IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE NASIR-UL-MULK
MR. JUSTICE AMIR HANI MUSLIM
MR. JUSTICE MUHAMMAD ATHER SAEED

CIVIL APPEAL NOS. 1540-1599 OF 2013
AND
CIVIL APPEAL NO.21 OF 2014
(On appeal from the judgment/order of the Peshawar High Court, Peshawar dated 13.6.2013 in Writ Petition Nos.2582-P, 2880-P, 2457-P, 2546-P, 2578-P, 2653-P, 2804-P, 3050-P, 3156-P, 2654-P, 2579-P, 2750-P, 2831-P, 3022-P, 3023-P, 3089-P, 2454-P, 2455-P, 2459-P, 2738-P, 2740-P, 2801-P, 3051, 2581-P, 2583-P, 2584-P, 2613-P, 2728-P, 2802-P, 3087-P, 2456-P, 2523-P, 2585-P, 2611-P, 3380-P, 3088-P, 3090-P, 2577-P, 2580-P, 2739-P, 2881-P, 2941-P, 2976-P, 3270-P, 2612-P, 2911-P, 2913-P, 2940-P, 2987-P, 3104-P, 3228-P, 2395-P, 2424-P, 2910-P, 2974, 3214-P, 3227-P, 3229-P, 3271-P, 2514-P/12 and judgment dated 24-10-2013 passed by Peshawar High Court, Abbottabad Bench in Writ Petition No.788-A/2012)

Federation of Pakistan through the Secretary
M/o Petroleum & Natural Resources & another (in all cases)
...Appellants

VERSUS

Durrani Ceramics & others (in CA 1540/13)
M/s Zam Zam CNG Filling Station & others (in CA 1541/13)
Khyber Match & others (in CA 1542/13)
M/s T.K.M. Enterprises, Peshawar & others (in CA 1543/13)
Libra (Pvt) Ltd & others (in CA 1544/13)
Al-Jasmin (Pvt) Ltd & others (in CA 1545/13)
M/s Khyber Electric Lamps & others (in CA 1546/13)
M/s Kumail CNG Filling Station & others (in CA 1547/13)
M/s Brightex Industries (Pvt) Ltd & others (in CA 1548/13)
Ashraf Match Factory (Pvt) Ltd & other (in CA 1549/13)
Swat Tyre & Rubber Co. (Pvt) Ltd & others (in CA 1550/13)
Frontier Ceramics Ltd & others (in CA 1551/13)
AR Processing Industries (Pvt) Ltd & others (in CA 1552/13)
M/s Diamond Filling & CNG Station & others (in CA 1553/13)
M/s Gas Centre II CNG Station & other (in CA 1554/13)
M/s Capital CNG Station & others (in CA 1555/13)
Royal Textile Mills Ltd & others (in CA 1556/13)
Sarhad Textile Mills Ltd & others (in CA 1557/13)
Lahore Steel Mills & others (in CA 1558/13)
M/s Taj Vegetable Oil Processing Units (Pvt) Ltd etc. (in CA 1559/13)
M/s Gateway CNG Filling Station & others (in CA 1560/13)
M/s Enem Multi Textile (Pvt) Ltd & others (in CA 1561/13)
M/s Green Hill CNG Station (Pvt) Ltd & others (in CA 1562/13)

M/s A.G.E. Industries (Pvt) Ltd & others	(in CA 1563/13)
Premier Formica Industries Ltd & others	(in CA 1564/13)
S.S. Polypropylene (Pvt) Ltd & others	(in CA 1565/13)
Swat Ceramics Company (Pvt) Ltd & others	(in CA 1566/13)
M/s Peshawar Chemical Industries & others	(in CA 1567/13)
M/s Mohsin Match Factory (Pvt) Ltd & others	(in CA 1568/13)
Swat CNG Station, Swat & others	(in CA 1569/13)
Frontier Foundry (Pvt) Ltd & others	(in CA 1570/13)
M/s A.J. Textile Mills Ltd & others	(in CA 1571/13)
M/s M.K.B. Enterprises (Pvt) Ltd & others	(in CA 1572/13)
M/s I.T.H.F.Z. Mills Ltd & others	(in CA 1573/13)
M/s United Rubber (Pvt) Ltd & others	(in CA 1574/13)
M/s Power Tech CNG Filling Stations & others	(in CA 1575/13)
M/s Behram CNG Station & others	(in CA 1576/13)
M/s Bilour Industries (Pvt) Ltd & others	(in CA 1577/13)
United Rubber (Pvt) Ltd & others	(in CA 1578/13)
M/s Super Taj CNG Station & others	(in CA 1579/13)
M/s Peshawar II CNG Filling Station & others	(in CA 1580/13)
M/s Blue Tee Filling Station & others	(in CA 1581/13)
M/s Super CNG & others	(in CA 1582/13)
M/s Khurshid & Gul Brothers CNG Station & others	(in CA 1583/13)
M/s Gul Shahzada Enterprises (Pvt) Ltd & others	(in CA 1584/13)
M/s Daudzai CNG Filling Station & others	(in CA 1585/13)
M/s Wadud Woollen Mills Ltd & others	(in CA 1586/13)
M/s Yassrab CNG Filling Station & others	(in CA 1587/13)
M/s Asim CNG Station & others	(in CA 1588/13)
Daudsons Industries (Pvt) Ltd & others	(in CA 1589/13)
M/s Shabqadr CNG Filling Station & others	(in CA 1590/13)
M/s Hafeez Iqbal Oil Ghee (Pvt) Ltd & others	(in CA 1591/13)
M/s Rehman Cotton Mills Ltd & others	(in CA 1592/13)
M/s Alam Match (Pvt) Ltd & others	(in CA 1593/13)
M/s Aman CNG & others	(in CA 1594/13)
Khushal CNG Filling Station & others	(in CA 1595/13)
All Pakistan CNG Association (KPK Zone) & others	(in CA 1596/13)
M/s Shah's-III CNG Station & others	(in CA 1597/13)
M/s Al Hafiz CNG-II Fillion Station & others	(in CA 1598/13)
Ashraf Industries (Pvt) Ltd, Peshawar & others	(in CA 1599/13)
Frontier Dextrose Ltd. and others	(in CA 21/14)

...Respondents

For the Appellants: Mr. Salman Aslam Butt, AGP.
Mr. Muhammad Waqar Rana, ASC.
Assisted by:
Sardar Dil Nawaz Cheema, Advocate.
Mr. Nazir Malik, Director(Law) M/o Petroleum.
Mr. Hassan Mehmood, Director (Gas),
AND
Mr. Salman Akram Raja, ASC.
Assisted by:
Mr. Husnain Arshad, Mr. Bilal Bashir,
Ms. Zainab Qureshi, Neshay Aqueel, and
Mr.Muhammad Shakeel Mughal, Advocates.

For Respondent No.4: Mr. Abid S. Zuberi, ASC.
(in CA 1540/13): Assisted by:
Mr. Ayan Memon and M. Munir Khan, Advocates.

For Respondent-5:
(in CA 1540/13): Mr. Ahmed Nawaz Chaudhry, AOR/ASC

For Respondents 4-29
(in CA 1541/13): Syed Iftikhar Hussain Gillani, Sr. ASC.
Assisted by Mr.Saad Buttar, Advocate

For Respondent-1:
(in CAs 1542,1544,1549,1551,
1558,1563-1565,1567,1568,
1570,1571,1577/13 and
For Respondent-2:
in CA 1568 &1592/13) Mr. Athar Minallah, ASC.

