

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

No. IHC/Judl.Deptt.

(REVISED FORM OF BLUE SLIP)

Case No. WP-1741-2014

Titled. Shell Pakistan Vs CDA

a) Judgment approved for reporting

✓
Yes/~~No~~

b) Judgment any comment upon the conduct of the
Judicial officer for quality of the impugned judgment
Is desired to be made.

Yes/No

(In case the answer is affirmative separate
confidential note may be sent to the Registrar
drawing his attention to the particular aspect).

Initial of the Judge.

NOTE.

1. If the slip is used, the Reader must attach on top of first Page of the judgment.
2. Reader may ask the Judge writing the judgment whether the judgment is to be approved for reporting of any comment is to be made about the judicial officer / quality of judgment.
3. This slip is only to be used when some action is to be taken.

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 1741 of 2014

SHELL Pakistan Limited
Versus
Capital Development Authority & Others

Date of Hearing: - 15th December, 2014

Petitioner By: - Mr. Salim Ur Rehman, learned ASC, Raja Muqsit Nawaz Khan [in WPs No. 1168, 4074/2014], Malik Muhammad Siddique Awan [in WPs No. 1222, 1429, 3404, 979, 980, 981, 982, 985, 994, 995, 996, 997 /2014], Malik Sardar Khan [in WP No. 2633/2014], Mr. A. Ammar Sehri [in WPs No. 1325, 2423/2014], Mr. Hafeez ur Rehman [in WP No. 1892/2014], M/s Mansoor Usman Awan & Hussain Ibrahim Muhammad [in WPs No. 1001 & 1002/2014], Mr. Muhammad Aurangzeb Khan & Muhammad Hamid Khan [in WP No. 903/2014], Mr. Habib Ahmed Bhatti & Akhlaq Ahmed Bhatti [in WP No. 3326/2014], Barrister Suleman Khan & Ms. Hadya Aziz [in WPs No. 3667 & 3669/2014], Mr. Ibrar Hussain [in WP No. 4343/2014]

Respondent By: - Ms. Muhammad Nazir Jawwad & Raja Adnan Aslam, Advocates for respondents 1&2,
Mr. Qamar Hussain Sabzwari & Syed Intekhab Hussain Shah, Mr. Mujeeb ur Rehman Kiani, Dr. Farhat Zafar & Sh. Anwar ul Haq learned ASCs for respondent No.3 in WP 1741/2014, Mr. Khubaib Aziz Advocate for NHA in WP No. 4074/2014, Mr. Ali Hussain Bhatti [for respondents 6-9 in WP 3667/2014, Mr. Rizwan Ejaz [for Respondent No. 3 in WP No. 3423/2014]

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J U D G M E N T
MUHAMMAD ANWAR KHAN KASI, CJ:

This Petition as well as W.P. Nos. 3404/2013, 903/2014, 979/2014, 980/2014, 981/2014, 982/2014, 985/2014, 994/2014, 995/2014, 996/2014, 997/2014, 1001/2014, 1002/2014, 1168/2014, 1222/2014, 1325/2014, 1429/2014, 1892/2014, 2633/2014, 3326/2014, 3423/2014, 3667/2014, 3669/2014,

4074/2014 & 4343/2014, involve virtually common question of facts and law, therefore, being decided through this Single Judgment.

2. Brief facts of the case are that petitioners are commercial entities having their operational outlets within Islamabad Capital Territory and in order to comply with the statutory requirement of Companies Ordinance, 1984 as well as to attract public attention they displayed business identification Sign Boards on their business premises.

3. They are aggrieved of demand notices issued by the respondent No.3 [Contractor of CDA] requiring payment of advertisement fee.

4. In W.P. No. 4074/2014 Petitioner-Bank has also assailed Rent collection notice issued by the Contractor of Respondent No.3- National Highway Authority whereby rent collection of Promotional Display Board for the year 2014-15 has been demanded.

5. Learned Counsel for petitioner submits that the demand notices are illegal because the same have been issued without lawful authority and that the impugned levy amounts to 'tax' sought to be recovered without obtaining approval of the Government which was a requirement under the CDA Ordinance, 1960 read with Municipal Administration Ordinance, 1960.

6. Explaining this argument, learned counsel submits that under Section 15-A of CDA Ordinance, 1960 the municipal functions have been assigned to CDA in relation to Islamabad Capital Territory and are required to be performed in accordance with Municipal Administration Ordinance, 1960. According to Section 33 of the last said Ordinance, Municipal Taxation cannot be imposed without taking sanction of Government, but this condition was overlooked prior to imposition of tax while the procedure laid down under CDA (Imposition of Tax) Rules, 1981 was also disregarded. It is also contended that the rates of fee under demand have been increased exorbitantly without obtaining approval. He added that the impugned demand of fee is ultra vires to Section 33 of Municipal Administration Ordinance, 1960 and Capital Territory Local Government Ordinance as well as Articles 4, 18, 25, 77, 141, 142 and 143 of the Constitution.

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7. Learned ASC [Raja Muqsit Nawaz Khan] argued that fiscal and taxing statutes are to be construed strictly and an authority cannot clothe itself with powers which have not been expressly granted by the statute itself. He added that imposition of tax on Corporations is subject of Federal Government as the same forms part of Federal Legislative List at entry No. 48. He submits that amendment in the rate of FEE without approval of Government is violative of Sections 20 & 23 of General Clauses Act, 1956 because only an authority, empowered to do an act is competent to alter the same.

8. Learned Counsel next submits that imposition of advertisement fee in relation to the signboards displayed on private properties, runs counter to the principle of *quid pro quo* because no corresponding service is being provided by the CDA.

