain levies/contributions that do not fall within the purview of Article 73(3) but still do not qualify the test of Article 73(2) and therefore cannot be introduced by way of a Money Bill, and instead have to follow the regular legislative procedure. The discussion above that the subject contributions/payments do not constitute a tax is sufficient to hold that any amendments to the provisions of the Ordinance of 1971, the Act of 1976, the Act of 1923, the Ordinance of 1968, the Act of 1968 and the Ordinance of 1969 could not have been lawfully made through a Money Bill, i.e. the Finance Acts of 2006 and 2008, as the amendments did not fall within the purview of the provisions of Article 73(2) of the Constitution.”

3. All the learned counsel for the petitioners/applicants and the respondents as well as learned Standing Counsel submit that the aforesaid petitions and the reference applications can be disposed of in terms of the aforesaid judgment of the Hon’ble Supreme Court, whereby, it has been held that since the WWF is not a tax, therefore, amendment introduced through Finance Act, 2006 and Finance Act, 2008, are ultra-vires to the Constitution of Islamic Republic of Pakistan, 1973.

4. Accordingly, all the aforesaid Petitions/ITRAs are disposed of in terms of paragraph 22 and 23 as reproduced hereinabove of the judgment of the Hon’ble Supreme Court passed in the Civil Appeals No.1049 to 1055 of 2011 (and several other connected Civil Appeals) in the case of Workers Welfare Fund (WWF) Ministry of Human Resources Development, Islamabad through Secretary Employees Old Age Benefits Institution through its Chairman and another v. East Pakistan Chrome Tannery (Pvt.) Ltd. through its G.M. Finance, Lahore and others.

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