For Respondent-1,2:
In CA 1546/13: Mr. Atif Ali Khan, ASC.

For Respondent-1:
(in CAs 1552,1559/13 &
For Respondents 1,4-13
in CA 1591/13 &
For Respondent-7:
and CA 1592/13) Mr. Haroon-ur-Rashid, ASC.

For Respondent-1:
In CAs 1555,1580
and 1587/13 **&**
For Respondents-2:
In CAs 1553/13 **&**
For Respondents-1,2
In CAs 1554/13 **&**
For Respondents 6,15
In CAs 1560/13 **&**
For Respondents 1-5
In CAs 1562/13 **&**
For Respondents 1-15
In CAs 1569/13 **&**
For Respondent-2:
In CAs 1581, 1585/13 **&**
For Respondents-2-7:
In CAs 1588/13 **&**
For Res-1,2,3,7,9,10
In CA 1597/13: Mr. Makhdoom Ali Khan, Sr. ASC.
Assisted by:
Mr. Khurram Hashmi, Mr. Umair Malik,
Mr. Saad Hashmi, Mr. Tanveer Niaz,
Mr. Nader Mehboob,Mr. Zarnab & Shoaib**.**
Advocates.

For Respondent-1:
CA 1556-1557/13: Sardar Muhammad Ghazi, ASC.

For Respondent-7,8, and
Respondents 12-14,18
in CA 1560/13: Mr. Ijaz Anwar, ASC.

For Respondent-1:

in CAs 1572/13 &
For Respondent-1,3:
in CA 1592/13 Mr. Tasleem Hussain, AOR/ASC.

For Respondent-1:
in CA 1576/13: Mr. Tariq Mahmood, Sr. ASC.

For Respondent-6:
(in CA 1592/13) Syed Arshad Ali, ASC.

For the Respondents:
(in CAs 1543, 1545, 1547, 1548, 1550, 1561, 1562, 1566, 1569, 1573-1575, 1578, 1579, 1582-1584, 1586, 1589-1590, 1593-1596, 1598, 1599/13 & 21/14) N.R.

CMAs 970-972/14 in
CA 1540/13: Mr. Zulfiqar Khalid Maluka, ASC.

CMA 1066/14: Mr. Issac Ali Qazi, ASC.

CMA 1091/14: Mr. Ali Ahmed Khan Rana, ASC.

Date of Hearing: 12,14,17 to 19.02.2014 &
04 and 05.03.2014.

JUDGMENT

NASIR-UL-MULK, J.— The respondents are industrial concerns and owners of the Compressed Natural Gas (CNG) Filling Stations carrying on businesses in the Province of Khyber Pakhtunkhwa (KPK). They filed separate Constitution Petitions before the- Peshawar High Court, assailing the levy of Gas Infrastructure Development Cess (in short '**the Cess**') under the Gas Infrastructure Development Cess Act, 2011 (in short '**the GIDC Act**'), as amended from time to time.

2. The GIDC Act was introduced as a 'Money Bill' under Article 73 of the Constitution of Pakistan of 1973 for the stated purpose of collection of the 'Cess' for the construction of pipelines for importing natural gas and for equalization of gas prices with other imported fuels such as LNG from all gas consumers except the domestic consumers

and certain other exempted sectors (as provided in the Second Schedule to the GIDC Act). The GIDC Act received the assent of the President on 13.12.2011 and was notified in the Gazette of Pakistan vide Notification. The provisions relevant for the decisions of these appeals need to be reproduced in extenso. The term 'Cess' has been defined in Section 2(a) of the GIDC Act to mean:

> *"'……..the gas infrastructure development cess chargeable from gas consumers, other than the domestic sector consumers, of the company over and above the fixed sale price and payable under section 3;"*

Section 3 provides the following manner of payment and collection of the 'Cess':

> *"(1) The company shall collect and pay cess at the rates specified in the Second Schedule and in such manner as the Federal Government may prescribe.*
>
> *(2) A mark up at the rate of four percent above three months KIBOR prescribed by the Federal Government shall be payable on any amount due under sub-section (1), if the said amount is not paid within the prescribed time."*

The companies mandated to collect the 'Cess' have been mentioned in the First Schedule, with reference to its definition under Section 2(b) of the GIDC Act, 2011, as follows:

"1. Sui Northern Gas Pipelines Limited;
2. Sui Southern Gas Company Limited;
3. Mari Gas Company Limited;
4. Pakistan Petroleum Limited; and
5. Tullow Pakistan Development Limited.".

The Federal Government has been empowered under Section 7 of the GIDC Act to bring about amendments in the First Schedule. The 'Cess' rates as chargeable from the gas consumers under Section 3 (1) have

been provided in the Second Schedule to the GIDC Act. The purpose of the levy of the 'Cess' has been stated in Section 4 of the GIDC Act:

> *"**Utilization of cess.—** (1) The cess shall be utilized for or in connection with infrastructure development of Iran Pakistan Pipeline Project, Turkmenistan Afghanistan Pakistan India (TAPI) Pipeline Project, LNG or other projects or for price equalization of other imported alternative fuels including LPG.*
>
> *(2) An annual Report in respect of the utilization of the cess shall be laid before the House after three months of the end of the each fiscal year."*

3. After hearing the Federation, the High Court in W.P. 2514-P of 2012 allowed the Constitution Petitions of the respondents on 13.06.2013, declaring the levy, imposition and recovery of the 'Cess' unconstitutional with the direction to refund the 'Cess' so far collected from the respondents within a reasonable time, either in lump sum or to be adjusted in monthly gas consumption bills of the respondents. The following grounds prevailed with the High Court for striking down the 'Cess':

i.) The bill culminating into the GIDC Act was introduced as Money Bill in contravention of the provisions of Article 73 (2) of the Constitution.

ii.) There was no intelligible differentia adopted nor sound rationale given for the disparity in 'Cess' rate charged as given in the Second Schedule of the Act, both region wise and on the basis of the nature of industry,

iii.) The GIDC Act was passed without convening any meeting of the Council of Common Interest (CCI). It was the

constitutional responsibility of the Government to place the bill before CCI prior to its introduction in the Parliament.

iv.) The 'Cess' rates given in Second Schedule of the GIDC Act, which differentiated among geographical regions, were against the provision of Article 158 of the Constitution, which grants the Province where the well-head of Natural Gas is located precedence over other parts of Pakistan in meeting its requirements from that well-head. The dictates of the said Article were not adopted in giving the Provinces from where natural gas is being extracted any concession in 'Cess' rates.

v.) The Bill was introduced in Parliament without being tabled before the Federal Cabinet in violation of the mandatory procedure provided under Federal Government Rules of Business.

vi.) Since the GIDC Act was neither declared to be a tax nor revenue of any kind which had to be deposited in the Federal Consolidated Fund, its classification and management under the constitution 'was ambiguous' as it was not certain that how the GIDC Act was managed, by whom and under whose authority.

vii.) That 'Cess' was collected on the subsisting and existing services being rendered by the state/government or its functionaries to a particular segment of a society/consumer. The 'Cess' could not be collected on future prospects of any proposed facilities which were yet to be provided.

