

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

Present

Mr. Justice Faisal Arab  
Mr. Justice Sajjad Ali Shah  
Mr. Justice Aqeel Ahmed Abbasi.

1. Const. Petition No.D-2753 of 2009

M/s Shahbaz Garments (Pvt) Ltd.....Petitioner

Versus

Pakistan, through Secretary and others.....Respondents

2. Const. Petition No.D-3482 of 2011

M/s Blessed Textiles Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

3. Const. Petition No.D-1084 of 2011

Adamjee Enterprises and others.....Petitioners

Versus

Pakistan, through Secretary and others.....Respondents

4. Const. Petition No.D-115 of 2011

Bulk Management Pakistan (Pvt) Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

5. Const. Petition No.D-1483 of 2011

Agar International (Pvt) Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

6. Const. Petition No.D-1619 of 2011

Yunus Textile Mills Limited.....Petitioner

Versus

Pakistan, through Secretary and others.....Respondents

7. Const. Petition No.D-230 of 2011

M/s Artistic Garment Industries (Pvt) Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

8. Const. Petition No.D-2700 of 2011

M/s Sitara Energy Limited.....Petitioner

Versus

Pakistan, through Secretary and others.....Respondents

9. Const. Petition No.D-2876 of 2011

M/s Abdul Sattar Noor Mohammad &amp; Co.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

10. Const. Petition No.D-2877 of 2011

M/s Imran Ship Breaking Company.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

11. Const. Petition No.D-2878 of 2011

M/s Sadaf Enterprises.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

12. Const. Petition No.D-344 of 2011

M/s Artistic Spinning Mills (Pvt) Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

13. Const. Petition No.D-345 of 2011

M/s Artistic Fabrics Mills (Pvt) Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

14. Const. Petition No.D-346 of 2011

M/s Artistic Milliners (Pvt) Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

15. Const. Petition No.D-347 of 2011

M/s Artistic Milliners (Pvt) Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

16. Const. Petition No.D-348 of 2011

M/s Feroze Textiles Industries (Pvt) Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

17. Const. Petition No.D-3483 of 2011

M/s Bhanero Textile Mills Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

18. Const. Petition No.D-3484 of 2011

M/s Nagina Cotton Mills Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

19. Const. Petition No.D-3488 of 2011

M/s Faisal Spinning Mills Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

20. Const. Petition No.D-3489 of 2011

M/s Sapphire Textile Mills Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

21. Const. Petition No.D-439 of 2011

M/s Qasim Rice Mills.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

22. Const. Petition No.D-3490 of 2011

M/s Sapphire Finishing Mills Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

23. Const. Petition No.D-3491 of 2011

M/s Sapphire Fibers Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

24. Const. Petition No.D-3492 of 2011

M/s Reliance Cotton Spinning Mills Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

25. Const. Petition No.D-3493 of 2011

M/s Amer Cotton Mills (Private) Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

26. Const. Petition No.D-3494 of 2011

M/s Diamond Fabrics Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

27. Const. Petition No.D-356 of 2011

Unibro Industries Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

28. Const. Petition No.D-357 of 2011

S. Fazalilahi &amp; Sons (Pvt) Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

29. Const. Petition No.D-358 of 2011

H. Nizam Din &amp; Sons (Pvt) Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

30. Const. Petition No.D-359 of 2011

Ihsan Industries (Pvt) Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

31. Const. Petition No.D-360 of 2011

Pakistan Housing (Pvt) Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

32. Const. Petition No.D-367 of 2011

M/s Gul Ahmed Textile Mills Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

33. Const. Petition No.D-3912 of 2011

M/s Naveena Industries Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

34. Const. Petition No.D-3913 of 2011

M/s QST Naveena (Private) Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

35. Const. Petition No.D-3914 of 2011

M/s Ahmed Oriental Textile Mills Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

36. Const. Petition No.D-4119 of 2011

M/s Sindh Abadgar's Sugar Mills Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

37. Const. Petition No.D-440 of 2011

M/s Amir Rice Trading Company.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

38. Const. Petition No.D-495 of 2011

M/s Hasan Ali Rice Export Co.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

39. Const. Petition No.D-589 of 2011

M/s Mayfair Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

40. Const. Petition No.D-590 of 2011

M/s Asian Food Industry Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

41. Const. Petition No.D-605 of 2011

Dalda Foods (Pvt) Ltd. and others.....Petitioners

Versus

Federation of Pakistan and others.....Respondents

42. Const. Petition No.D-679 of 2011

The Paracha Textile Mills Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

43. Const. Petition No.D-680 of 2011

North Star Textile Mills Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

44. Const. Petition No.D-699 of 2011

Indus Dyeing and Manufacturing Co. Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

45. Const. Petition No.D-856 of 2011

Salfi Textiles Mills Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

46. Const. Petition No.D-857 of 2011

Tata Textile Mills Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

47. Const. Petition No.D-4120 of 2011

M/s Mirza Sugar Mills Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

48. Const. Petition No.D-4121 of 2011

M/s Pangrio Sugar Mills Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

49. Const. Petition No.D-2754 of 2009

M/s Convenience Food Industries (Pvt) Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

50. Const. Petition No.D-2755 of 2009

M/s Eastern Garments.....Petitioner

Versus

Pakistan, through Secretary and others.....Respondents

51. Const. Petition No.D-2756 of 2009

M/s Industrial Clothing (Pvt) Ltd.....Petitioner

Versus

Pakistan, through Secretary and others.....Respondents

52. Const. Petition No.D-1394 of 2010

M/s Pakistan Gum Industries (Pvt) Ltd.....Petitioner

Versus

Pakistan, through Secretary and others.....Respondents

53. Const. Petition No.D-2688 of 2010

M/s Dewan Steel Mills.....Petitioner

Versus

Pakistan, through Secretary and others.....Respondents

54. Const. Petition No.D-3143 of 2010

M/s Artistic Denim Mills Ltd.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

55. Const. Petition No.D-3521 of 2010

M/s Lucky Cement Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents



56. Const. Petition No.D-3618 of 2010

M/s Naveena Exports Limited.....Petitioner

Versus

Federation of Pakistan and others.....Respondents

57. Const. Petition No.D-452 of 2010

Yunus Textile Mills Limited.....Petitioner

Versus

Pakistan, through Secretary and others.....Respondents

58. Const. Petition No.D-06 of 2010

M/s Afzal Motors (Private) Limited.....Petitioner

Versus

Pakistan, through Secretary and others.....Respondents

Petitioners:

through M/s Dr. Muhammad Farogh Naseem, Khalid Javed Khan, Rashid Anwar, M. Anas Makhdoom, Anwar Kashif Mumtaz, Naveed A. Andrabi, Khalid Mehmood Siddiqui, Ghulam Murtaza, Lubna Pervez, Abid Shahban, Junaid Farooqi, Muhammad Rafi Kamboh, Kazim Hasan, Abdul Rahim Lakhani, Aminuddin Ansari, Ali Mumtaz Shaikh, Abdul Hameed Kazi, and Muhammad Adnan, advocates.

Respondents:

through Mr. Amjad Javed Hashmi, advocate, Dr. Tariq Masood, Additional Commissioner (Legal), Mr. M. Asif Mangi, Standing Counsel, Mr. M. Sarwar Khan, Addl.A.G, Mr. Chaman Lal, Mr. S. Mohsin Imam and Mr. S. Riazuddin, Mr. Muhammad Saleem Mangrio, advocate.