9. Asserting the stance that compliance of statutory requirement cannot be termed 'advertisement, he argued that pursuant to Section 144 & 153 of Companies Ordinance, 1984 petitioners are under statutory obligation to display their business-nameplates on their premises and no tax or levy can be imposed upon an activity performed in compliance with rules and regulations. Same position was taken by petitioners who are banking companies and are obliged to show sign boards under Banking Companies Ordinance, 1962 read with regulation 8.3 dated 12.10.2007 Paragraph 51 issued by State Bank of Pakistan.

10. Relying upon Capital Territory Local Government Ordinance, 1979 read with Union Councils (Taxation) Rules, 1981, petitioners emphatically challenged the authority of private contractor to issue demand notices. It is contended that in case of rural areas only the Secretary Union Council can demand notice for payment of tax and under Section 9 of the Advertisement (Control) Regulation 1977 the Director CDA can issue demand notice while a contract qua enfranchisement of statutory obligation is not permissible according to dictums laid down by the Hon'ble Superior Courts of the country.

11. Learned Counsel in relation to WP. No. 4074/2014 submits that National Highway Authority does not carry mandate to collect advertisement fee for sign boards displayed on the face of private premises in compliance with the statutory requirements.

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11. Following case laws have been relied upon by the petitioners' side;

- i. **Messers Coca-Cola Beverages Vs Cantonment Board Chakdala etc [2011 MLD 1987 Lahore]** wherein the Hon'ble High Court holds that *"Using of shutter gates or sign boards on shops by petitioners for displaying name of their products or logo had no relation with any advertisement made through hoarding boards, bill boards or any other mode of advertisement...Cantonment Board under S. 60 of Cantonment Board Act, 1924 could impose taxes permitted to be imposed under any enactment of any municipality of the Province...Tehsil Municipal Administration Under S. 116 read with item No. 5, Part 3 of Second Schedule, of Punjab Local Government Ordinance, 2001 could levy tax or fee on advertisement other than on radio television and bill boards... fee would mean to defray cost of particular services rendered to a particular individual on principle of quid pro quo.. Tax would be levied as a part of common burden and for public purpose...No rules had been framed under Cantonment Act, 1924 to provide for collection of fee for use of borrowed space of sign boards of shops on an internal arrangement between borrower and lender...impugned demand could not be termed as a 'fee' in absence of providing any service or facility by Cantonment Board to petitioners for displaying name of their products and logo on their shops... Cantonment Board could not impose Tax without satisfying pre-condition of drawing proposals, fixation of liability and publication of notification... Impugned Tax was not prevalent in collateral Local Councils...Contracts permissible under S. 112 of the Act, were those necessary for purpose of the Act..Such purpose would include duties and discretionary functions of Cantonment Board laid down under Ss.116 and 117 of the Act...Collection of fee and taxes could be means for ensuring accomplishment of such purposes, but not a purpose itself...Cantonment Board could not collect fees and taxes through contractor..impugned demand was an illegality in itself and its collection through a contractor was a contempt."*

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- ii. **Abdul Hameed Vs District Coordination Officer Multan & another [2014 MLD 16 Lahore]** wherein it is observed that *"it was necessary for local government administration to indicate in draft notification/advertisement, the class of persons or categories of property proposed to be taxed. Advertisement of tax proposal in newspaper did not contain the class of persons, whereas in the notification class of persons was added at the end of the notification, note at the end of the notification made the whole process illegal and against Punjab Local Government (Taxation) Rules, 2001, as the same had provided a complete procedure to be followed for imposition of tax/fees etc. by the local councils."*
- iii. **Haji Muhammad Saeed Vs Municipal Corporation Cheechawatni [2006 CLC 1582 Lahore]** explaining the point that *"Mandatory provision of law for imposing license fee having not been complied with, imposition of license fee was declared to be illegal."*
- iv. **Dubai Islamic Bank Vs Federation of Pakistan [2013 CLD 2202 Lahore]** in said case the Hon'ble High Court held that *"Cantonment Board before demanding charges was legally obliged to provide places of uniform size within its limits for displaying names and boards by persons and companies desiring so."*
- v. **Messers & Shamim & CO. Vs Tehsil Municipal Administration, Multan City through Nazim and two others [2004 YLR 366 Lahore]** wherein it is held that *"Notice for the recovery had been issued by the contractor under S.142 of the Punjab Local Government Ordinance, 2001 which could only be issued by an officer authorized by the Nazim who was under his administrative control...Contractor being not under the administrative control of Nazim, notices issued by contractor were without lawful authority."*
- vi. **Shabbir Hussain Vs Tehsil Municipal Administration, Rahim Yar Khan through two Nazim and three others [2008 YLR 1889 Lahore]** the ruling is on the point that *"heading has clearly provided power and jurisdiction to Tehsil Municipal Administration to collect fees on billboard which is ultra vires to the powers conferred by the Statute."*



- vii. **Messers ACE Quality Pvt Ltd through CEO Vs Tehsil Municipal Administration Multan etc [2007 CLC 35 Lahore]** this case is on the point that “ *Authorities were required to regulate affixing of sign board and advertisements by framing bye-laws under S.192 of Punjab Local Government Ordinance, 2001, but Authorities had levied the fee without framing said bye-laws.*”
- viii. **Excide Pakistan Ltd Vs Cantonment Board Clifton & others [2012 CLC 1124 Sindh]** in this case the Hon’ble Sindh High Court that “ *Power of the Cantonment Board under Section 200 of the Cantonment Act, 1924 to impose “stallage, rent and fees” was not unqualified, but could only be used with the prior approval and sanction of the competent authority (the Chief of Army Staff or any other Officer appointed by the Government as per section 2 (viii) of the Cantonments Act, 1924..Nothing on record was available to show that such levy had the approval of the Competent Authority.*”
- ix. **Muhammad Yousof Khan Khattak Vs SM Ayub & 02 others [PLD 1972 Peshawar 151]** wherein it is concluded that “ *Statute providing for doing a thing in particular manner that thing could not be done in any other manner*”
- x. **Province of East Pakistan Vs Noor Ahmed [PLD 1964 SC 451]** setting the principle that “*Rule making authority cannot clothe itself with powers which statute itself does not give.*”
- xi. **Glaxo Laboratories Ltd Vs Union Council Dulu Khurd through Chairman & 04 others [1991 CLC 354 Lahore]** wherein it is elaborated that “*Tax being a compulsory exaction of money from public there was no equity in favor of a Tax. Disregard of procedure prescribed for levy of tax could not be looked at with disfavor...Default or failure to comply with the legal formalities would necessitate that benefit must go to the citizens.*”
- xii. **PakCom Limited Vs FOP [PLD 2011 SC 44]** Which is on the point of distinction between the expression of ‘fee’ versus ‘tax’ and that “*Principle of quid pro quo is used in law for giving one valuable thing for another and it is nothing more than mutual consideration which passes*