4. Leave to appeal was granted to the Federation of Pakistan on 26.12.2013 to examine, *inter alia,* whether:

> *" i) the Act could not have been introduced as money bill keeping in view the provision of the Article 73(2) of the Constitution;*
>
> *ii) there was any question regarding excessive delegation of legislative powers under the Act for levying the cess;*
>
> *iii) there was any discrimination regarding levy of the cess on different consumers;*
>
> *iv) the cess was ultra vires of the Constitution on account of the Schedule of the Act having not been placed for approval before the Council of Common Interest and the same was bad in law having not been placed before the Federal Cabinet;*
>
> *v) cess can only be imposed for services provided as cess is a form of tax imposed for the purpose of raising revenue."*

5. Mr. Makhdoom Ali Khan, Sr. ASC, leading arguments on behalf of the respondents pointed that the imposition of the 'Cess' is also under challenge before the High Court of Sindh and Islamabad High Court, which are awaiting the decision of the present appeals. He therefore sought permission to raise additional grounds taken up in the matters pending before the High Courts but not dilated upon in the judgment impugned in these appeals. The request is reasonable, considering the importance of the issue and its application throughout the country. Mr. Salman Akram Raja, ASC, who appeared for the

Federation, has also prayed that he be allowed to take up new points not raised before the Peshawar High Court on behalf of the Federation. In all fairness to both the parties, we granted the requests.

6. The new points raised were so substantial that rather than assailing or defending the reasoning in the impugned judgment the learned counsel for both the parties argued the case afresh. The gist of the arguments of Mr. Makhdoom Ali Khan, Sr. ASC, was that the levy was a 'fee' and not 'tax' and thus the same could not have been introduced through a Money Bill under Article 73 of the Constitution; that in the alternative if the 'Cess' is considered to be a tax, the levy does not fall under any of the entries in Part-I of the Federal Legislative List.

7. Though the High Court had made some observations on the question as to whether the 'Cess' was a tax or not but, with respect, had not dilated upon the nature of the levy whether the same was 'tax' or 'fee'. Finding on this question was crucial for determining whether the 'Cess' could have been introduced through a Money Bill. According to Article 73(2) of the Constitution *"a bill or amendment shall be deemed to be a money bill if it contains the provisions dealing with all or any of the following matters, namely:-*

> *(a) the imposition, abolition, remission, alteration or regulation of any* ***tax****."*
>
> (b) .....
> (c) .....
> (d) .....
> (e) .....
> (f) .....
> (g) ....."

8. The Money Bill according to Article 73(1) of the Constitution is to be originated and passed by the National Assembly whereas the Senate can only make recommendations. It is common ground between

the parties that nomenclature of the levy is immaterial for determining its nature and its substance is to be examined to determine whether the same is 'tax' or 'fee'. Mr. Makhdoom Ali Khan, Sr. ASC, submitted that 'fee' has an element of *quid pro quo* and the money so collected is to be utilized for benefiting the people from whom the same is exacted. Reference was made to the judgment of this Court in *Sheikh Muhammad Ismail & Co. v Chief Cotton Inspector Council* **(PLD 1966 SC 388)** wherein it was held that no hard and fast rule could be laid down to distinguish 'fee' from 'tax' and the question needs to be decided on the basis of the facts and circumstances of each case. For the same proposition the learned counsel relied upon the cases of *Hirjin Salt Chemicals (Pak.) Ltd. v. Union Council & Others* **(PLJ 1982 SC 295)** , *Noor Sugar Mills v. Market Committee* **(PLD 1989 SC 449)**, *Collector of Customs and others v. Sheikh Spinning Mills and others* **(1999 SCMR 1402)**, *Sanofi Aventis v. Province of Sindh* **(PLD 2009 Karachi 69)** and *Soneri Bank Limited v. Federation of Pakistan & Others* **[2013 PLC (LC) 134]**.

The learned counsel further referred to certain judgments on the point from the Indian jurisdiction: *The Commissioner, Hindu Religious Endowments Madras v. Shri Lakshmindra Thirtha* **(AIR 1954 SC 282)**, *The Hingir Rampur Coal Co. v. State of Orissa* **(AIR 1961 SC 459)**, *Sreenivasa General Traders v. State of Andhra Pradesh* **(AIR 1983 SC 1246)** and *Calcutta Municipal Corporation v. M/s Shrey Mercantile Pvt. Ltd* **(AIR 2005 SC 1879).**

9. Referring to the case of *The Hingir Rampur Coal Co. v. State of Orissa* (*ibid*) it was contended that the 'Cess' would be a fee and not tax if it is levied on a *"defined class of interested individuals, and that the fund raised did not fall into the general mass of the proceeds of*

taxation but was applicable for a special and limited purpose.". That the primary object and essential purpose of the levy must be distinguished from its incidental results or consequences. Referring to *Pakcom Limited v. Federation of Pakistan* **(PLD 2011 SC 44)**, on which reliance was placed on behalf of the Federation, Mr. Makhdoom Ali Khan, Sr. ASC, submitted that so long as the money is collected for providing specific benefit to a particular class or group who contribute, the benefit to the contributors may not be returned or assessed with mathematical exactitude against their contributions. In the light of the principles laid down in the above referred judgments, the learned counsel contended that the 'Cess' has all the trappings of a fee and not a tax as it is allocated for a specific purpose that is to develop Iran Pakistan Pipeline Project, Turkmenistan Afghanistan Pakistan India (TAPI) Pipeline Project, LNG or other projects or for price equalization of other imported alternative fuels including LPG; that there is an element of *quid pro quo* in the levy, with some exceptions, for the users of the natural gas, who had invested in their respective infrastructures and depend on the gas and would be directly benefit from the increase in the supply of natural gas from the new projects. To augment his argument that the 'Cess' imposed is a fee, the learned counsel pointed out that the money so collected is to be deposited under a separate head and under Section 4(2) of the GIDC Act account whereof is to be presented before the Parliament in its Annual Report three months after each fiscal year. The same thus cannot be utilized for any purpose other than the object mentioned in Sub-Section (1) of Section 4 of the GIDC Act. He next pointed out that even the Government did not treat the collection of the 'Cess' as tax as is evident from the Explanatory Memorandum on the Federal Receipt prepared by the Finance Division, tabled with the

Annual Budget Statement before the National Assembly; that in both such statements for the Financial Year 2012-2013 and 2013-2014 the 'Cess' was mentioned in the 'Statement Of Revenue Proceeds' as Non-Tax Revenue and not included in the 'Receipts Tax Revenue'. It was thus argued that the 'Cess' being a fee could not have been levied through a Money Bill.

10. Mr. Abid S. Zuberi, ASC, appeared for the Karachi Electric Supply Company Limited (KESC), which was not a party before the Peshawar High Court but since it had also filed Constitution Petition before the High Court of Sindh challenging the 'Cess', we allowed their application to make submissions. The learned counsel submitted that a 'Cess' can be either a 'tax' or a 'fee', depending upon its nature and purpose. He referred to a case from Indian jurisdiction *M/s Shinde Brothers v. Deputy Commissioner Raichur* **(AIR 1967 SC 1512)** to submit that the earlier concept of rendering some specific service to a particular payer of fee is no longer considered necessary to sustain the levy as a 'fee'. That it is the primary object of the levy and essential purpose stated to be achieved which would determine whether the levy is a 'fee' or a 'tax'. The learned counsel pointed out that the 'Cess' was not made part of the Federal Consolidated Fund and was earmarked for a specific purpose. The learned counsel submitted that *Jindal Stainless Ltd. Etc. v. State of Haryana & Others* **(AIR 2006 SC 2550)**, reliance on which was earlier placed by Mr. Salman Akram Raja, ASC, was distinguished in *Vijayalashmi Rice Mill and Others v. Commercial Tax Officers Palakol* **[2006] 6 SCC 763**. The Court in the latter case held that as the question raised in *Jindal Stainless*'s case (ibid) did not concern the nature of a fee, it can not be held an authority explaining its nature.