Date of hearing : 10.12.2012

Date of judgment : 01.03.2013

**J U D G M E N T**

**Aqeel Ahmed Abbasi, J.** A Larger Bench was initially constituted by the order of the Hon'ble Chief Justice of this Court dated 28.01.2011 on a reference made by a Division Bench vide order dated 21.01.2011 in the following terms:

- “(13) Without discussing the merits of the case we are, therefore, of the considered view that this case be referred to the Honourable Chief Justice for constitution of a larger Bench to hear and decide the issue afresh.
- (14) We will, therefore, refer all these petitions to the Honourable Chief Justice for constitution of a larger Bench to hear and dispose of these petitions and since great urgency has been shown therefore we direct the office to send the reference to the Honourable Chief Justice as soon as possible within the shortest possible time and very humbly request the Honourable Chief Justice to constitute a larger bench at the first available opportunity.”

The constitution of the larger bench was subsequently changed from time to time as no decision could be made by previous benches. However, this Larger Bench has been constituted by the Hon’ble Chief Justice vide his recent order with the mandate to decide the controversy involved in all the pending petitions in terms of the reference made by division bench of this Court as referred to hereinabove.

2. Before we proceed to resolve the controversy in the instant petitions, we may observe that the Division Bench of this Court while referring all these petitions to the Hon’ble Chief Justice for constitution of a Larger Bench to hear and dispose of all these petitions, did not formulate any specific question (s) on which decision of the larger bench was sought, nor reference to any conflicting judgments of Divisions Benches by this Court was made. However, on 5<sup>th</sup> March 2011 when an earlier Larger Bench of this Court was hearing the matter an objection was raised by Mr. Adnan Karim, learned AAG with regard to constitution of Full Bench, on the ground that since Division Bench of this Court had not disagreed with the earlier judgment of a division bench of this Court on the subject controversy, in the case of **Mutual Fund Association of Pakistan v. Federation Pakistan reported in 2010 PLD 306**, therefore, constitution of larger bench was not justified. Reference in this regard was made to the cases of Hon’ble Supreme Court of Pakistan i.e. (i) **Multiline Associates v. Ardeshir Cowasjee and others 1995 SCMR 362** and (ii) **Ardeshir Cowasjee and 10 others v. Karachi Building Control Authority (KMC), Karachi (1999 SCMR**

**2883**). Such objection was however, repelled by the Full Bench in the following terms:

“We have, however, indicated that a contrary view may be taken and therefore, we are of the opinion that this reference by the D.B. is not contrary to the Multiline Associates case quoted supra and or the ARDESHIR COWASJEE and 10 others Vs. KARACHI BUILDING CONTROL AUTHORITY (KMC), Karachi (1999 SCMR 2883) case in which the Multiline case was followed. We, therefore, reject the objection raised by the learned Assistant A.G. and are adjourning this case to 12<sup>th</sup> March 2011 at 10:30 morning.”

Since, above decision on the objection raised by the respondent has not been assailed by the petitioners, therefore, we will decide the subject controversy on merits.

3. In order to avoid repetition, the arguments advance by all the learned counsel for the petitioners can be summarized as under:-

It has been argued on behalf of the petitioners that Workers' Welfare Fund is not a tax as evident from the word used by legislature while enacting the same. It has been contended that the levy has been imposed to be utilized for the welfare of the workers, whereas the entire amount received in this regard goes to the fund constituted by law. Per learned counsel, since the subject levy cannot be utilized for any other purpose except as defined in the Ordinance itself, therefore, it cannot be termed as a tax. It is further submitted that a tax cannot be for some specific purpose, whereas the amount of tax goes to the Federal Consolidated Fund where it can be utilized for any purpose as the government may deem necessary. Whereas, per learned counsel, Workers' Welfare Fund does not go to the Federal Consolidated Fund and its use has also been restricted for the purposes of welfare of the workers/employees in the industrial establishment. It is argued that once a levy is imposed for some specific purpose it cannot be termed as tax., and as the Workers' Welfare Fund relates to providing certain services and benefits to the employees it can be treated as fee and not a tax. All the learned counsel for the petitioners have also assailed the finding

recorded by a Division Bench of this Court in the case of Mutual Fund Association of Pakistan v. Federation Pakistan reported in 2010 PLD 306 and submitted that the learned Division Bench was not properly assisted, whereas several aspects, which can determine as to whether a levy is a tax or otherwise, have not been examined by the Division Bench in the above referred judgment. An objection has also been raised by the learned counsel for the petitioners that once a Division Bench of this Court was pleased to dismiss the petition on the ground of maintainability, therefore, no finding was required to be recorded on the merits of the case. Reference to various provisions as contained in Workers' Welfare Fund Ordinance, 1971, including section 2(c), sections 3, 4, 6, 10, (10a) etc. was made by the learned counsel to substantiate their contention that Workers' Welfare Fund is not a tax as it is a specific purpose levy and cannot be utilized for any other purpose except as defined in the Ordinance itself. While concluding their arguments it has been contended by the learned counsel for the petitioners that the amendments introduced in the Workers' Welfare Fund Ordinance, 1971 through Finance Act, 2006 and Finance Act, 2008 may be declared as illegal, without jurisdiction, void abinitio and of no legal effect. In support of their contentions, the learned counsel for the petitioners have placed reliance on the following reported case laws:

- (1) C.I.T v. Kamran Model Factory 2002 P.T.D 14.
- (2) East Pakistan Chrome Tannery (P.) Ltd. v. Federation of Pakistan 2011 P.T.D 2643.
- (3) M. Ismail & Co. v. Chief Collector 1966 PLD 388
- (4) Pakistan Agricultural Storage & Service Corporation Ltd. v. Province of Punjab and another PLD 1989 Lahore 367
- (5) Collector of Customs v. Sheikh Spinning Mills 1999 SCMR 1402
- (6) Biafo Industries v. Federation of Pakistan 2000 CLC 170
- (7) Messrs Lever Brothers (Pakistan) Ltd., Karachi v. Market Committee, Rahimyar Khan PLD 1980 Baghdadul Jadid 23
- (8) Abdul Majid v. Province of East Pakistan PLD 1960 Dacca 502

- (9) Dr. Abdul Jamil v. Malik Nazar Mohyuddin & others PLD 1988 Peshawar 15
- (10) Sindh High Court Bar Association v. Federation of Pakistan PLD 2009 SC 789
- (11) Mir Muhammad Idris v. Federation of Pakistan PLD 2011 SC 213

4. Conversely, counsel for the respondents have seriously controverted the submissions made by the counsel for the petitioners. To avoid duplication, the arguments of learned counsel for the respondents, duly assisted by departmental representative, can be summarized as follows.