between the two parties to a contract and which renders the contract valid and binding."

- xiii. **Messer AZGARD NINE Ltd VS Pakistan through Secretary & others [2013 PTD 1030 Lahore]** where the Hon'ble Court sets that *"Distinction between a tax and the fee lay primarily in the fact that a tax was levied a part of a common burden, while a fee was a payment for a special benefit or privilege...tax was levied to raise funds for meeting the "necessary expenses" of the State, therefore, a tax was not co-related to services rendered or special benefit or privilege conferred on the taxpayer and accordingly the taxpayer was sharing/discharging his obligation under a common burden without being a beneficiary of a corresponding benefit, whereas in contrast, a fee was not part of the common burden but was payment made in lieu of a benefit, service or privilege by the payer of such fee."*
- xiv. **Hirjina Salt Chemicals Vs Union Council Gharo and others etc [1982 SCMR 522]** to elucidate that *"word used in statute not defined therein...should be understood to have been use in its dictionary meaning or even its ordinary or popularly understood meaning."*
- xv. **Arbab Contracting Vs Tehsil Municipal Administration Multan etc [2005 MLD 1520 Lahore]**, It specifies that *"mode of determination of reserve price was also provide by R.9 of the Punjab Local Government (Auctioning of Collection Rights), Rules, 2003 and earnest money according to R.16 of said Rules was also to be calculated on the basis of price so determined and was to be mentioned in the publication...Similarly the very basis regarding reserve price was not available on record, entire proceedings of auction conducted without that basis, was of no legal consequence... person to whom contract was granted, was an individual, who was not competent under S.54 (2) of Punjab Local Government Ordinance, 2001 to have any contract of the any of functions of Local Council."*
- xvi. **Azad Government of the State of Jammu & Kashmir Vs Hajj Mir Muhammad Naseer & others [1999 PLC (CS) 1173 Supreme Court AJK]** Which states that *"Fees Chargeable from students were challenged before High Court in constitutional petition alleging that fees amounted*

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to 'tax' which under provisions of S.31(4) of Azad Jammu and Kashmir Interim Constitution Act, 1974 could be imposed only by legislative assembly and not through an executive action...High Court accepting constitutional petition concluded that fee chargeable from students was "tax" because no part of said fee was earmarked necessarily for rendering service in return to those from whom it was to be recovered...High Court had failed to take note of the fact that tuition fee was being received from only those students who were to receive education from teachers in educational institutions..student was paying money and in return was getting education..."Tax" was a compulsory exaction of money by a public Authority for a public purpose and was not a payment for any specific service rendered..in respect of "fee" there was "quid pro quo" which means "something for something" while in "tax" it was absent..in case of payment of fee not only there was "quid pro quo" but was absence of compulsory exaction because tuition fee was to be paid by one who would go to the educational institution and not by one who would not go there...tuition fee as well as admission fee charged from students was a fee and could not by any standard be construed as tax."

- xvii. **Muhammad Munir Abdullah Vs Tehsil Municipal Administration & others [2010 YLR 2543 Lahore]**
Wherein it was held that " Holding of cattle-market was not a function or duty of the cantonment Board under S.116 of Cantonments Act, 1924 instead Tehsil Municipal Administration was tasked with holding of such markets under Punjab Local Governments Ordinance, 2001...Under S.112 of the Cantonments Act, 1924 the Board could enter into those Contracts only which were necessary for the purposes of said Act..Station Head Quarter could not award contract to the petitioner because a contract for holding cattle-market was not necessary for the purposes of the Cantonments Act, 1924...Cantonment Board or the Station Head Quarter could not supersede the right of the Tehsil Municipal Administration which was responsible for holding cattle markets."



- xviii. **Johar Ali (RAKI) and others Vs District Co-ordination Officer etc [2012 CLC 1471 Peshawar]** the case law is on point that *“Collection of tax under S.127 of Khyber Pakhtunkhawa local Government Ordinance, 2001 was meant for Provincial tax levied by Provincial Government... no publication before levying of tax had been produced vide which objections from public were invited nor any legal procedure for imposition of disputed tax had been brought on record...Government had abolished Octroi/Zilla tax on transportation of articles so transported within the country from one district to another...High Court in exercise of Constitutional Jurisdiction declared Kohistan Development Fee-Cess, illegal and void.”*
- xix. **Ms. Nargis Moeen Vs Government of Pakistan etc [PLD 2003 Lahore 730]** Wherein it was held that *“ Section 60 of Cantonment Act, 1924 was governed by principles of legislation by reference whereunder Cantonment could impose only such taxes which were legally permissible in municipal areas where such Cantonment was situated..Intention of legislature and rationale behind such imposition was based upon rule of equality i.e Municipality and Board areas had been considered and brought at par for purposes of imposition of local taxes...Referred legislation the moment same was amended omitting imposition of tax on property in municipality, power of Board to impose and claim omitted taxes would diminish automatically..Item No.5 in Second Schedule of Punjab Local Government Ordinance, 1979 had been omitted through Punjab Local Government (Amendment for Abolition of Certain Taxes) Ordinance, 1999 with effect from 28.09.1999..Board , thus, had no jurisdiction to claim tax qua the transfer of property, after promulgation of the amending Ordinance.”*
- xx. **Multiline Associates Vs ArdSherCowasjee etc [PLD 1995 SC 423]**, Wherein it was observed that *“Regulations made by the authority, are supposed to be not inconsistent with the provisions of the Ordinance and rules framed thereunder. If there is inconsistency between any provisions of the Ordinance and the Regulations, to that extent, Regulations, being inferior and subordinate legislation, will yield to the provision of the Ordinance and the rules framed*