11. Mr. Salam Aslam Butt, the learned Attorney General for Pakistan, defending the levy submitted that features of a tax are compulsory imposition for public purpose which is enforceable by law; that the 'Cess' fulfills all the three requirements; that it was imposed for the benefit of the public at large and not for the few beneficiaries. Relying upon the judgment from the High Court of Australia in the case of *Australian Tape Manufacturers Association Limited* v. *Common Wealth of Australia* **[1993] 176 CLR 480**. The learned Attorney General submitted that since the 'Cess' goes into the Federal Consolidated Fund, it is a 'tax' and not a 'fee'.

12. Mr. Salman Akram Raja, ASC, appearing on behalf of the Federation of Pakistan argued that the 'Cess' has to be treated, for every intent and purpose, a 'tax' and not a 'fee'. He argued that the 'Cess' has been understood and defined by opinion of the courts as tax raised for a special purpose. Reliance in this regard was placed on *Shahtaj Sugar Mills* v. *Province of Punjab* **(1998 CLC 1912)** which was affirmed by this Court in *Shahtaj Sugar Mills* v. *Province of Punjab* **(1998 SCMR 2492)**; Quetta Textile Mills v. Province of Sindh **(PLD 2005 Kar. 55).** That cases from Indian Jurisdiction have also adopted this definition of 'Cess' as a tax raised for a special purpose: *M/s Shinde Brothers* v. *Deputy Commissioner* (supra); *Kunwar Ram Nath & Others* v. *The Municipal Board, Pilibhit* **(AIR 1983 SC 930).**

13. Relying upon judgments from the Indian jurisdiction for establishing a distinction between the two types of levy, Mr. Salman Akram Raja, ASC, argued that the primary purpose for the imposition is to be considered and that any incidental consequences of the levy are to be discarded from the calculation of the difference between 'tax' and 'fee'. Reliance was placed on *Dewan Chand Builders* v. *Union of India*

[2012 (1) SCC 101]; *Hingir Rampur Coal Company v. The State of Orissa* (*supra*). The existence of *quid pro quo* as a necessary element in the classification of a 'Cess' as a fee was reiterated by relying upon cases from Indian jurisdiction: *Mohan Meakin Limited v. State of Himachal Pradesh and Others* **[2009 (3) SCC 157];** *M. Chandru* v. *Member-Secretary, Chennai Metropolitan Development Authority and another* **[2009 (4) SCC 72]**; *Jindal Stainless Ltd. Etc. v. State of Haryana & Others* **[2006 (7) SCC 241]**. The learned counsel however submitted that the law on the distinction between 'tax' and 'fee' in Pakistan has not undergone any change and that the case law from the Indian Jurisdiction is only of secondary and illustrative value. He referred to the case of *Pakcom Limited v. Federation of Pakistan* (*ibid*) to point out that this Court had, after reviewing the case law on the subject, reiterated the rule that 'fee' is payment for a specific benefit or privilege and that the element of *quid pro quo* must be present in the imposition for it to be declared as 'fee'. Reference was further made to *Collector of Customs v. Sheikh Spinning Mills* **(2013 PTD 969).** The learned counsel provided a three tier test from perusal of the case laws, for determining the nature of a levy as tax. He contended that for a levy to be classified as a tax the following three condition-precedents have to be present;

i.) that the subject of the levy is covered by a head of taxation;

ii.) that the payer expects no special consideration or benefit;

iii.) that any benefit which might accrue to the payer is only incidental whereas the entire country would benefit from the exaction.

14. Applying the said criteria, he argued that the GIDC Act neither assures nor provides any particular benefit to the payers. That the benefits which will accrue from increased supply of gas will be extended to every consumer of gas including the domestic consumers and the industrial concerns. As the increase in supply of gas will not provide any special benefits to the payer the 'Cess' must be treated as a tax and not a fee. Further, that the primary purpose of the imposition of the levy was raising revenue for the Pipeline Projects and price equalization and benefits following from it may not specifically accrue to the payers.

15. Responding to the argument of Mr. Makhdoom Ali Khan, Sr. ASC, of listing the 'Cess' as Non-Tax Revenue in the Annual Budget Statement, Mr. Salman Akram Raja, ASC, referred to the case of *Sheikh Muhammad Ismail & Co. v Chief Cotton Inspector Council* (*supra*) that:

> *"Mere forms of accounting however, should not be regarded as conclusive in this regard. So long as the levy is raised for the purposes contemplated by an enactment designed to serve a particular trade or commodity production and the realizations made are expended actually for those purposes, the levy would remain a fee, whatever method of keeping accounts for other Governmental purpose may be adopted."*

16. The question whether a particular levy is a 'tax' or a 'fee' has been the subject matter of long line judgments of the Courts in Pakistan as well as in India. The Courts have decided this question upon examining the facts and circumstances of each case keeping in mind the criteria for holding the levy a 'fee' or 'tax'. 'Cess' has been defined as a 'tax', which raises revenue to be applied for a specific purpose. Nomenclature, however, would not be relevant and whether the imposition of a particular 'Cess' can be termed as a 'tax' or 'fee'

would depend upon the nature of a levy. [*SEE* *Vijayalakshmi Rice Mill and Others* *v.* *Commercial Tax Officers Palakol* *(supra)]*.

17. Before referring to the test applied by our Courts for drawing distinction between 'tax' and 'fee', two judgments, one by the Indian Supreme Court in the case of *Jindal Stainless Ltd. Etc.* *v.* *State of Haryana & Others* (*supra*) and the other from Australian High Court in the case of *Australian Tape Manufacturers Association Limited* *v.* *Common Wealth* (*ibid*), need to be examined. The first case, reliance upon which was placed by Mr. Salman Akram Raja, ASC, had laid down the principle of equivalence in determining whether a particular levy is a 'fee'. The Court held that this principle was converse of the principle of ability to pay and that the main basis of a fee or a compensatory tax was the quantifiable and measurable benefit. That under the principle of equivalence there is indication of quantifiable data namely the benefit which is measurable. This judgment however was not followed by the Supreme Court in the case of *Vijayalakshmi Rice Mill and Others* *v.* *Commercial Tax Officers Palakol* (*ibid*) wherein it was held that *Jindal Stainless Ltd.*'s case (*supra*) cannot be interpreted to mean that the sea change which has taken place in the concept of 'fee' has vanished and that by this decision the old concept of 'fee' has been restored and now it has to be established that a particular individual from whom the fee is realized must be rendered some specific service. The Court went on to hold that the principle laid down in *Sreenivasa General Traders* *v.* *State of Andhra Pradesh* *(supra)* and *State of Himachal Pradesh* *v.* *M/s Shivalik Agro Poly Products* **(AIR 2004 SC 4393)** still holds the field regarding the nature of 'fee'.

18. The same treatment has been meted by the Australian Courts to the principle laid down in *Australian Tape Manufacturers*

Association Limited's case (ibid). According to the rule laid down in the said case the fact that the levy is directed to be paid in the Consolidated Revenue Fund is to be recorded as a conclusive indication that the levy is exacted for public purpose and the imposition would be treated as 'tax'. This statement of law by the Australian High Court in the year 1993 was not followed in *Luton v. Lessels* **[2002] HCA 13** where it was held that the destination of money that is exacted may well be significant in deciding whether it is exacted for public purposes, however the requirement of legislation that a sum be paid into the Consolidated Revenue Fund does not conclude the issue of characterizing the law as one imposing tax. That not every sum that statute requires to be paid into the Consolidated Revenue Fund is a tax. The rule in *Australian Tape Manufacturers Association Limited*'s case (*supra*) has not been followed by the same Court subsequently (see *Roy Morgan Research Pvt. Ltd. v. Commissioner of Taxation* **[2011] HCA 35**).