It has been argued on behalf of the respondents that the Workers' Welfare Fund is a tax, therefore, amendments introduced through Finance Act, 2006 and 2008 respectively in the Workers' Welfare Fund Ordinance, 1971 are not ultra vires of the Constitution or in violation of the Article 73 of the Constitution of Pakistan, 1973. It has been contended that the Workers' Welfare Fund has all the ingredients and characteristic of a tax as it is a compulsory exaction of money from industrial establishments having income of Rs.5,00,000/- during a year. Workers' Welfare Fund Ordinance, 1971, is the basic legislation which creates a charge upon income of industrial establishment, whereas the Income Tax Ordinance is the complementary legislation which provides for assessment and collection of such levy on the basis of income of the industrial establishment for that year. It has been contended that the amount so collected goes to the Federal Consolidated Fund and the Public Accounts and is utilized for general purpose to meet the expenses of the Government. Learned Counsel have further stated that the term 'tax' has not been defined exhaustively either in the Constitution or by any Statute, as it includes several levies and does not refer to any specific levy with specific nomenclature. The definition of tax is always inclusive in nature as it cannot be defined exhaustively, on the contrary, its scope continues to grow and enlarge with the growth of economic activity itself. It has been contended by the

learned counsel that the Workers' Welfare Fund, by any stretch of imagination, cannot be termed as 'fee' as it is neither charged against any specific service rendered by the government nor there is any element of quid pro quo, as the payer is not the beneficiary. Per learned counsel, there is clear distinction in both the terms, as the term 'tax' is inclusive in nature and includes several Federal, Provincial and Local Levies, which are imposed by the legislature on the income, property, sales, imports, expenditure etc. of a person including individuals, association of person, firms, companies, corporation etc. which constitutes part of a common burden and can be utilized for general purpose by the Government. Whereas, on the other hand, 'fee' is charged for a special service or privilege and to meet the expenses of the Government for providing services to the payer. Per learned counsel, the element of rendition of services by the Government to the individual from whom fee is charged, and the reciprocate benefit, though not in exact terms, is the prerequisite for a levy to be termed as 'fee'. It has been contended that no such ingredients or characteristics are available in Workers' Welfare Fund, as neither it is charged for services rendered by the Government nor its payer gets any benefit out of such payments to the Government. Fund is meant to be used for providing residential accommodation and other facilities to the **workers** of the industrial establishments and not to its payer. Per learned counsel for the respondents, as per the budget document, it can be seen that the amount received towards Workers' Welfare Fund contribution goes to the Federal Consolidated Fund and the Public Accounts and the same is placed at the disposal of the Federal Government for further expenditure, therefore, it cannot be said that the Fund is used for some specific purpose or for the benefit of its payer. It has been stated that the case law referred and relied upon by the learned counsel for the petitioner is not relevant and does not apply to the facts of the instant controversy. On the contrary, the same support the case of the respondents. In supports of their contention, learned counsel have placed reliance on the following reported cases:

- (1) Messrs Elahi Cotton Mills Ltd and others v. Federation of Pakistan  
PLD 1997 SC 582
- (2) In the case of Collector of Customs and others v. Sheikh Spinning  
Mills 1999 SCMR 1402
- (3) East Pakistan Chrome Tannery (P.) Ltd. v. Federation of Pakistan  
2011 P.T.D 2643.
- (4) In the case of Messrs Mutual Funds Association of Pakistan  
(MUFAB) v. Federation of Pakistan 2010 P.L.C 306.
- (5) C.A. 1891 Unwin v. Hanson 115
- (6) Kawther Grain (Pvt) Ltd v. DCIT Gujranwala (80 Tax 262)
- (7) Collector of Central Excise, Bombay-1 and another v. Messrs Parle  
Exports (P) Ltd. AIR 1989 SC 644
- (8) Messrs Hindustan Aluminum Corporation Ltd v. The State of U.P  
and another AIR 1981 SC 1649
- (9) Messrs Indian Cable Company Ltd. Calcutta v. Collector of Central  
AIR 1995 SC 64.

5. After hearing the learned counsel for the parties, following legal question has been formulated to be answered by this Full Bench which will resolve the controversy involved in all these petitions.

**“Whether Workers’ Welfare Fund is a tax, and the amendments could have been introduced in the Workers’ Welfare Fund Ordinance, 1971 through Finance Act (Money Bill) of 2006 and 2008 respectively, OR it’s a fee and no amendments could have been made through Finance Act (Money Bill)”?**

6. It will be advantageous to reproduce the following provisions of the Workers’ Welfare Fund Ordinance, 1971 and the Articles of the Constitution of Pakistan, 1973, which are relevant for the purposes of resolution of the instant controversy.

- Section 2(c) ”Fund” means the Workers’ Welfare Fund constituted under Section 3.
- (ff) ‘Ordinance’ means the Income Tax Ordinance, [2001] ([XLIX of 2001]);
- [(i) “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 the 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 per cent of the receipt as per the statement filed under section 115 of the Ordinance, whichever is higher.]

Section 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 and properties and assets acquired from out of the fund, [and]
  - (e) proceeds of loans raised by the Government Body.

Section 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 [five] lakh of rupees **shall pay to the Fund in respect of that year a sum equal to two per cent [xxxx] of its total income as [xxxxx] [xxxx].**

- (2) Every industrial establishment which is liable under sub-section (1) shall pay the amount due from it to the [Taxation Officer] having jurisdiction over the industrial establishment for purposes of the [Ordinance].
- (3) .....
- (4) .....
- (5) .....



(6) .....

(7) The payment made by an industrial establishment to the Fund under sub-section (1) shall be treated as an expenditure for purposes of assessment of income-tax.

(8) .....

(9) The provisions of [the Ordinance] relating to the mode and time of recovery of the income-tax leviable under the Act shall, so far as may, apply to the recovery of the amount due under sub-section (1).

Section. 5 **Liability to be discharged by certain persons:** Any liability imposed on an industrial establishment by this Ordinance shall be deemed to be the liability of the person who is liable to pay income-tax in respect of the income relatable to such industrial establishment.

Article 73. **Procedure with respect to Money Bills.** (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 fourteen 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 purpose 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 preceding paragraphs.
- (3) A Bill shall not be deemed to be a Money Bill by reason only that it provides—
- (a) **for the imposition or alternation of any fine or other pecuniary penalty, or for the demand or payment of a licence fee or a fee or charge for any service rendered; or**
  - (b) for the imposition, abolition, remission, alternation 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.

7. In order to comprehend definition and the scope of term “**fee**” it will be advantageous to refer to various dictionaries wherein fee has been defined as follows:-

(i) **Chambers 21<sup>st</sup> Century Dictionary (Revised Edition)**

**Fee:-** A charge made for professional services, *eg* by a doctor or lawyer etc. A charge for *eg* membership of a society, sitting an examination, entrance to a museum etc. a payment for school or college education, or for a course of instruction.

**(ii) Black's Law Dictionary (Sixth Edition)**

**Fee:-** A charge fixed by law for services of public officers or for use of a privilege under control of government.....A fixed charge or perquisite charged as recompense for labor, reward, compensation, or wage given to a person for performance of services or something done or to be done.

**(iii) Wharton's Law Lexicon Dictionary (Fifteenth Edition)**

**Fee:-** A 'fee' is generally defined to be a charge for a special service rendered to individuals by some governmental agency.

A fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it.

Payments primarily in the public interest but for some special service rendered or some special work done for the benefit of those from whom payments are demanded; the fees charged must be commensurate with the services rendered.

**(iv) Judicial Dictionary 13<sup>th</sup> Edition K J Aiyar**

**Fee: Before any levy can be upheld as a fee, it must be shown that the levy has reasonable co-relationship with the services rendered by the government. In other words, the levy must be proved to be a quid pro quo for the services rendered.**

**(v) Legal Terms & Phrases 2006 Edition by M. Ilyas Khan**

**Fee:(i) there must be co-relation between the amount realized as fee and the services rendered or benefits granted to those who are made to pay the same;**

(ii) the general purpose for raising revenue alone for the Province or the Federation shall militate against 'quid pro quo', which is an essential component of the levy of fee. Such 'quid pro quo' may not be determined with exactitude but there has to be significant relations between the fee charged and the services rendered;

**(vi) Supreme Court on Words and Phrases by Justice M. L. Singhal**

**Fee:** Conceptually fee and tax stand on different footings; whereas the element of tax is based on the principle of compulsory exaction, the concept of fee relates to the principle of quid pro quo.