thereunder. In the instant case, amendment brought about in Section 6 of the said Ordinance, empowering the Government to suspend or cancel no objection certificate and then reprocess it, shall hold the filed for two reasons, firstly, that provision of Ordinance is substantive law, which has preference over the Regulations which are procedural in nature and made by the authority which is created under the Ordinance, and secondly, that the amendment in the Ordinance was made after coming into force of the Regulations, hence to the extent of inconsistency, if any, Ordinance shall prevail and not the Regulations."

- xxi. **Messer Dadex Eternit Limited Vs Government of Sindh etc [2005 CLC 305 Karachi]** the ruling lays the principle that " conservancy charges leviable by the respondent No.2 are only in the nature of fee for rendition of specific services and cannot be levied in case no service is being performed."
- xxii. **M/s United Bank Ltd Karachi Vs M/s Mohib Ali Tannery etc [PLD 1994 Karachi 275]** which amplifies the point that "Rule making power conferred by a statute cannot override postulates of the statute itself ; it is to be confined to the parameters within which the parent statute has circumscribed its field of operation. Such power does not extend to supply omission or fill lacunas in the legislation from which it has emanated for being exercised...even when those requirements of competency are satisfied the end product viz, the rules framed have to be just, reasonable, in consonance with the law of the land, in accord with public policy and totally free of apprehension."
- xxiii. **Fauji Sugar Mills Vs Zilla Nazim [2007 MLD 302 Lahore]**, wherein it is held that "Professional Tax imposed by Zilla Council was illegal, and tax on corporation could only be imposed and levied by Federal Legislature and levy of professional tax/permit fee/license fee by local government on a corporation was not constitutionally permissible."
- xxiv. **Abdur Rasheed Vs CDA [PLD 1979 Lahore 803]**, wherein it is observed that "Regulations, otherwise non-statutory in character, requirement of publication, held cannot make non-statutory regulations statutory."
- xxv. **Calcutta Soft Drinks Vs Calcutta Municipal Corporation [AIR 2007 Calcutta 136]** the principle set therein is



that where situation warrants application of two provisions, non obstinate clause prevails.

xxvi. **Aradhana Drinks & Beverages Pvt Ltd. Vs State of Punjab & Orissa [AIR 2012 Punjab & Harryana 20]** wherein it is held that *“Dealer Boards erected or displayed by Company on outlet, shops or building were one of activity of ‘business’ or ‘trade’, carried out by a company which included sale of product marketed or distributed by a company, no advertisement tax can be levied on such dealer boards.”*

12. On the other hand, learned Counsel for respondent CDA vehemently opposed the petitions by submitting that the same are not maintainable in presence of alternate remedy of Appeal, provided under the Islamabad (Control of Advertisement) Regulations, 1977, and that appropriate course has not been adopted by them prior to invoking constitutional jurisdiction of this Court. He contended that the ‘Authority’ [CDA] under Section 15 of Capital Development Ordinance, 1960 is empowered to take necessary measures and enter into contracts for carrying out the purposes of the Ordinance. He added that under S.15-A of the CDA Ordinance, 1960 the powers and functions of ‘Authority’ are at par with Municipal Committee under Municipal Administration Ordinance, 1960. In support of this argument learned Counsel placed reliance on case law titled as *“Mrs. Bilquis Anwar Khan & 39 others Vs Pakistan through Secretary Cabinet Division etc.” [2001 SCMR 809]*

13. Learned Counsel next submits that in exercise of powers conferred under Section 51 of the CDA, Ordinance, 1960 the Authority made the Islamabad (Control of Advertisement) Regulations, 1977 which were notified in Official Gazette by the Government of Pakistan on 3.05.2008 whereby no advertisement in the ICT could be displayed without permission of the Authority and for such permission the Authority can levy and recover fee. He added that rate of fee was altered from time to time through notification in the official Gazette.

14. Learned Counsel also apprised that many petitioners have installed huge Sign Boards for advertisement of their products, Schemes etc. for attraction of the general public, therefore, such advertisements are liable to charges. He submitted that the

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Islamabad (Control of Advertisement) Regulations, 1977 has been in promulgation for years and vires of the same have been challenged by the petitioners after a significant delay. He added that the demands of fee have not been made for the first time and previously petitioners were paying the charges on the same count, therefore, by their own conduct they are estopped from raising objections at this belated stage.

15. Learned Counsel for respondent No. 3 [Contractor of the Authority] while adopting the above arguments added that he was awarded the contract after public notice in the newspaper, through open auction and committee in accordance with rules and law on the subject selected his bid of Rs. 09 Crores being highest, amongst the other contestants.

16. Defending the demand notice issued on behalf of NHA learned Counsel for NHA submits that the authorized regulatory body can take appropriate measures for corridor management and under the rules can authorize collection of levies through the private contractor.

17. Learned Counsel for **petitioner** clarifying the alternate remedy of appeal submits that under S. 13 of the Islamabad (Control of Advertisement) Regulations, 1977 an order issued by the Director has been made appealable while the impugned Notice has been issued by a Private Contractor, therefore, said remedy of appeal before the authority cannot be said to be available. He further explained that an action in violation of legal and Constitutional provisions is not sustainable on the basis of a subordinate legislation which is ultra vires to the Constitution as well as law.