19. Upon examining the case law from our own and other jurisdictions it emerges that the 'Cess' is levied for a particular purpose. It can either be 'tax' or 'fee' depending upon the nature of the levy. Both are compulsory exaction of money by public authorities. Whereas 'tax' is a common burden for raising revenue and upon collection becomes part of public revenue of the State, 'fee' is exacted for a specific purpose and for rendering services or providing privilege to particular individuals or a class or a community or a specific area. However, the benefit so accrued may not be measurable in exactitude. So long as the levy is to the advantage of the payers, consequential benefit to the community at large would not render the levy a 'tax'. In the light of this

statement of law it is to be examined whether the GIDC is a 'tax' or a 'fee'.

20. To recapitulate the 'Cess' collected is to be utilized for specific purposes, namely, development of infrastructure of Iran Pakistan Pipeline Project, Turkmenistan Afghanistan Pakistan India (TAPI) Pipeline Project, LNG or other projects or for price equalization of other imported alternative fuels including LPG. An annual report regarding utilization of the amount so collected is to be regularly placed before the House after three months of the end of each fiscal year (See S.4 of GIDC Act). The levy therefore is to be utilized only for the purposes mentioned in the GIDC Act. The same is not a common burden for raising revenue generally. The money so collected from the levy is to be utilized for a specific purpose for the advantage and benefit of the consumers of gas. The 'Cess' is basically to be levied on all consumers of gas with certain exemptions, mainly for domestic consumers. This exemption is by way of relief to such consumers. Even otherwise the data so provided to us regarding consumption of gas by different sectors shows that the domestic sector consumes only 20.3 % of the total gas whereas 76 % of the total gas is consumed by those from whom the 'Cess' is collected (see Pakistan Energy Year Book, 2012). The latter sector has invested in development of the infrastructure for utilization of gas for their respective concerns. As envisaged in Section 4 of GIDC Act, the 'Cess' is mainly to be utilized for development of the pipelines from other countries and other similar projects in order to ensure continuous and increased supply of gas to this sector. Undoubtedly other consumers or country as a whole would also benefit from such Projects but the same is inconsequential compared to the advantage that will accrue to the payers.

21. Mr. Salman Akram Raja, ASC, had emphasized that the 'Cess' is also to be utilized for the price equalization of other imported fuels, including LPG. This argument has been aptly met by Mr. Makhdoom Ali Khan, Sr. ASC, by submitting that the imported alternatives to the natural gas are more expensive than the natural gas available in Pakistan. That if the levy is used for equalizing the price of the imported alternative fuels it would directly benefit the users of natural gas who can still afford the cheaper fuel and remain competitive.

22. Another formidable argument on behalf of the respondents was based upon the National Assembly for the Financial Years 2012-13 and 2013-14. The Preface to the said Annual Budget dated 01.06.2014 reads:

> ***"P R E F A C E***
>
> *The Annual Budget Statement containing estimated receipts and expenditure for financial year 2012-13 is being tabled in the National Assembly of Pakistan and transmitted to the Senate of Pakistan as required under Article 80(1) and 73(1) of the Constitution of the Islamic Republic of Pakistan.*
>
> *The statement meets the requirement of Article 80(2) of the Constitution which stipulates that the Annual Budget Statement shall show separately:-*
>
> *(a) the sums required to meet expenditure described by the Constitution as expenditure charged upon the Federal Consolidated Fund; and*
>
> *(b) the sums reqired to meet other expenditure proposed to be made from the Federal Consolidated Fund;*
>
> *The Statement also makes a distinction between expenditure on revenue account and other expenditure, both Current and Development, as required by the Constitution. Additionally information pertaining to details of revenue, capital and externals receipts has also been included.*
>
> *Abdul Wajid Rana*
> *Secretary to the Government of Pakistan*
>
> *Finance Division*
> *Islamabad, the 1st June, 2012."*

Article 80 of the Constitution titled "Annual Budget Statement" provides that "*The Federal Government shall, in respect of every financial year, cause to be laid before the National Assembly a statement of the estimated receipts and expenditure of the Federal Government for that year……*". This Annual Budget Statement along with money bill is to be simultaneously transmitted to the Senate so that it may make recommendations to the National Assembly. Page-6 of the Statement contains list of Non-Tax Revenue, which under the Object Code C03916 includes 'Gas Infrastructure Development Cess'. Similarly in the Annual Budget Statement (Federal Budget 2013-14) that carries a similar worded preface, 'Gas Infrastructure Development Cess' has again been listed at C03916 as Non-Tax Revenue. Thus on the Government's own showing, as reflected in the Annual Budget, GIDC is not a 'tax'. No argument has been advanced on behalf of the appellants to explain away the categorization of GIDC as Non-Tax Revenue by the Government in the Annual Budget. This is not a mere accounting procedure as urged by Mr. Salman Akram Raja, ASC, who in this context had relied upon *Sheikh Muhammad Ismail & Co. v Chief Cotton Inspector Council (supra)*, but were part of the Annual Budget Statements. As submitted by Mr. Makhdoom Ali Khan, Sr. ASC, the possible reason why the levy has been reflected as Non-Tax Revenue in the Budget was to exclude it from the divisible pool under the National Finance Commission (NFC) Award. The above determination is sufficient to hold that being a 'fee' the same could not have been imposed through a money bill and on this score the levy was liable to be struck down.

23. It follows from the above that GIDC is not a 'tax' but a 'fee'. Having held so, the same could not have been introduced as money bill under Article 73 of the Constitution. However, we now take up the other contentious issue between the parties, namely whether GIDC can be considered a 'tax' under one or more of Entries 49, 51 and 52 of Part-I of the Federal Legislative List and if so would it not offend the provisions of Article 160 of the Constitution providing for distribution of taxes by the order of the President of Pakistan on the recommendations of the NFC between the Federal and Provinces. The said Entries read:

> *"**49.** Taxes on the sales and purchase of goods imported, exported, produced, manufactured or consumed, except sales tax on services.*
> ***50**.....*
> ***51.** Taxes on mineral oil, natural gas **and** minerals for use in generation of nuclear energy.*
> ***52.** Taxes and duties on the production capacity of any plant, machinery, undertaking, establishment or installation in lieu of the taxes and duties specified in entries 44, 47, 48 and 49 or in lieu of any one or more of them."*

24. Mr. Salman Aslam Butt, learned Attorney General for Pakistan on the interpretation of Entry 51, provided instances where judiciary had interpreted the word "and" as "or" in purposive interpretation for bringing out the true meaning of the statute. Relying upon a letter written by the Pakistan Atomic Energy Commission in which it was stated that 'mineral oil' and 'natural gas' are not used for production of nuclear energy, it was argued that "and" in Entry 51 should be read as "or" for bringing out the true meaning of it as intended by the framers of the Constitution. Reliance in this context was placed on: *The Mersey Docks and Harbour Board* v. *Henderson*

Brothers **[1888 (13) A.C. 595];** *Green* v. *Premier Glynrhonwy Slate Company Limited* **[1928 (I) K.B. 561];** *The Joint Director of Mines Safety* v. *M/s Tandur & Nayandgi Stone Quarries (P.) Ltd.* **(AIR 1987 SC 1253);***Gujrat Urja Vikash Nigam Ltd.* v. *Essar Power Ltd.* **(AIR 2008 SC 1921);** *M. Arif* v. *District and Sessions Judge, Sialkot* **(2011 SCMR 1591);** *Khadim Hussain v. Additional District Judge* **(PLD 1990 SC 632);** *Abdul Razak* v. *Karachi Building Control Authority* **(PLD 1994 SC 512);** *Abdur Rauf Khan* v. *Land Acquisition Collector* **(1991 SCMR 2164).** In additions to reliance on Entry 51 the learned Attorney General also relied on Entry 52 to argue that Cess is a tax on the capacity of the consumption of natural gas. In support of this proposition reference was made to *M/s Ellahi Cotton Mills Ltd.* v. *Federation of Pakistan* **(PLD 1997 SC 582)**.