8. Similarly, in order to understand definition and the scope of term '**tax**', we may refer to various dictionaries wherein tax has been defined as follows:-

(i) **Chambers 21<sup>st</sup> Century Dictionary (Revised Edition)**

**‘Tax’** A compulsory contribution towards a country’s expenses raised by the government from people’s salaries, property and from the sale of goods and services.

(ii) **Black’s Law Dictionary (Sixth Edition)**

**‘Tax’** A charge by the government on the income of an individual, corporation, or trust, as well as the value of an estate or gift. The objective in assessing the tax is to generate revenue to be used for the needs of the public.

**A pecuniary burden laid upon individual or property to support the government, and is a payment exacted by legislative authority. ....whether under the name of toll, tribute, tal-age, gable, impost, duty, custom, excise, subsidy, aid, supply, or other name.**

(iii) **Wharton’s Law Lexicon Dictionary (Fifteenth Edition)**

**‘Tax’** A monetary charge imposed by government on persons entities or property to yield public revenue.

**A “tax” is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered.**

**“Tax”** includes fee in the wider sense of the term.

Tax, includes any toll, crate, cess fee or other impost leviable or levied under the Act.

(iv) **Judicial Dictionary 13<sup>th</sup> Edition K J Aiyar**

**‘Tax’** ‘A tax’, according to the learned Chief Justice, ‘is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment ‘for services rendered’. This definition brings out, the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense are included within it. It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the tax-payer’s consent and the payment is enforced by law.

(v) **Legal Terms & Phrases 2006 Edition by M. Ilyas Khan**

**Tax** – A pecuniary obligation imposed by the State on its subject. It is a charge levied upon a person or a property by the Government for public purposes.

The word ‘tax’ has been used and it is to be taken as a tax whether of central or provincial Government. For revenue realization the terms used and in vogue are tax, charge, fee and duty.

A tax is a compulsory extraction or a contribution imposed by a sovereign authority or required by the general body of the subjects or citizens.

(vi) **Supreme Court on Words & Phrases by Justice M. L. Singhal**

“**Tax**” A charge or fee, if levied for the purpose of raising revenue under the taxing power is a “tax”. Similarly, imposition of fees for the primary purpose or “regulation and control” may be classified as fees as it is in the exercise of “police power”, but if revenue is the primary purpose and regulation is merely incidental, then the imposition is a “tax”. A tax is an enforced contribution expected pursuant to a legislative authority for purpose of raising revenue to be used for public or governmental purpose and not as payment for a special privilege or service rendered by a public officer, in which case it is a “fee”. Generally speaking “taxes” are burdens of a pecuniary nature imposed for defraying the cost of governmental functions, whereas charges are “fees” where they are imposed upon a person to defray the cost of particular services rendered to his account.

9. After having examined the definitions of term ‘**tax**’ and ‘**fee**’ separately, as defined in various dictionaries as referred to hereinabove, it will be equally beneficial to examine the **distinction** between two terms as defined in the following dictionaries:-

(i) **Legal Terms & Phrases 2006 Edition by M. Ilyas Khan**

**Tax and Fee:- Tax is compulsory exaction of money by public authority for public purposes enforceable by law.** (PLD 1977 Kar. 742, 1986 CLC 533, 1990 CLC 550, NLR 1994 Tax 114). In contrast, **a fee is a sort of consideration for the services rendered, which necessitate that there should be an element of quid pro quo.** Therefore co-relationship must exist between the fee charged and services rendered against it, like parking fee. (PLD 1997 Kar. 604, 1990 CLC 197 and 638, 1998 SCMR 1402). It is, however, not

necessary those services mathematically are proportionate or equal with the benefit to the person charged or necessarily is uniform. **At the same time it may not be excessively disproportionate.**

(ii) **Wharton's Law Lexicon Dictionary (Fifteenth Edition)**

**Tax and fee:-** It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; **but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it.**

**Tax and fee:** A tax is a compulsory exaction of money by a public authority for public purposes enforceable by law and is not payment "for services rendered"..... **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 to individuals by some governmental agency.

(iii) **Judicial Dictionary 13<sup>th</sup> Edition K J Aiyar**

**Tax and Fee:-** It follows, therefore, that although a tax may be levied upon particular classes of persons or particular kinds of property, it is imposed not to confer any special benefit upon individual persons and the collections are all merged in the general revenue of the state to be applied for general public purposes. **Tax is a common burden and the only return which the tax-payer gets is participation in the common benefits of the state.** Fees, on the other hand, are payments primarily in the public interest, **but for some special service rendered or some special work done for the benefit of those from whom the payments are demanded. Thus, in fees, there is always an element of quid pro quo which is absent in a tax.**

10. After having referred to the various definitions of the term 'tax', 'fee' and **distinction** between them as defined in various dictionaries, we would now refer

to various judgments of the Hon'ble Supreme Court of Pakistan, High Courts and judgments of Foreign Jurisdiction whereby the term 'tax', 'fee', their scope and jurisdiction as well as **distinction** between them has been dealt with judicially as follows:

- (i) In the case of **Collector of Customs and others v. Sheikh Spinning Mills 1999 SCMR 1402**, A Full Bench of Hon'ble Supreme Court of Pakistan vide their common judgment in number of identical appeals while examining the validity of levy of service charges under Section 19-B in the Customs Act, 1969 has elaborately defined the distinction between terms 'tax' and 'fee' in the following manner:-

*“5.....The distinction between “tax” and “fee” lies primarily in the fact that a tax is levied as a part of common burden while a fee is paid for a special benefit or privilege. Fees confer a special capacity although the special advantage as for example, in the case of registration fee for documents or marriage licence is secondary to the primary motive or regulation in the public interest. Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit, which the individual receives. It is the special benefit accorded to the individual, which is the reason for payment in the case of fees. In the case of a tax, the particular advantage if it exists at all, is an incidental result of State action. “This distinction was elaborated” by a Division Bench of the Dacca High Court in the case reported as Abdul Majid and another v. Province of East Pakistan and others (PLD 1960 Dacca 502) and it was held unless the fee is embarked or specified for rendering services to the payee, it would amount to a tax and not a fee.”*

*“6. On the other hand the nature of tax is entirely different. The term “tax” was defined by Chief Justice Latham 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 services 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 a part of the common burden while a fee is a payment for special benefit or privilege. The same was followed by this Court in the case of M/s Sohail Jute Mills Ltd. v. Federation of Pakistan and M/s Nishat Textile Mills Ltd. v. Federation of Pakistan (supra).”*

*“8.....No doubt both tax and fee are compulsory exactions, 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. A tax is for the purpose and goes to the general revenue unlike fee. This view was also followed by the Indian Supreme Court in the case reported as The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamirar of Sri Shirpur Mutt (AIR 1954 SC 282)."*

*"16. To sum up in the light of the definition and distinction between 'tax' and 'fee' as demonstrated above, the service charge as levied by virtue of section 18-B, inserted into the Act through Tax Adjustment Ordinance, the charge is not a fee, because it is neither meant for benefit of payees nor its collection enables the Government to carry out expense, for the benefit of importer. The world has shrunk into a global village. With the advancement of information and media technology, the determination of prices is an easy task, and the quality of goods to be exported or imported can be checked through the machinery provided by the Customs Act."*

(ii) In the case of **Pakistan Burmah Sheel Ltd. v. Federation of Pakistan 1998**