18. Heard and record perused.

19. Primarily it is pertinent to observe that the Judgment passed by the Hon'ble Lahore High Court in case of **Messers Coca-Cola Beverages**, *supra* does not entirely correspond to the questions of law in the instant case, due to peculiar legislative position in Islamabad Capital Territory, therefore, this case is to be decided on the basis of separate reasons.

20. In order to resolve the controversy involved in the present case, following questions require determination;

- a. Whether Islamabad (Control of Advertisement) Regulations, 1977, has been issued without authority of law and Constitution?
- b. Whether the petitions are not maintainable due to alternate remedy of appeal?
- c. Whether *Fascia* Sign Boards fall within the definition of 'Advertisement' where the same have been displayed on private properties in compliance with statutory obligation and can CDA demand levy of fee thereupon even in rural areas?
- d. Whether a fee can be levied without provision of service thereagainst on the basis of principle '*quid pro quo*'
- e. Whether CDA is competent to enter into a Contract with a private party assigning powers of collecting the Advertisement fee?

In relation to Writ Petition No. 4074/2014 following ancillary question requires determination;

- f. Whether NHA can impose fee/rent/tax upon the private properties situated on the building line across the Highway/Motorway.

21. The Islamabad (Control of Advertisement) Regulations, 1977 have been brought under challenge as ultra vires to the Constitutional provisions contained in Articles 4, 18, 25, 77, 141, 142 and 143, by and large claiming that the impugned levy is against the freedom of trade and is a trespass in the authority of Parliament for two reasons, one that only parliament can impose tax concerning the purposes of Federation and tax on Corporations which is mentioned at entry No. 48 of Federal Legislative List contained in Fourth Schedule of the Constitution. Secondly, that the provisions of subordinate legislation in the shape of Islamabad (Control of Advertisement) Regulations, 1977 cannot prevail due to being inconsistent with Federal Legislation i.e Municipal Administration Ordinance, 1960. However, these contentions do not inspire confidence because freedom of trade guaranteed under Article 18 is qualified and remains subject to law and where a condition has been imposed under the authority of law, it cannot be presumed to be in contravention of the freedom of trade. So far as the subject of

Federal Legislative list is concerned, for the time being avoiding the debate on the status of levy as 'tax' or 'fee' it is observed that joint reading of Article 70 & Article 77 shows that expression used in Article 77 'by or under the authority' empowers the Parliament/legislature to delegate the mentioned powers to another institution. Guidance is sought from case of *"All Pakistan Textile Mills Association Vs Province of Sindh through Secretary etc"* [2004 YLR 192 Karachi] wherein it was observed that words *"under the Authority"* in Art. 77 of Constitution had clearly shown that Legislature could always authorize another institution such as Local Council to levy a tax..."

22. The Islamabad (Control of Advertisement) Regulations, 1977 was issued in exercise of power under Section 51 of CDA Ordinance, 1960 which is a Federal Legislation by all means and a levy imposed thereby cannot be called contravention of the Federal Legislative List or the Constitution. Adverting to the argument that the Regulation is in conflict with Section 33 of the Municipal Administration Ordinance, 1960 whereby the levy cannot be imposed without sanction of the Government, it is observed that the plea is misconceived because levy has been allowed pursuant to the entry No. 22 of Third Schedule to The Municipal Administration Ordinance, 1960 [i.e the Schedule relates to Taxes, Rates, Tolls and Fees which may be levied by a Municipal Committee and entry No. 22 authorizes levy of fees for licenses, sanctions, and permits granted by a Municipal Committee] and in case titled as *"Bilquis Anwar Khan Vs Pakistan"* [2001 SCMR 809] while upholding the levy of property tax by CDA the Hon'ble Supreme Court held that *"Capital Development Authority has been authorized to perform functions and exercise powers of Municipal Committee under the Municipal Administration Ordinance, 1960."* Consequently, question of conflict does not arise, while the CDA (Imposition of Tax) Rules, 1981 are inapplicable not only due to obvious distinction between the tax and fee but also because the Islamabad (Control of Advertisement) Regulations, 1977 derive the origin directly from the CDA Ordinance, 1960, therefore, cannot be called subservient to a subordinate legislation i.e CDA (Imposition of Tax) Rules, 1981. Moreover, the Islamabad (Control of Advertisement) Regulation, 1977 was notified in Part II of the



Gazette of Pakistan on 23.6.2008 and petitioners kept paying the impugned fee without any objection and at a belated stage came up with this challenge without explanation for delay.

23. The contention that rate of fee has been changed without approval of the government is not tenable because under Section 20 of West Pakistan General Clauses Act, 1956, a 'power to make rules' includes the 'powers to add and amend the same'.

24. In view of above discussion it is concluded that the Islamabad (Control of Advertisement) Regulation, 1977 as well as fee rate amending notifications published in the Gazette of Pakistan cannot be held to be ultra vires to the law or Constitution.

