Syed Mansoor Ali Shah, J.-

44. I have had the privilege of reading the judgment authored by my learned brother Faisal Arab J. with which my learned brother Mushir Alam J. has concurred ("**Majority Judgment**"). I, with respect, do not agree with the reasoning and conclusion of the Majority Judgment. I look at the issue somewhat differently. The principal question that concerns me is whether a fiscal levy imposed for a *service to be rendered – a service* dependent on the completion of long-term multinational infrastructural projects tied to the vagaries of international politics, exist without a reasonable timeline ? Is reasonable time, therefore, an essential constituent of *quid pro quo*? Can a fee levying legislation, resting on reciprocity, impose a one sided obligation on the gas consumers to pay the levy while providing no timeline nor any consequences for failure to deliver the proposed service ? I venture to examine the constitutionality of the impugned levy (GIDC) in this background.

45. Constitutionality and legality of Gas Infrastructure Development Cess **("GIDC")** imposed under the Gas Infrastructure Development Cess Act, 2015[1] **("Act")** has come up for our consideration. Two provincial High Courts have expressed contrary views; Sindh High Court has struck down the levy and the Act, as being unconstitutional, vide judgment[2] dated 26.10.2016, whereas, Peshawar High Court has upheld the levy, vide judgment[3] dated 31.05.2017. Matters are still pending in other Provincial High Courts.

46. GIDC is levied and charged[4] by the Federal Government from the gas consumers[5], other than the domestic sector consumers. According to the Act, GIDC is to be utilized[6] by the Federal Government for infrastructure development of Iran Pakistan Pipeline Project (IP), Turkmenistan-Afghanistan-Pakistan-India (TAPI) Pipeline Project, LNG or other ancillary projects.

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[1] ACT IV of 2015 which received the assent of the President on 21.05.2015 and was published in the Gazette of Pakistan Extraordinary, part-1 on 23.05.2015.
[2] M/s Century Paper & Board Mills Ltd and others vs. Federation of Pakistan and others.
[3] Passed in W.P 2178/2015, etc titled M/s Umair Steel vs. Federation of Pakistan and others, etc.
[4] section 3 of the Act
[5] Defined in section 2(a) of the Act.
[6] Section 4 of the Act.

47. As a matter of background almost similar Cess (GIDC) was earlier imposed under The Gas Infrastructure Development Cess Act, 2011 **("Act, 2011")**.[7] Considering it to be a "tax" under item no.51 of Part I of the Federal Legislative List of the Constitution[8], it was passed as a Money Bill under Article 73 of the Constitution. It was soon challenged after its promulgation by the gas consumers, primarily on the grounds; that GIDC was infact a Fee and could not have been introduced through a Money Bill bypassing the bicameral legislative procedure provided under Article 70 of the Constitution; and that the Parliament did not enjoy the legislative competence to impose "Tax" on "natural gas."

48. Peshawar and Islamabad High Courts struck down the Act, 2011 and declared the levy of GIDC as being unconstitutional in *Ashraf Industries (Pvt) Ltd*[9] and *Master Textile Mills.*[10] Finally, the matter came up before this Court in *Durrani Ceramics*[11]. This Court also declared the law unconstitutional on the ground that GIDC under Act, 2011 was not a Tax but a Fee and therefore could not have been passed as a Money Bill. Review filed against the same was also dismissed in *Durrani Ceramics -II.*[12]

49. The Gas Infrastructure Development Cess Act, 2015 was promulgated on 21.05.2015 with modifications once again imposing GIDC (Cess) on all the gas consumers other than the domestic sector consumers. It drew its legislative competence from item no. 2[13] of Part II of the Federal Legislative List. The new Act is substantially a repeat of the previous Act, 2011 except that its legislative routing is through both the Houses of the Parliament in terms of Article 70 of the Constitution. The new legislation does not set out the essential constituents of the new levy (Fee) to show that GIDC is no more a Tax but a Fee. Perhaps the legislature simply