**P.T.D. 1804**, it has been held as under:-

*"21. The expression "Money Bill" has been defined by clause (2) of Article 73 of the Constitution and paragraph (a) thereof indicates that a Bill dealing with the imposition, abolition, remission, alteration or regulation of any tax" would fall within the purview of the said definition. Paragraph (g) in the said clause further indicates that any matter incidental to above or any other paragraph of the said clause (not reproduced herein for the sake of brevity) would fall within the purview of the said definition. Article 73(1) of the Constitution which relates to the procedure with respect to money bills indicates that a money bill shall originate in the National Assembly and after it has been passed by the Assembly, it is to be presented to the President for his assent without the same being transmitted to the Senate. It may be pointed out that although Article 73 of the Constitution provides for a different procedure in respect of Money Bills but when the Bill has been passed by the National Assembly and it receives assent by the President, it will have effect like an Act of Parliament. The fact that the Money Bill was not transmitted to Senate, in no case places it at a lower pedestal when compared to any other Act passed by the Parliament."*

(iii) In the case of **Pakistan Flour Mills Association v. Government of Sindh**

**2003 SCMR 162**, the Hon'ble Supreme Court has held as follows:-

*"Admittedly if the pith and substance of the said Act is to be examined in view of the definition of "fee" and "tax" as defined by this Court in Collector of Customs and others v. Sheikh Spinning Mills (1999 SCMR 1402), the said imposition would be fees and not tax considering special services to be rendered by the respondents and the fact that collection of said fees being not appropriated by the Government for general revenue purposes but for the better regulation of the purchase and sale of agricultural produce and the establishment of markets and for proper admiration thereof within the province."*



(iv) In the case of **Messrs Mutual Funds Association of Pakistan (MUFAB) v. Federation of Pakistan 2010 P.L.C 306**, a Division Bench of this Court, while examining the validity of amendments through Finance Act, 2006 and 2008 in the Workers' Welfare Fund Ordinance, 1971 has decided the controversy in the following manner;

*“26. Reading of the above provisions indicates that firstly (i) imposition under the Workers' Welfare Fund Ordinance, 1971 is in the nature of a tax and not in the nature of fee because it is not a charge for service rendered or to be rendered and is certainly a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered, Muhammad Ismail and Co. v. Chief Cotton Inspector, PLD 1966 SC 388.*

*(ii) An entry in a Legislative List cannot be construed narrowly or in a pedantic manner but is to be given a liberal construction. It should be, as far as possible or permissible, interpreted in a manner so as to save the legislation rather than in a narrow manner so as to reduce as far as possible power of Parliament to legislate.*

*(iii) The only basis for determination of liability of an industrial establishment for payment of Workers' Welfare Fund is total income of the establishment. Under Entry 47 of the Part-I of the Federal Legislative List, taxes on income (other than agricultural income) is a federal subject.*

*(iv) It cannot be held that the Legislature can impose a tax on income only and only through the Income Tax Ordinance. If the Legislature through any other piece of law authorizes as compulsory exaction for public purpose without making rendering of his service a condition for a levy, such a levy, by whatever name called, would be a tax on income.”*

*27. Therefore, in our opinion the amendment incorporated in the Workers' Welfare Fund Ordinance, 1971 by the Finance Act, 2008 is also a financial amendment as it imposes a sort of tax on income of establishments including the petitioner. Admittedly the taxes on income, other than agricultural income, is within the legislative competence of the Parliament under Item 47 of Part-I of the Federal Legislative List contained in the Fourth Schedule. Therefore its adoption on a money bill is not ultra-vices of the Constitution.”*

11. It will not be out of place to refer to the judgments of the Hon'ble Supreme Court and High Courts whereby the principles of interpretation of taxing

statute and construction of the constitutional provisions as well as the legislative competence of the State to impose various levies have been defined.

**(a) Messrs Elahi Cotton Mills Ltd v. Federation of Pakistan PLD 1997 SC 582.**

*“Since this power is contained in our Constitution, our approach while interpreting the same should be dynamic, progressive and oriented with the desire to meet the situation, which has arisen, effectively. **The interpretation cannot be narrow and pedantic but the Court’s efforts should be to construe the same broadly, so that it may be able to meet the requirement of ever changing society.** The general words cannot be construed in isolation but the same are to be construed in the context in which they are employed. In other words, their colour and contents are derived from their context.”*

16. We may point out that in a Federal Constitution like we have in Pakistan, the legislative power is distributed between the Provincial and the Federal Legislatures. With that view legislative lists are prepared. The entries contained therein indicate the subjects on which a particular Legislature is competent but they do not provide any restriction as to the power of the Legislature concerned. It can legislate on the subject mentioned in any entry so long as it does not transgress or encroach upon the power of the other Legislature and also does not violate any fundamental right as the Legislative power is subject to constraints contained in the Constitution itself. **It is also a well-settled proposition of law that an entry in a legislative list cannot be construed narrowly or in a pedantic manner but it is to be given liberal construction. In this behalf reference may be made to the following cases;**

- (i) Assistant Commissioner of Land Tax, Madras, and others v. Buckingham and Carnatic Co. Ltd. (1970) 75 ITR 603;

*in which the facts were that the Madras Urban Land Tax Act, 1966, imposed a tax on urban land at a percentage of the market value. The above Act was enacted by the State Legislature pursuant to the power contained in entry 49 of List II of Schedule VII to the Constitution of India. The same was impugned in the Madras High Court to declare the provisions of the aforesaid Act as ultra vires. The matter was brought before the Indian Supreme Court by the Revenue Authorities. The Supreme Court while setting aside the judgment of the Madras High Court made the following observations as to how the entries in the legislative list are to be interpreted:-*

***“The legislative entries must be given a large and liberal interpretation, the reason being that the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere simplex enumeratio of broad categories. We see no reason therefore, for holding that entries 86 and 87 or List I preclude the State Legislature from taxing capital value of lands and buildings under entry 49 of List II. In our opinion there is no conflict between entry 86 of List I and entry 49 of List II.***

*The basis of taxation under the two entries is quite distinct. As regards entry 86 of List I the basis of the taxation is the capital value of the asset. It is not a tax directly on the capital value of assets of individuals and companies on the valuation date. The tax is not imposed on the components of the assets of the assessee. The tax under entry 86 proceeds on the principle of aggregation and is imposed on the totality of the value of all the assets. It is imposed on the total assets which the assessee owns and in determining the net wealth not only the encumbrance specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account. In certain exceptional cases, where a person owes no debts and is under no enforceable obligation to discharge and liability out of his assets it may be possible to break up the tax which is leviable on the total assets into components and attribute a component to lands and buildings owned by an assessee. In such a case, the component out of the total tax attributable to lands and buildings may in the matter of computation bear similarity to a tax on lands and buildings levied on the capital or annual value under entry 49, list II. But in a normal case a tax on capital value of assets bears no definable relation to lands and buildings which may or may not form a component of the total assets of the assessee.”*

- (ii) The Elel Hotels and Investments Ltd., and another v. Union of India AIR 1990 SC 1664.