25. Next question relates to objection of the respondents upon the maintainability of the petitions due to available alternate remedy within the departmental hierarchy under Clause 13 of the Islamabad (Control of Advertisement) Regulations, 1977 [Notified in Official Gazette through S.R.O 653(I)/2008 dated 03.05.2008] Corresponding to Clause 12 of the Regulations vide Notification No. CDA/DMA-18(1) A/75 dated 30.11.1977. It is settled principle of law that mere right of appeal against the impugned Order is not sufficient to exclude Constitutional jurisdiction and the Court is required to ascertain whether such right of appeal constitutes 'alternate' remedy besides being adequate & efficacious. In the instant case not only the vires of Regulation but also very authority of CDA to raise the demand of fee has been challenged, therefore, appeal before the same forum whose jurisdiction has been challenged can neither be called adequate nor an alternate remedy. Resultantly the objection raised by respondents is scored out. Guidance is sought from case of **"Muhammad Aslam V. Senior Member [Colonies], Board of Revenue Punjab & others** [2004 SCMR 1587] wherein it was held that *"Mere availability of alternate remedy would not be a ground for holding constitutional petition is not maintainable without applying judicial mind to question, whether same was infact available, if so, whether same was adequate and efficacious remedy...availability of alternate remedy would not render Constitutional petition as unmaintainable nor same was a matter affecting jurisdiction of Court to entertain Constitutional petition...availability of alternate remedy would not be relevant to decide, whether discretion under Art. 199 of Constitution should be exercised or not, which decision would be made on judicial application of mind to facts of each case...finding with regard to non-maintainability of*

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Constitutional petition would constitute a decision that High Court was not vested with jurisdiction to entertain same...Commissioner had been named as arbitrator in the agreement...office of commissioner had been abolished under new district government system, thus, arbitration clause had been rendered ineffective and alleged alternate remedy would not be available" In another case of "Town Committee Gakhar Mandi Vs Authority Under the Payment of Wages Act, Gujranwala & 57 others" [PLD 2002 SC 452] wherein the Hon'ble Supreme Court held that " where the case was one of absence of jurisdiction on the part of the authority, High Court was not right in rejecting the petition under Art.199 of the Constitution in that case only because a remedy by way of appeal was available to the petitioner...such order of the High Court could, therefore, not be said to be an order justifiable in law"

26. Adverting to the question regarding nature of advertisement, Clause 2 (1) of the Islamabad (Control of Advertisement) Regulations, 1977 defines "Advertisement" as follows;

(1) "Advertisement" means any words, letters, model, sign, placard, board, notice, device or representation, whether illuminated or not, in nature of and employed wholly or in part for the purposes of advertisement, announcement or direction, and includes any hoarding or similar structure used or adopted for use for the display of any advertisement."

27. The above definition is exhaustive enough to include all kinds of fascia boards and identification Boards. The Regulation draws no distinction between public or private owned properties and the only restriction upon area of application has been made under Clause 2 (10) whereby the advertisement falling within the regime of the Regulation is restricted to that which is 'on' the building or land instead of inside of buildings, meaning thereby that the outer structures of private or public owned building remains subject to the Regulation. Clause 2(10) is reproduced for ready reference

"Site" means land or building on which an advertisement is displayed or intended to be displayed.

28. Bare perusal of the Regulation shows that its framer was cognizant of the statutory obligation requiring display of advertisement, with which several classes of persons are burdened, therefore, through an exception under subclause (b) of Clause 3

Statutory Advertisements have been excluded from requirement of permission by the authority, subject to size restriction and standard conditions. The referred Clause 3 is reproduced hereunder for ready reference;

3. Ban on display of advertisements without permission.

No advertisement, except those mentioned hereunder, shall be displayed within the Islamabad Capital Territory without the permission of the Authority:

(a) Election Notice:- advertisements relating to any pending election of the parliament, provincial assembly or a local body; provided that all such advertisements shall be removed within seven days after the close of the poll in the election to which the advertisements relate.

(b) Statutory Advertisements. Advertisements required to be displayed by any enactment for the time being enforced subject to the condition that these conform to the size restrictions prescribed by the Authority for area concerned, if any, and standard conditions laid down in clause 4 of these Regulations. [emphasis added]

(c) Office Sign Board of the Government departments and Government sponsored autonomous organizations on their office buildings.

(d) Traffic Signs.

(e) Name Plates on residential buildings. Name plates of the owners/occupants not exceeding [1.50] sq. meter surface area to be displayed on the gate or gate posts.

29. From the above, it is logical to conclude that where permission is not mandatory for displaying an advertisement, fee is not applicable, however, where the advertisement does not conform to the restriction or the standard size given in Clause 4 of the Regulation, it would automatically lose cover under Clause 3 and requirement of permission and the fee would become applicable. Needless to mention that in case of any factual dispute regarding size and applicability of fee standard, the same would be raised before appellate authority provided under Clause 12 of the Regulation, notwithstanding the same having been issued either by the Contractor or the Director. The moot question as to whether the appeal lies against demand notice issued by Contractor, has been explained hereinafter.

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30. So far as the limit of applicability of Regulation and fee in the rural areas is concerned, *firstly*, Item 22, Schedule II of Sections 64 & 65 of the Local Government Ordinance, 1979 authorizes administrator of the Union Council to levy fee while the notification has been issued with the approval of Deputy Commissioner. *Secondly*, the Regulation has been issued under the CDA Ordinance, 1960, therefore, the same has applicability within the area of the operation given under Sections 1(2) & 2(p) read with Schedule to the CDA Ordinance, 1960 which draws no distinction between the rural or the urban areas and the contention regarding inapplicability of the Regulation to rural areas does not deserve favorable consideration.

31. On the controversy relating to nature of levy it is observed that mere nomenclature given to the levy is not determinative but is assessed on the basis of established characteristic distinction between the 'tax' and 'fee' which describes that tax is imposed to share the common burden while fee is levied as a charge against a benefit or privilege. When this test is applied in the present case, Regulation itself gives name of 'Advertisement fee' because it is not the common burden which is being shared rather it is being imposed as fee. Guidance is sought from case of **PakCom Limited Vs FOP [PLD 2011 SC 44]** wherein the Hon'ble Supreme Court held as follows;

"The 'fee' and 'tax' are not synonymous and interchangeable terms and there is a difference between the two. The distinction between the 'tax' and a 'fee' is well established. A tax is a compulsory exaction of money by public authorities for public purposes enforceable by law and is not a payment for services rendered. The main distinction between them lies primarily in the fact that a tax is levied as a part of common burden, while a fee is a payment for a special benefit or privilege.

A tax is a compulsory exaction of money by a public authority for a purpose and is not a payment for any specific service rendered.

