

**JUDGEMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT.**

W.P.No.2384/2015

UCH Power Private Limited

**Vs**

Federation of Pakistan, etc

**PETITIONER BY:** Barrister Umair Majeed Malik and Saad Muhammad Hashmi, Advocates.

**RESPONDENT BY:** Khawaja Saeed-ul-Zafar and Sardar Ahmed Jamal Sukhera, Advocates.

**STATE BY:** Syed Hussnain Ibrahim Kazmi, Deputy Attorney General.  
 Malik Muhammad Nazir, Director Law, Ministry of Petroleum.

**DATE OF HEARING:** 21.10.2015

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**AAMER FAROOQ, J.** Through this judgement, the instant petition as well as W.P.No.2383/2015 are being decided as common question of law is involved.

Through the instant Constitution petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, as well as W.P.No.2383/2015, the petitioners *inter alia* seek declaration that Gas Infrastructure Development Cess Act, 2015 is repugnant to the provisions of Constitution and that the Gas Infrastructure Development Cess is not applicable to them.

2. The facts, in brief, are that the petitioners are private limited company and electricity producers in Pakistan. In order to produce electricity, the petitioners consume low BTU natural gas from a dedicated gas field owned and operated by respondent No.2 under the Gas Supply Agreement dated 02.11.1995. The price of gas delivered to the petitioners is to be determined by respondent No.2 in accordance with Article 8 and exhibit 'B' of the Gas Supply Agreement. In 2011, Gas Infrastructure Development Cess Act was passed and under the same, Gas Infrastructure Development Cess (GIDC) was imposed on natural gas. The constitutionality of the referred Act

on cases titled "*Federation of Pakistan Vs Durrani Ceramics*" (2014 SCMR 1630), "*East Pakistan Chrome Tannery Pvt. Ltd. Vs Federation of Pakistan and others* ( 2011 PTD 2643). It was further contended that the GIDC Act, 2015 is a validating statute and hence is validate. In support of contentions, the learned counsel placed reliance on cases reported as 1993 SCMR 1705, PLD 1975 SC 50, 1973 SCMR 02 and PLD 1981 Lahore 640.

5. In the instant petition as well as W.P.No.2383/2015, the petitioners have *inter alia* assailed the vires of Gas Infrastructure Development Cess Act, 2015, however, during the course of arguments, the learned counsel for the petitioners submitted that he shall not press the vires of the referred Act, therefore, no judgement is required with respect to the same.
6. The sole thrust of the argument by the learned counsel for the petitioners is that since cess is a fee declared by the Hon'ble Supreme Court of Pakistan in case titled "*Federation of Pakistan Vs Durrani Ceramics*" (2014 SCMR 1630) and no reciprocal services are being provided to the petitioner by the respondents, therefore, they are not liable to pay the same.
7. Under section 3 of the Gas Infrastructure Development Cess Act, 2015, a cess was levied and charged by the Federal government from the gas consumers. In this behalf, for the sake of brevity, the referred provision of law is reproduced below and is as follows:

### **3. Levy of cess**

*(1) The cess shall be levied and charged by the Federal Government from gas consumers, other than the domestic sector consumers, or the company at the rates as provided in the Second Schedule to this Act. The gas company shall be responsible for billing of cess to gas consumers, its collection from gas consumers and its onward payment to the Federal Government in the manner as prescribed by the Federal Government.*

*(2) 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:*

*Provided that the Federal Government may decide to levy any rate of cess on any category of gas consumers subject to maximum rate provided in the Second Schedule.*

*(3) A mark up at the rate of four percent above three months KIBOR prescribed by the Federal Government shall be payable by the gas consumer or the company on any amount due under sub-section (1), if the said amount is not paid by the said gas consumer or by the said company respectively within the prescribed time, mark up payable by the gas company or any mark up payable by gas consumer to the gas company shall be deposited in such manner as the Federal Government may prescribe:*

*Provided that the said mark up shall be payable with effect from the 1<sup>st</sup> July, 2015.*

8. Under section 4 of the Act *ibid*, the cess so charged levied and collected is to be utilized by the Federal Government for or in connection with infrastructure development of Iran-Pakistan Pipeline Project, Turkmenistan-Afghanistan-Pakistan-India (TAPI) Pipeline Project, LNG or other ancillary projects.

9. The cess so levied is to be paid by the companies mentioned in the First Schedule from the gas consumers at the rates mentioned in the Second Schedule. In this behalf, cess has been defined in section 2(a) of the Act and is as follows:

*"Cess" means the gas infrastructure development cess levied and chargeable from gas consumers, other than the domestic sector consumer, of the company over and above the sale price and payable under section 3;*

10. The nature and status of cess as levied under Gas Infrastructure Development Act, 2011 came up for consideration before the Hon'ble Supreme Court of Pakistan in case titled "*Federation of Pakistan Vs Durrani Ceramics*" (2014 SCMR 1630) wherein it was held as follows:

*"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 of 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."*

11. In light of above, the Hon'ble Supreme Court of Pakistan held that cess is a fee. Similar test was applied by the Hon'ble Lahore High Court in case titled "*East Pakistan Chrome Tannery Pvt. Ltd. Vs Federation of Pakistan and others* (2011 PTD 2643) wherein it was held as follows:

*"Osmosis of case-law helps indentify the core differentiating features between Tax and Fee. In case of Fee, the allocation of the moneys*

*collected (i.e.; the Fee collected) is for a specific purpose and more importantly for a specific beneficial purpose, as the moneys collected flow back for the benefit and advantage of a particular class or sector or group of individuals who have paid or contributed towards the Fee. It is qualified that this benefit need not be returned with mathematical precision or exactitude against the contribution made. It would be sufficient for a levy to pass as a Fee if the identified class of persons or sector benefits as a whole. Tax on the other hand lacks this specificity of purpose. It is more generic and does not have a defined purpose attached to the allocation of revenues collected. It neither has a specified allocation target nor the mandate to extend any benefit or privilege to an identified class. The State, therefore, has discretion in allocating revenues collected through Tax but no such discretion is available in case of a Fee which is already predetermined by law. It is also underlined that payment of both the levies may be mandatory or compulsory therefore the distinction between the two levies does not lie on the basis of its policing or collection mechanism but actually lies in its purpose and mode of allocation of moneys so collected. Review of WWF Ordinance in the light of the above parameters makes it evident that contribution paid towards the Fund under the WWF Ordinance is a Fee and not a Tax."*

12. In case titled "*Pak Com Ltd. & others Vs Federation of Pakistan*" (**PLD 2011 SC 44**) the distinction between tax and fee was highlighted and the nature of the two levies was discussed. In the referred case, 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 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 fee there is 'quid pro quo'; while in a tax it is absent.*

*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 the levy is exacted. Fee levies 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 correlation between the amount realized as fee from one particular person and the services rendered to him. In a given case, 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 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. "*

13. In case titled "*The Hinger-Rampur Coal Co. Ltd. and others Vs The State of Orissa and others*" (**AIR 1961 SC 459**), the Supreme Court of India while determining the nature of cess levied under Arrisa Mining Areas Development Fund Act, 1952 held as follows"

*"It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any*



*consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilized for all public purposes, whereas a cess levied by way of fee is not intended to be, and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied. There is however, an element of compulsion in the imposition of both tax and fee. When the Legislature decides to render a specific service to any area or to any class of persons, it is not open to the said area or to the said class of persons to plead that they do not want the service and therefore, they should be exempted from the payment of the cess. Though there is an element of quid pro quo between the tax-payer and the public authority there is no option to the tax-payer in the matter of receiving the service determined by public authority. In regard to fees there is, and must always be, co-relation between the fee collected and the service intended to be rendered. Whether or not a particular cess levied by a statute amounts to a fee or tax would always be a question of fact to be determined in the*

*circumstances of each case: AIR 1954 SC 282 and AIR 1954 SC 400 and AIR 1954 SC 388, Rel. on.*

*It is true that when the Legislature levies a fee for rendering specific services to a specified area or to a specified class of persons or trade or business, in the last analysis such services may indirectly form part of services to the public in general. If the special service rendered is distinctly and primarily meant for the benefit of a specified class or area the fact that in benefiting the specified class or area the State as a whole may ultimately and indirectly be benefited would not detract from the character of the levy as a fee. Where, however, the specific service is indistinguishable from public service, and in essence is directly a part of it, different considerations may arise. In such a case it is necessary to enquire what is the primary object of the levy and the essential purpose which it is intended to achieve. Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences. That is the true test in determining the character of the levy: 1950 AC 87, Ref. to."*

14. In light of the above judgements determining the nature of taxed fee the Hon'ble Supreme Court in (2014 SCMR 1630) supra has held that cess levied 2011 Act, which is essentially the same as levied under Act of 2015 ibid is a fee. The sole question that is to be determined in view of the judgements cited above and the facts and circumstances of the case is whether the petitioners derive any benefit or service due to the levy or is there any element of reciprocity.

15. The Hon'ble Supreme Court in (2014 SCMR 1630) as well in (PLD 2015 SC 354) held that levy of cess was in nature of fee extending special benefit to a class of people. The class that would benefit due to cess is that require natural gas for its business/commercial purpose. As stated above, the petitioners are the producers of electricity and for referred process utilize natural gas.
16. The argument of the learned counsel for the petitioners that the gas is supplied to them from a particular field, therefore, no benefit shall accrue to them from the payment of fee and development of pipelines is not tenable. The petitioners are users of natural gas and the projects for which fee is being charged shall eventually benefit them too. In this behalf as laid down in the judgements above that the benefit accruing might not be calculable with mathematical precision or exactitude against the constitution mode. The petitioners, therefore, being commercial / industrial user of natural gas shall derive benefit from the fee/cess paid by them.
17. In view of above, the instant petition as well as connected W.P.No.2383/2015 are devoid of merit and hence dismissed.

**(AAMER FAROOQ)**  
**JUDGE**

Announced in open Court on this 18<sup>th</sup> day of January, 2016.

**(AAMER FAROOQ)**  
**JUDGE**

\*M.AMIR\*

*Approved For Reporting*