*In the above case validity of the Hotel Receipts Tax Act (1980), which imposed a special tax on the gross receipts of certain category of hotels, was imposed through a batch of writ petitions under Article 32 of the Indian Constitution directly before the Supreme Court of India on the ground of lack of legislative competence and violation of Articles 14 and 19(1) (g) of the Indian Constitution. **The Supreme Court while dismissing the aforesaid writ petition and upholding the validity of the aforementioned Act made the following observations as to the interpretation of entry 82 of Legislative List I of the Indian Constitution (which corresponds to entry 47 of our Constitution):-***

*“6. On a consideration of the matter, we are of the opinion that the submissions of the learned Attorney-General as to the source of the legislative power to enact a law of the kind in question require to be accepted. The word “income” is of elastic import. In interpreting expressions in the legislative lists a very wide meaning should be given to the entries. In understanding the scope and amplitude of the expression “income” in Entry 82, List I, any meaning which fails to accord with the plenitude of the concept of “income” in all its width and comprehensiveness should be avoided. The cardinal rule of interpretation is that the entries in the legislative lists are not to be read in a narrow or*

*restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. **The widest possible construction, according to the ordinary meaning of the words in the entry, must be put upon them. Reference to legislative practice may be admissible in reconciling two conflicting provisions of rival legislative lists. In construing the words in a Constitutional document conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude.***

34. *Keeping in view the above case-law and the treatises and the aforesaid legal Inferences drawn therefrom, we may now revert to the question of vires of impugned sections. **It may again be observed that the power to levy taxes is a sine qua non for a State. In fact it is an attribute of sovereignty of a State. It is mandatory requirement of a State as it generates financial resources which are needed for running a State and for achieving the cherished goal, namely, to establish a welfare State. In this view of the matter, the Legislature enjoys plenary power to impose taxes within the framework of the Constitution. It has prima facie power to tax whom it chooses, power to exempt whom it chooses, power to impose such conditions as to liability or as to exemption as it chooses, so long as they do not exceed the mandate of the Constitution. It is also apparent that the entries in the Legislative List of the Constitution are not powers of legislation but only fields of legislative heads. The allocation of the subjects to the lists is not by way of scientific or logical definition but by way of mere simple enumeration of broad catalogue. A single tax may derive its sanction from one or more entries and many taxes may emanate from one single entry. It is needless to reiterate that it is a well-settled proposition of law that an entry in the Legislative List must be given a very wide and liberal interpretation. The word "income" is susceptible as to include not only what is in ordinary parlance it conveys or it is understood, but what is deemed to have arisen or accrued. It is also manifest that income-tax is not only levied in the conventional manner i.e., by working out the net income after adjusting admissible expenses and other items, but the same may also be levied on the basis of gross receipts, expenditure etc. There are new species of income-tax, namely, presumptive tax and minimum tax.***

*Additionally, while examining a fiscal statute the Court should not be carried away with the fact that the same may be disadvantageous to some of the tax-payers. If such a fiscal statute is beneficial to the country on the whole, the individuals interest should yield to the nationals interest.*

**(b) Sohail Jute Mills Ltd. v. Federation of Pakistan PLD 1991 SC 329**

*"10. It is correct that 'Iqra' has the dictionary meaning as suggested. It is also correct that Education as such is not mentioned either directly or indirectly in the Federal Legislative*

List or the Concurrent Legislative List. What is contained in the Federal Legislative List at serial No.16 is “Federal agencies and institutes for the following purposes, that is to say, for research, for professional or technical training, or for promotion of special studies”. At serial No.17 in the same List is mentioned “Education as respects Pakistani students in foreign countries and foreign students in Pakistan.” In the Concurrent Legislative List at serial No.38 exists the entry “Curriculum, syllabus, planning, policy, centres of excellence and standards of education.” These entries do not cover the field of adult literacy which was suggested by the use of the word ‘Iqra’. **This argument fails on two points. Firstly, the charging sections consistently mention it as additional customs duty. Not only in name but in substance too it is customs duty because it has been levied on the import of goods, has reference to goods specified in the First Schedule to the Customs Act, 1969 and the value of the goods is to be determined under section 25 of the Customs Act, 1969. At serial No.43 of the Federal Legislative List is mentioned “duties of customs, including export duties.” In Halsbury’s Laws of England, Volume 12, 4<sup>th</sup> edition, Para 501, page 65, contains the following recital of law:-**

“Duties of customs, or customs duties, in the strict sense are pecuniary charges or tolls payable upon goods exported from, or imported into the country, as contrasted with excise duties which are payable upon goods produced and consumed within the country.”

**In Corpus Juris Secundum, Volume 25 at page 140 it is mentioned that “customs duties are taxes assessed on merchandise imported from or exported to a foreign country.”**

**( c ) Syed Nasir Ali v. Pakistan 2010 PTD 1924**

“30. A perusal of the above section reveals that income tax shall be imposed at the rates specified in the first Schedule. We have already come to the conclusion that the legislature has the legislative competence under Entry 47 of the Constitution to declare a levy as a tax on certain persons. We have also reproduced the definition of tax and pointed out in earlier part of this judgment that this definition is very exhaustive and may bring charge of any kind including tax on tax within its ambit. The imposition of IDPT by way of bringing the same by adding either a proviso or otherwise would therefore become secondary as long as the same is within the legislative competence to enact it and falls within the definition of tax. Thus in our opinion a valid charge has been created and in view of the explicit decision given by the Apex Court in Sohail Jute Mills’ case and by this Court in the case of Fauji Foundation the introduction of IDPT has become a part and parcel of the normal tax hence the same does not suffer from any legal infirmity. Furthermore, a perusal of the said proviso would reveal that the intention of the Legislature is to treat the IDPT as “income tax”. Hence, if section 4 of the Ordinance is read in conjunction with the newly added proviso, there would be no ambiguity so far as the introduction of IDPT by way of adding a proviso is concerned. Therefore, we are of the

*opinion, that imposition of IDPT is a valid piece of legislation and does not require any interference of this Court.”*

12. The purpose of referring to the definitions of ‘**tax**’ and ‘**fee**’ and their **distinction** as defined in various dictionaries and the judgments of the Superior Courts is to comprehend and define the concept and scope of ‘tax’ and ‘fee’ and also to examine the legislative competence to introduce amendments in various levies under the Constitution through Money Bill (Finance Act). From perusal of the above referred definitions and the case law following conclusion can be drawn:

- (i) That in view of wide variety of diverse economic criteria, which are to be considered for the formulation of a fiscal policy, Legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events etc. for taxation. But with all this latitude certain irreducible desiderata of equality shall govern classification for differential treatment in taxation law as well.
- (ii) That Courts while interpreting laws relating to economic activities view the same with greater latitude than the laws relating to civil rights such as freedom of speech, religion etc., keeping in view the complexity of economic problems which do not admit of solution through any doctrinaire or strait jacket formula as pointed out by Holmes, J. in one of his judgments.
- (iii) That Frankfurter J., in *Morey v. Doud* (1957) U.S. 457 has remarked that “in the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to the legislative judgment”.
- (iv) That while interpreting Constitutional provisions Court should keep in mind, social setting of the country, growing requirements of the society/nation, burning problems of the day and the complex issues facing the people, which the Legislature in its wisdom through legislation seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid.
- (v) That the law should be saved rather than be destroyed and the Court must lean in favour of upholding the constitutionality of a legislation keeping in view that the rule of Constitutional interpretation is that there is a presumption in favour of the constitutionality of the legislative enactments unless ex facie it is violative of Constitutional provision.