In respect of the fee there is quid pro quo while in a tax it is absent.

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The distinction between a tax and fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is payment for special benefit or privilege.

A fee is charge for the services rendered by the Government to the persons from whom the fee is received. It is a consideration for the services provided by the Government or its agencies to the persons from whom the fee is collected.

Both tax and fee are compulsory exactions. But the difference between the two lies in the fact that a tax is not co-related to particular service rendered but is intended to meet the expenses of the Government and a fee is meant to compensate to Government for expenses incurred in rendering services of a special nature.

'Fee' can be levied by any authority only for some service rendered by it to the person from whom levy is exacted. Fee levied by any local authority can be justified only if there is some special service rendered to the person from whom fee is collected and the sum total of the activities of the public body like the Municipal Council cannot be taken into account for this purpose.

In some cases it will not be possible to show with mathematical exactitude the precise co-relation between the amount realized as fee from one particular person and the services rendered to him. In a given cases, it is also possible that the fee is realized from hundreds or thousands of persons and the corresponding services are also rendered to hundreds or thousands. In that situation it may not be possible to show any strict correlation qua an individual except to indicate that the person who had paid the fee has derived a benefit in return. In such a case correlation between the

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fee levied and the services rendered may have to be determined having regard to the services rendered to the various persons and the benefits derived by an individual. There is always quid pro quo in fee but such element is missing in tax which is compulsory exaction of money."

In case titled as **Collector of Customs Vs Sheikh Spinning Mills [1999 SCMR 1402]**, the Hon'ble Supreme Court held as follows;

"..As far as fee is concerned, it is distinguishable from tax. The distinction between "tax" and "fee" lies primarily in the fact that a tax is levied as apart of common burden while a fee is paid for a special benefit or privilege. Fee confer a special capacity although the special advantage as for example, in the case of registration fee for documents or marriage license 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 accruing to the individual, which is the reason for payment in the case of fees.

32. The contention of petitioners that fee has been sought to be exacted without providing the corresponding consideration and is a violation of the principle of *quid pro quo*, lacks merit because uniformity of Sign Boards sought to be achieved through Regulation requires management which is the service provided by the authority satisfying the requirement of *quid pro quo*, moreso, the petitioners admittedly paid the fee previously. In this regard guidance is sought from the case of **PakCom Limited, Supra** wherein it was held that *"It is not understandable how it could be argued validly that the 'fee', was demanded without rendering any service which cannot be confined within a limited sphere. The fee was to be paid in lieu of spectrum and frequency for which certain steps are required to be taken and which can be equated to that of a "technical service". The "requisite fee" agreed upon by the PakCom is to be paid and the question of evasion thereof does not arise under the garb of 'quid pro quo'."*

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it is worth mentioning that there are certain kinds of 'fee' where corresponding consideration is not clearly perceivable and pertains to privilege or benefit, such as in case of 'regulatory fees' where the authority exacts the fee against the service of regulating an obligatory duty from the public. An instance of regulatory fee can be found in case of 'Arms License Fee' or other 'professional fees' where the corresponding service is not that conspicuous as it is in case of water supply fee received by the Municipality, but either way it cannot be called exaction of money to share common burden, therefore, it is not termed as 'tax' and is called 'fee'. Guidance is sought from a decision from the Indian Jurisdiction by the Hon'ble Supreme Court of India in case of **"Secunderabad Hyderabad Hotel Owners Association & others Vs Hyderabad Municipal Corporation etc [AIR 1999 SC 635]** wherein it was held as follows;

"A license fee may be either regulatory or compensatory. When a fee is charged for rendering specific services a certain element of quid pro quo must be there between the service rendered and the fee charged so that the license fee is commensurate with the cost of rendering the service although exact arithmetical equivalence is not expected. However, this is not the only kind of fee which can be charged. License fee can also be regulatory when the activities for which a license is given is require to be regulated or controlled. The fee which is charged for regulation for such activity would be validly classifiable as a fee and not tax although no service is rendered. An element of quid pro quo for levy of such fees is not required although such fee cannot be excessive."

33. Next question regarding legal character of the Contract executed between the CDA and respondent No.3 requires attention because according to petitioners said contract has been awarded without lawful authority and amounts to delegation of statutory duty to a private person which is against the spirit of law. Validity of a

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Contract entered into by the Public functionary is evaluated *inter alia* on the basis of following three questions;

- a) Whether the award of contract has been done in transparent manner by observing rules on the subject,
- b) Whether under the law, 'authority' has the jurisdiction to enter into Contract,
- c) Whether the statutory authority cannot delegate fee collection function under any circumstances?

34. In the instant case no allegation has been made against the process of awarding the contract, therefore, does not require any further deliberation, while Section 15 (2) (v) of CDA Ordinance, 1960 [as well as The Capital Territory Union Councils (Contract) Rules, 1981 read with Section 102 of the Capital Territory Local Government Ordinance, 1970 in rural areas] clearly empowers the Authority to enter into the Contract for purposes of the Ordinance and the Regulation has been issued under the authority of Section 51 of CDA Ordinance, 1960, therefore, implementation of the same constitutes purposes of the Ordinance. Relevant portion of Section 15 of CDA Ordinance, 1960 is being reproduced due to relevance;

"15. Power of the Authority. (1). Subject to the other provision of this Ordinance and the rules, the authority may take such measures and exercise such powers as may be necessary for the carrying out of the purposes of this Ordinance;

(2). Without prejudice to the generality of the powers conferred by subsection (1), the Authority may-

.....

(v) enter into and perform all such contract as it may consider necessary;

...."