25. Mr. Salman Akram Raja, ASC, submitted that his arguments concerning the interpretation of the Entries be considered as complimentary to those advanced by the learned Attorney General and be viewed in alternative where necessary. He argued that the 'Cess' as a 'tax' can be levied by the Federal Government under Entries 49 and 51 of the Federal Legislative List, contained in Part-I to the Fourth Schedule of the Constitution. He maintained that the purpose of Entry 51 was to cover all aspects of taxation related to the three primary sources of non-hydel energy i.e. 'mineral oil', 'natural gas' and those 'minerals' which can be used in the generation of nuclear energy, so that they could be taken out of the purview of provincial taxation. He referred to the "Last Antecedent Rule" of interpretation for arguing that general words qualifying any situation should be read so that they apply to most pertinent objects and not to others; reference was also made to the "mischief rule" and Rule Against Absurdity, the purpose of

which are to resolve the absurdity contained in a statute in order to bring out the meaning intended by the framers of the Constitution; that in this case minerals should be restrictively read as those required for the generation of nuclear energy and not 'mineral oil' or 'natural gas'; that as 'mineral oil' and 'natural gas' are not used directly in the generation of nuclear energy, they should be read as independent from other minerals used in the generation of nuclear energy. He further argued that there is a distinction in the Fourth Schedule of the Constitution between the taxation of commodities and activities; that Entry 49 for instances taxes the activity of sale, similar to Entry 43 which taxes the activity of import and export. However, the purpose behind the Entry 51 by the framers was to tax the commodities of energy production including 'natural gas' and 'mineral oil'. Reference was made to judgments from Indian jurisdiction to bring out distinction between the tax on objects as opposed to a tax on activities: *Kerala State Electricity Board v. Commissioner of Central Excise* **[2008 (1) SCC 780]**; *Godfrey Phillips India Ltd. v. State of UP* **[2005 (2) SCC 515].** He then referred to Entry 49 as an alternative argument, without any prejudice to the earlier arguments on Entry 51; that as Cess is chargeable from the consumers of natural gas, it is a tax on the purchase of natural gas covered by Entry 49. That since there is no constitutional bar on double taxation, the sale of natural gas can be taxed by the GIDC Act even though it is already being taxed under Sales Tax Act, 1990. Reliance in this context was placed on *Pakistan Industrial Development Corporation v. Pakistan, through Secretary Ministry of Finance* **(1992 SCMR 891)**.

26. Mr. Makhdoom Ali Khan, Sr. ASC, replying to the arguments raised on behalf of Federation argued that Entry 51 should

be read conjunctively as the framers of the Constitution intended to restrict the taxation under the said Entry on such 'mineral oil' and 'natural gas' along with 'minerals' as are used for the generation of nuclear energy. That there is no mischief or absurdity contained in the said Entry requiring the use of external tools of statutory interpretation in order to read the word 'and' as 'or'. In interpreting Entry 49, he agreed that there is no bar upon double taxation as envisaged under the said Entry, however it was argued that parliament has to express its intention to levy double taxation in clear and unambiguous language. As no such clear or express intention for double taxation was provided for in the GIDC Act, it cannot be sustained as an instance of double taxation. Reliance in this context was laid upon *Pakistan Industrial Development Corporation v. Pakistan, through Secretary Ministry of Finance (ibid)*

27. Further, Mr. Makhdoom Ali Khan, Sr. ASC, referred to the case of *Engineer Iqbal Zafar Jhagra & Senator Rukhsana Zuberi v. Federation of Pakistan* **(2014 PTD 243)**, to point out that in the said case, Attorney General had taken the position before the Court that Cess under the GIDC Act was not a tax but a cost under Section 2 (46) of the Sales Tax Act, 1990. As Cess had earlier been classified as a cost by the Attorney General, it cannot be classified as a tax.

28. Replying to the arguments raised by Attorney General while pressing Entry 52, Mr. Makhdoom Ali Khan, Sr. ASC argued that Entry 52 and Entry 49 are mutually exclusive as they provide two different modes for the levy of taxation. Cess if assumed to be a tax on capacity cannot be collected on the sale of natural gas. Reliance in this context was placed on *Kohinoor Industries Ltd., Faisalabad* v. *Government of*

Pakistan **(1989 MLD 1);** *Central Board of Revenue* v. *Seven-Up Bottling Company (Pvt.) Ltd.***(1996 SCMR 700).**

29. The learned counsel for the appellants had primarily focused on Entry No.51 of Part-I of the Federal Legislative List to show that 'tax' on natural gas could be levied through money bill. Their argument in essence was that the 'mineral oil' and 'natural gas' mentioned therein are to be read independently and not restricted to their use in generation of nuclear energy and only 'minerals' were subjected to such condition. The authorities cited by the learned Attorney General are examples of situations where the Courts have in particular circumstances read 'or' instead of 'and' and thus assigned disjunctive meaning to particular words in the statutes. Such construction is permissible if it reflects the true intention of the Legislature and if to hold otherwise would render particular words in the statute either meaningless or lead to absurdity. This is what was stated by this Court in the case of *Abdur Razaq v. Karachi Building Control Authority (supra),* relied upon by the learned Attorney General for Pakistan. Mr. Justice Ajmal Mian, as he then was, writing for the Court, and after citing the relevant provisions from Maxwell on Interpretation of Statues and Crawford on Statutory Interpretation regarding use of 'and' and 'or' held that:

> *"15. From the above-quoted passages from the above celebrated treatises on the Interpretation of Statutes, it is evident that the words "and" and "or" are interchangeable. However, in ordinary usage the word "and" is conjunctive and the word "or" is disjunctive. But to implement the legislative intent, it may become imperative to read "and" in place of the conjunction "or" and vice versa. This cannot be done if the meaning of the relevant provision of the statute is clear or if the*

> *above construction will operate to change the meaning of the law."*

In the above case this Court had while interpreting the relevant Regulation held that the use of the word 'or' must be assigned its disjunctive meaning, thus setting aside the finding of the High Court which had read the same as 'and' in the Regulation.