- (vi) That what is not “income under the Income Tax Act can be made “income” by Finance Act. An exemption granted by the Income Tax Act can be withdrawn by the Finance Act or the efficacy of that exemption may be reduced by the imposition of a new charge, of course, subject to Constitutional limitations.
- (vii) That the taxing power is unlimited as long as it does not amount to confiscation and that the Legislature does not have the power to tax to the point of confiscation.
- (viii) That income-tax is a tax on a person in relation to his income. It is a tax imposed upon a person (natural or juristic) in relation to his income.
- (ix) That there is a clear distinction between the subject-matter of a tax and the standard by which the amount of tax is measured keeping in view the practical difficulties, which are encountered by the Revenue to locate the persons and to collect the tax due in certain trades, if the Legislature in its wisdom thought that it would facilitate the collection of tax due from specified traders on a presumptive basis, the same is not violative of the Fundamental Right relating to equality.
- (x) Tax is compulsory exaction of money by public authority for public purposes enforceable by law. In contrast, a fee is a sort of consideration for the services rendered, which necessitate that there should be an element of quid pro quo. Therefore co-relationship must exist between the fee charged and services rendered against it, like parking fee. It is, however, not necessary those services mathematically are proportionate or equal with the benefit to the person charged. At the same time it may not be excessively disproportionate.
- (xi) Tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it.
- (xii) 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 to individuals by some governmental agency.
- (xiii) Tax is a common burden and the only return which the taxpayer gets is participation in the common benefits of the state. Fees, on the other hand, are payments primarily in the public interest, but for some special service rendered or

some special work done for the benefit of those from whom the payments are demanded. Thus, in fees, there is always an element of quid pro quo which is absent in a tax.

- (xiv) The distinction between “tax” and “fee” lies primarily in the fact that a tax is levied as a part of common burden while a fee is paid for a special benefit or privilege.
- (xv) No doubt both tax and fee are compulsory exactions, 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.
- (xvi) The expression “Money Bill” has been defined by clause (2) of Article 73 of the Constitution and paragraph (a) thereof indicates that a Bill dealing with the imposition, abolition, remission, alteration or regulation of any tax” would fall within the purview of the said definition.

13. The word **taxation and tax** have been defined in Article 260(1) of the Constitution which reads as under:-

“Article 260(1) “taxation” includes the imposition of any tax or duty, whether general, local or special, and “tax” shall be construed accordingly.”

Plain reading of the above Article shows that constitution has given widest amplitude to the word “**taxation**”, it is an inclusive definition instead of exhaustive in nature. Duties of all types have been included in its scope, therefore, if levy under WWFO can be said to be a “duty” then it would fall within the meaning and scope of word taxation as used in Article 73(2) (a). As the word tax is required to be construed accordingly, therefore, the definition of tax is to be given widest meanings and any levy which has attributes of a tax may fall in its ambit irrespective of name & nomenclature or ultimate use of the fund generated through the particular statute.

14. In terms of the Constitutional mandate and Federal Consolidated List, the government can levy various taxes on items and activities to raise revenue to finance the government operations. When one earns money one pays income tax, when one spends money he pays sales tax, and when one owns real estate he pays property tax. Similarly, when one buys specific products he pays excise tax. In most of the cases the revenue collected through various taxes goes into the government’s general fund, where it can be used for whatever proposes, the



Government think is best. On the other hand, Government impose levy on some specified services in order to cover government's specific cost of providing those services. For instance postage stamp fee covers cost of providing mail services, a bridge toll (fee) covers the cost of maintaining the bridge. Fee is always levied on services rendered by government to its payer. In other words, **quid pro quo** is an essential ingredient which brings a levy within the definition of term '**fee**'. A fee can be regarded as a charge or payment for a service rendered by the government to its payer. If one wants to utilize a service available with the Government against a charge of money then upon its utilization whatever is required to be paid is a "fee". If the charge of money by Government is not against a service provided by the Government, then such levy cannot be termed as fee. Fee cannot be regarded as a general levy or impost as it is meant for those who want to avail the benefit of the services provided by the Government. In case of imposition of parking fee, parks fee, tuition fee, registration fee, license fee etc., the direct beneficiary of such payment is the person who pays it and gets reciprocated, though not in exact terms, the benefit out of such payment. Whereas **tax** is not co-related to a particular service to be provided by the Government to the taxpayers. Tax in fact is a compulsory exaction of money by public authority for public purposes enforceable by law and is not a payment for services rendered.

15. From perusal of the definitions as given in the various dictionaries as referred to herein above and the judgments of the superior Courts, it has emerged that the legislature has vast powers under the Constitution to impose various taxes on its subject by whatever nomenclature, however, within the Constitutional domain. The legislative competence of the Government to raise funds though imposition of various taxes is required to be jealously guarded instead of making an attempt to declare a taxing statute ultra vires. Keeping in view the mandate of State to levy taxes, and after having examined the scope, nature and attributes of the terms tax and fee, we may now examine on the above thresh hold, the nature and characteristics of Workers' Welfare Fund.

16. Section 4 of Workers' Welfare Fund Ordinance, 1971, provides for creation of the **charge** of Workers' Welfare Fund upon Industrial Establishments. The Workers' Welfare Fund is a charge on the **income** of industrial establishments, if not less than Rs.5,00,000/- (Rupees Five Lac) in any year of account, at the rate of 2% of the total income of the industrial establishment. Workers' Welfare Fund Ordinance, 1971 is in fact the primary legislation which provides for the creation of **charge** of the levy, whereas its **assessment and collection** has been provided under the Income Tax Ordinance, 2001. Imposition of Workers' Welfare Fund @ 2% on the total income of the industrial establishment where income exceeds Rs.500,000/- (Rupees Five Lac) is treated as a liability of income tax of such industrial establishment in terms of section 5 of Workers' Welfare Fund Ordinance, 1971. It is a compulsory exaction of money by the government from all industrial establishments having an income of Rs.5,00,000/- (Rupees Five Lac) or more in any year of account, **irrespective of the fact that neither it is a charge for providing any services**, whatsoever, by the government to its payers i.e. the **industrial establishment**, nor the said amount is meant to be utilized for the **benefit of its payer i.e. the industrial establishment**. On the contrary, Section 6 of Workers' Welfare Fund Ordinance 1971, provides that the said payment may be utilized for the benefit of the **workers** for providing them housing facility etc., therefore, the element of **quid pro quo**, which is a prerequisite in case of **fee**, is totally missing in the case of Workers' Welfare Fund.

17. We may observe that reference to the provisions of Section 6 of the Workers' Welfare Fund by the petitioners, **which is not the charging section** of Workers' Welfare Fund Ordinance, 1971 is misconceived, as it **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. The term '**fund**' as defined under section 3(2) of the Workers' Welfare Fund Ordinance, 1971 includes;-

- (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 & 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 Profit (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 and properties and assets acquired from out of the Fund, and
- (e) proceeds of loans raised by the Governing Body.

18. In order to examine the distinction between various ingredients of the **fund** as referred to hereinabove, it will be advantageous to refer to **Schedule-A** to the Ordinance in Chapter-1 under the heading “**RECEIPTS**” which describes various heads under the receipts of the fund as under:

1. **Tax received under section 4**
2. **Tax received under section 4A**
3. Voluntary Contributions (Cash)
4. Contributions/grants made by the Federal Government/Provincial Governments
5. Income from Investments in

19. It may be seen from hereinabove construction of the Fund that legislature has distinctly defined the revenue charged and received under Section 4 and 4A of the Ordinance as “**tax received u/s 4**” and “**tax received u/s 4A**”. Both the above collections are to be credited to account heads 1 & 2 respectively. Whereas voluntary contributions, contributions by Federal and Provincial Governments and income from investments have been assigned separate heads of accounts (3, 4 & 5 respectively). Both these levies have been kept separate from other collections of funds (which is further verified by the Budget documents submitted by the respondents during the course of hearing). Even otherwise, it refers to the application of the amount of fund to the benefit of **workers** and not to its **payer** i.e. Industrial Establishment. If the provisions of Workers’ Welfare Fund

Ordinance, 1971, are examined in harmony, it can safely be concluded that the legislature has imposed a 'tax' in the nomenclature of Workers' Welfare Fund, upon the total income of Industrial Establishments, if not less than Rs.5,00,000/- in respect of any year of account at the rate of 2% of its total income to be assessed and collected by the Taxation Officer having jurisdiction over the case of Industrial Establishments. It is pertinent to note that in the Workers' Welfare Fund Ordinance, 1971, nowhere, the legislature has used the word **fee**, nor the levy is for providing any services to its payer. Similarly, the amount so collected, in no manner, is 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 Workers' Welfare Fund, which is not only a basic attribute, rather a pre-requisite, for a levy to be termed as 'fee'. After having examined the above provisions of WWFO it becomes clear that levy under the WWFO has all the attributes of tax, whereas the legislature has also treated the same as Tax as evident from Schedule 'A' to the WWFO, 1971, whereas the revenue received under this head is kept in separate & distinct accounts.