35. Bare perusal of above Section reflects that expression "*Subject to the other provision of this Ordinance and the rules*" used in the above provision makes the same controlled by the overall spirit of the Ordinance as well as rules. So far as remaining aspect of sub delegation of the statutory function is concerned, the Contractor has

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been merely assigned the role of collecting the fees on behalf of authority without any discretionary powers while Clause VI of the Contract spells out the scope of the Contractor's authority which is reproduced;

"The Scope of this agreement shall strictly be limited to the collection of fascia sign boards, shop/building wrap/shop wall panels, Petrol/CNG filling stations Signboards only as per latest schedule. [emphasis added] The licensee /contractor shall not collect fee, renew license and issue new license in respect of any other advertisement such as rooftop billboard, hoardings, moppies, LCD/LEDs, temperature and time clock, pole signs, banners, streamers, video walls, variable message electronic signs, twin sided Back-lit, Billboards, pylons/Unipoles Sign, Sky Signs, trivisions, Temporary Hoardings, or any other advertisement except fascia sign boards, shop/building wraps/Shops wall panels, petrol/CNG stations Signboards. Any violation in this regard shall result in immediate termination of the contract/license without any notice and the security as well as advance paid license/contract fee/amount shall be forfeited without any legal and financial obligations over CDA."

36. Further the Contractor has not been allowed to take coercive measures on his own against the defaulting licensees as according to clause xvii of the contract "in case of any resistance by the shopowners for not paying legal fee regarding fascia signboards, the Director will be informed in writing and the Director will support the licensee/contractor for taking legal actions as per law." Such assignment does not run counter to the principle of *delegatus non potest delegare* [one to whom power is delegated cannot himself further delegate that power] and is merely interchangeable to endeavor of deregulation. It is also clarified that where a ministerial function is assigned to a private person, on the basis of common law principle of *qui facit per alium facit per se* [He who acts through another does the act himself], therefore, status of such repository is equivalent of the functionary who was originally delegated the function by the statute and any

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grievance in this regard can be got redressed from Appellate authority.

37. The last question relates to the authority of NHA for imposing levy upon the advertisements displayed on the building line across the Highways/Motorways. The response submitted by the NHA is evasive and nothing has been brought on record whereby requirement of fee/rent or permission has been made mandatory for installing the sign board on private premises falling on the Building Line of the Highways & Motorways. The contention that NHA is empowered to generate income by subjecting its Right of Way to commercial way is devoid of force because Right of Way does not include building line, the term 'Right of Way' has been defined in Section 2 (j) of NHA Act, 1991, as follows;

j) "Right of Way" (ROW) means the land acquired for the purpose of construction of a National Highway or any other road assigned to the Authority.

Similarly 'Right of Way' has been further explained in Rule 2 (xx) of the National Highway and Strategic Roads (Control) Rules, 1998 [amended in 2002] , as follows;

(xx) "Right of Way (ROW)" means the land acquired for the purpose of construction of a National Highway or any other road assigned to the Authority or taken over, ROW of the roads declared as National Highway or Strategic Road under the NHA Act and controlled by the Authority including bridges constructed and owned by the Authority."

38. The Corridor Management under no circumstances, include levy of fee/rent for the boards displayed on private premises on the building line of the Highway. According to Rule 2 (c) of NHA Roads Maintenance Accounts Rules, 1998 the jurisdiction of NHA concerning regulation of building line is restricted to removal of encroachments, ribbon development, utilities, access or approach roads, afforestation, commercialization, roadside facilities (service and rest areas, filling stations, amenities), traffic and highway safety operations (enforcement of traffic law and rules, road side emergency telephone service, mobile vehicle repairs and rescue service, para medical service), weigh station operations, and toll operations. The

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commercialization mentioned in this rule cannot be presumed to mean that NHA has authority to impose levies upon commercial activities rather the same is meant to oversee the commercialization in the back drop of road safety. Moreover, no authority can be clothed with unbridled powers to levy fees/taxes upon a class of persons which has not been specifically mentioned in statute or regulation. At this juncture it is relevant to mention that a novel stance has been taken by the authority in their written arguments whereby it is claimed that prime function of the Authority/Respondent No.3 is to generate revenue (raise funds) through commercial use. This contention is neither rationale nor legal and amounts to ruthless disregard of Section 4 of National Highway Act, 1991, which enumerates following functions of Authority;

"4. Purpose and functions of Authority._ The purpose and functions of the Authority shall be to plan, promote, organize and implement programmes for constructions, development operation, repairs and maintenance of National Highways and strategic roads specially entrusted to it by the Federal Government or other authority concerned."

In this connection the demand of fee/rent for the sign board on the private premises falling on the building line of Highway is held to be illegal and ultra vires to the NHA Act, 1991 as well as the relevant rules. The NHA, however, may regulate the size and other characteristics of Sign Boards in view of carriage way visual and road safety.

39. In view of above discussion, all the writ petitions stand disposed of in the following terms:-

- i. The Islamabad (Control of Advertisement) Regulations, 1977 cannot be held ultra vires to the Constitution or law,
- ii. The petitions are maintainable for reasons recorded in Para 25 hereinabove,
- iii. The Fascia Sign Boards fall within the category of advertisement and the Capital Development Authority can levy fee, irrespective of urban or rural territory, in accordance with the Regulations

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[except the statutory advertisement subject to size requirement],

iv. The fee being charges cannot be held to be illegal, contravention of rules on the subject and in consonance with principle of 'quid pro quo',

v. Contract with third party contractor for the purpose of fee collection cannot be held to be in contravention of any statutory requirement and is not found in violation of law, and the grievance in relation to requirement of fee, determination of its scale either by the Director or by the Contractor is appealable under Clause 13 of the Islamabad (Control of Advertisement) Regulations, 1977, and

vi. The Fee demand for fascia sign board by the National Highway Authority is found to be without lawful basis, therefore, set aside.

40. No Order as to costs.

(CHIEF JUSTICE)

Announced in Open Court, on this 11th day of March, 2015.

(CHIEF JUSTICE)

Approved for Reporting

Umar

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