30. Mr. Salman Akram Raja, ASC, however, laid stress on the Rule Against Absurdity and Last Antecedent Rule. The latter principle has been taken from the principles of statutory interpretation by Justice (Retd.) G.P. Singh, who has described it as follows:

> *"Under the principle of Reddendo Singula Singulis where there are general words of description, following an enumeration of particular things such general words are to be construed distributively; and if the general words are to apply to some things and not to others, the general words are to be applied to those things to which they will, and not to those which they will not apply; that rule is beyond all controversy."*

31. Entry 51 mentions three items, namely 'mineral oil', 'natural gas' and 'minerals' which are followed by the words *"for use in generation of nuclear energy"*. The basic rule for interpretation of statutes is to give the words their ordinary and natural meaning. Deviation from this rule is permissible only when it becomes necessary, for example to avoid or overcome absurdity or render certain words meaningless. This exercise is undertaken when assigning the words their ordinary meaning does not reflect the true intention of the Legislature. By the use of 'and' in between 'natural gas' and 'minerals' in Entry 51, all the three items are to be read conjunctively with the words following them. In the said Entry 'and' could have been

substituted by 'or' only if without the change absurd consequences would have followed. Restricting 'mineral oil' or 'natural gas' to their use in the generation of nuclear energy would not lead to any absurdity. The argument raised by learned Attorney General to give disjunctive rather than conjunctive interpretation to Entry 51 is based in the main on the letter written by Pakistan Atomic Energy Commission (PAEC), which was produced during the hearing of the cases and it appears to have been written in response to a query made by the Attorney General for Pakistan in between the hearings. Without going into the correctness or otherwise of the view expressed in the said letter, suffice it is to state that such outside tool cannot be taken into account for interpreting a Constitutional provision. Even if the opinion given therein is correct to the extent of the activity carried out in the PAEC it does not conclusively establishes that 'mineral oil' and 'natural gas' are nowhere used for the generation of nuclear energy or that there is no possibility of their such use in future. After all the Constitution is a living document which caters for future development and progress. Thus Entry 51 can only be accorded its natural meaning and the same shall be read conjunctively. Similarly the Last Antecedent Rule is of no help to the appellants when the plain reading does not admit of any other interpretation but that only such items mentioned therein can be subjected to tax that are used in the generation of nuclear energy.

32. As regards Entry 49, the learned Attorney General at one stage of hearing did not press the argument that the 'Cess' is also covered under it. However, he later invoked when Mr. Salman Akram Raja, ASC, pressed the same into service. Mr. Salman Akram Raja, ASC, had relied upon Entry 49 as alternative to Entry 51 and submitted that the 'Cess' chargeable from the consumers of 'natural gas' may be

viewed as tax on the purchase of natural gas and thus covered by Entry 49. Referring to the case of *Pakistan Industrial Development Corporation v. Pakistan, through Secretary Ministry of Finance (ibid)* it was contended that although 'natural gas' is already subject to Sales Tax but there is no bar against levy of additional Sales Tax. Responding to this contention Mr. Makhdoom Ali Khan, Sr. ASC, argued that intention of the Legislative in levying double taxation must be expressed in clear terms and the same cannot be levied by mere implication. He also referred to *Pakistan Industrial Development Corporation v. Pakistan, through Secretary Ministry of Finance (ibid).*

33. Both the learned counsel are correct in their respective submissions as the following passage from the above referred authority shows:

> *"It is, thus, clear that unless there is any prohibition or restriction imposed on the power of Legislature to impose a tax twice on the same subject matter double taxation though a heavy burden and seemingly oppressive and inequitable cannot be declared to be void or beyond the powers of the Legislature. It may, however, be noted that double taxation can be imposed by clear and specific language to that effect. Where the language is not clear or specific by implication such levy cannot be permitted.*
>
> *There could be double taxation if the Legislature distinctly enacted it, but upon general words of taxation, and when you have to interpret a taxing hands of the assessee on the basis of the first receipt may be subjected income-tax more than once which unless specifically provided in a clear unambiguous language, is disapproved."*

34. Admittedly 'natural gas' is subject to levy of Sales Tax and GIDC Act does not appear to suggest that it is another instance of Sales Tax levied by the Parliament on the supply of natural gas. As held in the above cited judgment, double taxation can be imposed only by clear and specific language and not by implication. The Federation's own stand in the case of *Engineer Iqbal Zafar Jhagra & Senator Rukhsana Zuberi v. Federation of Pakistan (supra)* was that the 'Cess' was not a Sales Tax. This is evident from the following reply submitted by the learned Attorney General for Pakistan on behalf of the Federal Board of Revenue in response to a query made by this Court:

> *"31. The learned Attorney-General... also furnished replies of the Federal Board of Revenue (FBR) to the foregoing queries. The queries were replied to as under:*
>
> *(iv) GIDC has been levied under the Gas Infrastructure Development Cess Act, 2011 and can be charged only by companies specified in the First Schedule to the Act, from their consumers (other than domestic consumers).* ***These consumers (which include CNG stations), cannot charge/further pass on the cess as such. Thus, GIDC becomes part of the cost of the CNG stations, and should not be considered as an indirect tax to be passed on the end consumers.*** *Thus, like all other costs (such as cost of gas, labour, electricity, overheads, advertising etc.), in case of CNG stations, GIDC is a component of the cost of the business to be included in the sale price of the product."*

35. Upon the above clear position taken by the Federation the Court in Paragraph No.36 of the judgment declared and held that:

> *"(ix) As far as recovery of the gas development charges GIDC is concerned, it falls within the definition*

of section 2(46) of the Sales Tax Act, 1990 and no order is required to be passed in this behalf."

Thus under Section 2(46) of the Sales Tax Act, 1990 the 'Cess' is one of the cost added to the price of the product for the calculation of sales tax. It cannot therefore be termed as another Sales Tax.

36. Coming to Entry 52, Mr. Salman Akram Raja, ASC, had not urged that the GIDC can be levied under the said Entry. The learned Attorney General initially made submissions with regard to the said Entry but ultimately did not seriously press the same. Mr. Makhdoom Ali Khan, Sr. ASC, in response to the said argument submitted that Entry 49 imposing Sales Tax on 'natural gas' and other commodities and Entry 52 empowering the imposition of tax on capacity are mutually exclusive. That since the 'natural gas' has already been subjected to Sales Tax no additional tax can be levied on the capacity. The learned counsel in this context had referred to *Kohinoor Industries Ltd., Faisalabad* v. *Government of Pakistan (ibid)*, *Central Board of Revenue* v. *Seven-Up Bottling Company (Pvt.) Ltd. (ibid)* and *Ellahi Cotton Mills Ltd.* v. *Federation of Pakistan (supra)*. The above authorities clearly lay down, with reference to Entry 52 and other Entries in Part-1 of the Federal Legislative List, that tax cannot be levied under the said Entry if the goods or activity has already been subjected to tax or duty under any other Entry. It follows that the GIDC is not covered by either of the three Entries, i.e. 49, 51 or 52 of Part-I of the Federal Legislative List. It was admitted on behalf of the appellant that for a 'tax' to fall under the said Federal Legislative List it must be covered by Entries No. 43 to 53. Apart from the said three no other Entries were pressed in service on behalf of the appellants for declaring the 'Cess' as 'tax'. On this count

too the 'Cess' could not have been introduced through a money bill under Article 73 of the Constitution.