20. As regards contention of the counsel for petitioners that "preamble" restricts the scope or defines the purpose of a Statute, appears to be misconceived. The preamble can be used as an aid to ascertain the purpose of legislation, but it does not determine the scope or validity of any statute. In taxing statute, the provision relating to **chargeability of the levy** determine the jurisdiction and scope of such levy. The charging provision not only defines the mandate of the levy but also the subject from whom such levy is to be charged and collected. In Workers' Welfare Fund Ordinance, 1971, sections 4 and 4A are the charging provisions whereby a tax in the nomenclature of Workers' Welfare Fund has been imposed on the income of industrial establishments whose income is not less than Rs.5,00,000/- (Rupees Five Lac) for the year of account, at the rate of 2% of such income, to be assessed and collected by the Taxation Officer having jurisdiction over the case of the industrial establishment. Therefore, the **charge** of Workers'

Welfare Fund has no nexus with the purpose as defined in Section 6 nor its scope or application can be restricted or determined by referring to preamble of the Ordinance alone.

21. Petitioners' contention that the levy under the WWFO has a specific purpose and a name, which are determinative of its character is not supported by the judgment of the Hon'ble Supreme Court of Pakistan in the case of *M/s. Sohail Jute Mills Ltd reported as PLD 1991 SC 329*, wherein their Lordships, after having examined this aspect of the matter in detail, held that a particular name or nomenclature or purpose were not determinative of the true character of the levy which is to be decided on the pith and substance of the law. Their Lordships held that Iqra Surcharge was a special surcharge on imports & Federal Government was competent for this legislation.

Similarly, in the case of *Syed Nasir Ali v. Pakistan 2010 PTD 1924*, a Division Bench of this Court has declared a specific purpose levy i.e. IDPT as a valid piece of legislation by treating the same as a tax, inspite of the fact that it was imposed for the purposes of rehabilitation of internally displaced person. Hence the contention of the petitioner that since the WWF is for specific purpose and cannot be treated as tax is, therefore, devoid of any merit.

Keeping in view the legal position as discussed above, when the provisions of Workers' Welfare Fund Ordinance, 1971, are examined, more particularly, section 2(c), 2(ff), 2(i), 3, 4, 5, 6 and Schedule 'A' to Chapter I of the Ordinance, the irresistible conclusion would be, that levy of Workers' Welfare Fund has all the attributes of **tax** and not of a **fee**.

22. Counsel for the petitioners in support of their contention heavily placed reliance in the case of *East Pakistan Chrome Tannery (P.) Ltd. v. Federation of Pakistan 2011 P.T.D 2643*, whereby the learned Single Judge of Lahore High Court has held *that Workers' Welfare Fund is a fee and not tax mainly on the ground that since it is a levy for specific purpose in terms of section 6 of the*

*Workers' Welfare Fund and is to be used for the residential accommodation and benefits to the workers, whereas it is not for general purposes and does not go to the Federal Consolidated Fund, therefore, it cannot be regarded as a tax.*

23. We may observe that the learned Single Judge of Lahore High Court, who has had the benefit to go through with the judgment of a Division Bench of this Court on the subject controversy in the case of *Messrs Mutual Funds Association of Pakistan v. Federation of Pakistan 2010 PTD 306* did not resort to harmonious construction of the provisions of Workers' Welfare Fund Ordinance, particularly the charging provisions, hence could not reconcile the same and reached to an erroneous conclusion. While holding that Workers' Welfare Fund is a fee and not tax, the learned Judge has given more emphases to one of the attributes i.e. specific purpose, whereas, he could not appreciate that the other two basic ingredients i.e. "fee is charged for providing services and reciprocate benefit to its payer" are totally missing in the case of Workers' Welfare Fund. The settled legal position as emerged from above referred judgments is that in order to determine as to whether a levy is tax or fee, all the attributes and characteristics as referred to hereinabove are to be taken into consideration collectively and not in isolation. The learned Single Judge also overlooked that in terms of Section 6 of Workers' Welfare Fund Ordinance, the application of the moneys received in the fund is for the benefit of the **workers** and not, even remotely, for the benefit of its **payer** i.e. industrial establishment. The levy infact is an additional burden upon the industrial establishment, over and above the charge of income tax, to be paid @ 2% of the total income. Accordingly, we are not in agreement with the finding as recorded by the learned Single Judge of Lahore High Court in the above cited case, as it does not depict the correct legal position. Whereas, we are inclined to agree with the finding on the subject controversy as recorded by the learned Division Bench of this Court in the case of *Messrs Mutual Funds Association of Pakistan v. Federation of Pakistan 2010 PTD 306*, however, for our own reasons as recorded hereinabove.

24. For the aforesaid reasons, we hold that the Workers' Welfare Fund charged in terms of Section 4 and 4A on the income of industrial establishments exceeding Rs.5,00,000/- (Rupees Five Lac) in the year of account at the rate of 2% of its total income to be assessed and collected by the Taxation Officer having jurisdiction over the case of the industrial establishment is a **tax** as it contains all the attributes and characteristics of tax. Consequently, the amendments introduced in the Workers' Welfare Fund Ordinance, 1971 through Finance Act, 2006 and 2008 respectively (Money Bills) do not suffer from any constitutional or legal infirmity. The question referred to this bench is answered accordingly.

***JUDGE***

***JUDGE***

***JUDGE***

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

Const. Petition Nos.D-2753 to 2756 of 2009, 3521, 2688, 3618,  
06, 452, 1394, 115, 367, 427, 439, 440 of 2010,  
495, 589, 590,609, 548, 660 and 557 of 2011

**Present**

Mr. Justice Faisal Arab

Mr. Justice Sajjad Ali Shah

Mr. Justice Aqeel Ahmed Abbasi.

M/s Shahbaz Garments (Pvt) Ltd. & others.....Petitioners

Versus

Pakistan, through Secretary and others.....Respondents

Petitioners:

through M/s Dr. Muhammad Farogh Naseem, Rashid Anwar, M. Anas Makhdoom, Anwar Kashif Mumtaz, Naveed A. Andrabi, Khalid Javed Khan, Khalid Mehmood Siddiqui, Ghulam Murtaza, Lubna Pervez, Abid Shahban, Junaid Farooqi, Muhammad Rafi Kamboh, Kazim Hasan, Abdul Rahim Lakhani, Aminuddin Ansari, Ali Mumtaz Shaikh, Abdul Hameed Kazi, and Muhammad Adanan, advocates.

Respondents:

through Mr. Amjad Javed Hashmi, advocate assisted by Dr. Tariq Masood, Additional Commissioner (Legal), Mr. M. Asif Mangi, Standing Counsel, Mr. M. Sarwar Khan, Addl.A.G, Chaman Lal, S. Mohsin Imam and S. Riazuddin

Date of hearing : 10.12.2012

Date of judgment : .02.2013

**J U D G M E N T**