37. The next contentious issue raised on behalf of the respondents is based on Article 160 of the Constitution, which inter alia provides distribution of taxes between the Federation and the Provinces. Clause (2)(a) of Article 160 of the Constitution provides:

> ***160. (2)*** *It shall be the duty of the National Finance Commission to make recommendations to the President as to:*
>
> *(a) the distribution between the Federal and the Provinces of the net proceeds of the taxes mentioned in clause (3);"*

Clause (3) of the said Article provides details of the taxes to be form part of the divisible pool, which reads:

> *"(3) The taxes referred to in paragraph (a) of clause (2) are the following taxes raised under the authority of Majlis-e-Shoora (Parliament), namely:-*
>
> *(i) taxes on income, including corporation tax but not including taxes on income consisting of remuneration paid out of the Federal Consolidated Fund;*
> *(ii) taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed;*
> *(iii) export duties on cotton, and such other export duties as may be specified by the President;*
> *(iv) such duties of excise as may be specified by the President; and*
> *(v) such other taxes as may be specified by the President."*

Clause (4) of the said Article binds the President to pass an order in accordance with the recommendations made by the National Finance Commission (NFC). The NFC consists of Minister of Finance of the Federal Government, the Ministers of Finance of the Provincial

Governments and such other persons as may be appointed by the President after consultation with the Governors of the Provinces.

38. It was contended on behalf of the respondents that if the 'Cess' is considered to be 'tax' it ought have been included in the divisible pool for distribution between the Federation and the Provinces. That admittedly neither was it done nor was such inclusion possible in view of the purpose for which the 'Cess' was levied as mandated by Section 4 of the GIDC Act, providing for utilization of the collection for specific projects and purposes.

39. In order to counter the above submissions the learned Attorney General drew a distinction between the taxes mentioned in Articles 160 (3) and 77 of the Constitution. The latter Article states *"No tax shall be levied for the purposes of the Federation except by or under the authority of Act of Majlis-e-Shoora (Parliament)."* It was contended by the learned Attorney General that Article 160(3) of the Constitution is confined to only those taxes that are **raised** under the authority of Majlis-e-Shoora (Parliament) and therefore excludes taxes levied by or under the authority of the Parliament. It was thus contended that the 'Cess' was not raised but levied by the authority of an Act of Parliament. To fortify his submissions he made references, for the purpose of contrast, to income tax, sales tax, federal excise and custom duty that were taxes levied under the authority of the Parliament. This argument was aptly countered by Mr. Makhdoom Ali Khan, Sr. ASC. According to him all taxes are levied by an Act of Parliament or under its authority by any other body. 'Raise' according to the Black's Law Dictionary means to gather or collect and levy as the imposition of a tax. Once a 'tax' is levied by the Parliament, its collection is left to other authorities. The word 'raise' therefore appearing in Article 160(3) of the Constitution

refers to taxes levied by or under the authority of Parliament. The said Article does not provide for imposition of 'tax' but refers to tax that are collected and gathered under the authority of the Parliament.

40. In the context of Article 160 of the Constitution, Mr. Salman Akram Raja, ASC, advanced another argument that the vires of the GIDC Act cannot be determined on the touchstone of Article 160 of the Constitution in that the levy of the 'Cess' is distinct from question of its distribution amongst the provinces. He submitted that matters relating to the distribution of the taxes in the divisible pool, or its non-inclusion in the pool are to be resolved between the Federation and the Provinces. In support of this contention reference was made to *Jaora Sugar Mills Ltd. v. State of Madhya Pradesh* **(AIR 1966 SC 416)**. Taking the argument further the learned counsel referred to Clauses (1) and (2) of Article 146 of the Constitution which read:

> *"**146.** (1) Notwithstanding anything contained in the Constitution, the Federal Government may, with the consent of the Government of a Province, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive authority of the Federation extends.*
>
> *(2) An Act of Majlis-e-Shoora (Parliament) may, notwithstanding that it relates to a matter with respect to which a Provincial Assembly has no power to make laws, confer powers and impose duties upon a Province or officers and authorities thereof."*

41. It was submitted that the question of distribution of divisible pool can be resolved by invoking the above provisions. That in case a Province does not voluntarily give consent under Article 146(1) of the Constitution, the Parliament is empowered under Clause (2) of the said Article to confer authority on the executive and impose the duty to

carry out the purpose mentioned in Section 4 of GIDC Act. Clause (1) of Article 146 of the Constitution relates to the executive authority of the Federation and Clause (iii) empowers the Parliament to impose duty upon the Provinces in matters in which the Provincial Assemblies have no powers to make laws. The issue here is not simply utilization of the 'Cess' for the purpose mentioned in Section 4 of the GIDC Act. It is its non-distribution between the Federation and Provinces under Article 160 of the Constitution if it is to treat as a 'tax'. Additionally the argument is more speculative as neither the Federal Government under Clause (1) or the Parliament under Clause (2) of Article 146 has taken any step under the said provisions.

42 It was pointed out on behalf of the respondents that the Ministry of Petroleum and Natural Resources was of the view that the issue of levy of the 'Cess' may be placed for its approval before the Council of Commons Interest, which represents all the federating units. Similar was the opinion expressed by the Ministry of Law, Justice and Parliamentary Affairs. This fact was expressly averred in the Constitution Petitions filed before the Peshawar High Court and was not denied by the Federal Government. True that such an advice or opinion or non-reference of the matter to the Council of Common Interest would not render the levy illegal or invalid, nevertheless it would have been appropriate had the federating units been taken into confidence, particularly in the context of Article 160 (3) of the Constitution.

43. We were, however, persuaded by the alternative argument advanced by Mr. Salman Akram Raja, ASC, in the context of Article 160 of the Constitution that violation of Article 160 of the Constitution for not including the 'Cess' in the divisible pool cannot be made the touchstone for declaring the very levy as unconstitutional. On this point

we would refer to the principle laid down in the case of *Jaora Sugar Mills Ltd. v. State of Madhya Pradesh (ibid)* where it was held:

> *"The validity of the Act must be judged in the light of the legislative competence of the Legislature which passes the Act and in certain cases, by reference to the question as to whether fundamental rights of citizens have been improperly contravened, or other considerations which may be relevant in that behalf. Normally, it would not be appropriate or legitimate to hold an enquiry into the manner in which the funds raised by an Act would be dealt with, when the Court is considering the question about the validity of the Act itself. Validity of Section 3 of the Cess Act cannot, therefore, be questioned on the ground that the cesses recovered under it are not dealt with in accordance with the provisions of Art. 266 of the Constitution."*

44. Mr. Salman Akram Raja, ASC, receives support from the arguments advanced by Mr. Makhdoom Ali Khan, Sr. ASC, while countering the submissions made by the learned Attorney General on the proposition that **'raised'** in Article 160(3) of the Constitution does not include the 'tax' levied under Article 77 of the Constitution. Mr. Makhdoom Ali Khan, Sr. ASC, had submitted that 'tax' is not levied under Article 160(3) of the Constitution and the word **'raised'** therein means collection and gathering of the tax under the authority of the Parliament. Additionally, the question as to whether 'tax' ought or ought not to have been included in the divisible pool is a matter between the Federation and the Provinces. The non-inclusion of any tax in the divisible pool may have other consequences but would not render the levy unconstitutional. This argument proceeds on the assumption

that the 'Cess' was a tax invalidly levied under Article 77 of the Constitution.

45. To conclude the GIDC is a fee and not a tax, in the alternative it is not covered by any Entry relating to imposition or levy of tax under Part-I of the Federal Legislative List. On either counts the 'Cess' could not have been introduced through a money bill under Article 73 of the Constitution. The same was, therefore, not validly levied in accordance with the Constitution.

46. For the forgoing reasons, the impugned judgments are not liable to be reversed. The appeals are therefore dismissed.

Judge

Judge

Judge

ANNOUNCED IN OPEN COURT
ON 22nd August 2014. **Chief Justice**

Mudassar/*

"Approved for reporting."