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[7] ACT No. XXI of 2011. Received the assent of the President on 13.12.2011 and was published for general information in the Gazette of Pakistan Extraordinary on 15.12.2011.
[8] Item 51: Taxes on mineral oil, natural gas and minerals for use in generation of nuclear energy.
[9] Ashraf Industries (Pvt) Ltd. vs. Federation of Pakistan through Secretary, Ministry of Petroleum and Natural Resources, Control Secretariat and 3 others (2013 PTD 1732).
[10] Master Textile Mills & 275 others vs. Federation of Pakistan & others (PLD 2014 Islamabad 83)
[11] Federation of Pakistan through Secretary M/o Petroleum and Natural Resources and another vs. Durrani Ceramics and others (2014 SCMR 1630). [three member bench]
[12] Federation of Pakistan through Secretary Ministry of Petroleum and Natural Resources and another vs. Durrani Ceramics and others (PLD 2015 SC 354).
[13] Item no.2: Mineral oil and natural gas; liquids and substances declared by Federal law to be dangerously inflammable.

banked on the declaration given in *Durrani Ceramics* and thought that no additional legislative design was required.

50. The constitutionality and legality of the new Act was challenged before the provincial High Courts in the country. Sindh High Court vide judgment dated 26.10.2016 struck down the levy as being unconstitutional, however, the Peshawar High Court upheld the levy in its judgment dated 31.05.2017. Litigation is still pending in other Provinces, therefore, this bench vide order dated 22.10.2019 had allowed parties in pending matters to join these proceedings as intervenors so that their contention and viewpoint can be heard. The matter has now come up before us for final determination.

Grounds of challenge

51. Several legal questions of varying complexities were raised before us in the startling backdrop of this case; the more fundamental and pivotal being; whether the Act imposes a Fee under our constitutional framework, especially when the corresponding service or *quid pro quo* is to be rendered in some distant future; whether different Cess rates provided in the Second Schedule to the Act are discriminatory; the failure to seek prior approval of the Federal Cabinet before initiating the legislative process of the Act; whether the Parliament can legislate without first allowing Council of Common Interest (CCI) to deliberate on the subject of natural gas which falls in Part II of the Federal Legislative List and without considering its recommendations. And in the absence of any notification and specification of the rates under section 3 of the Act, whether GIDC could be levied and charged; and finally whether the validation provision under section 8 of the Act holds water and GIDC for the period prior to the Act was lawfully charged. I deal with the constitutionality of the Fee imposed and therefore some of the questions raised are not required to be answered in this case.

52. I have had the opportunity of hearing the learned counsel for the parties and the intervenors extensively over days. I have examined the record of the case; the current status of the infrastructure development gas projects on the ground; the recent

trends in the sub-continental comparative jurisprudence on the subject of Tax and Fee; and tried to understand the contemporary concept and meaning of Fee (with *future service*), now used for raising public finance for large infrastructure projects and have examined its constitutionality and legality under our living Constitution.

OPINION

Concept of Fee

53. Summarizing the sub-continental jurisprudence[14] on Tax versus Fee, I see that normatively, theoretically and legislatively three prominent tasks have been entrusted to taxation, namely; revenue augmentation, redistribution of wealth in society and regulatory function to ensure expected economic behaviour. Fee, on the other hand, has a narrower scope and is premised on a corresponding service in return or *quid pro quo*. While tax is

[14] See: Haji Dossa Limited, Karachi vs. Province of Punjab through Collector, Sahiwal and others (1973 SCMR 2), Workers' Welfare Funds, M/O Human Resources Development, Islamabad through Secretary and others vs. East Pakistan Chrome Tannery Pvt. Through G.M. Finance Lahore and others (PLD 2017 SC 28), Sheikh Muhammad Ismail & Co. Ltd., Lahore vs. The Chief Cotton Inspector, Multan Division, Multan and others (PLD 1966 SC 388), Pakistan Flour Mills Association and another vs. Government of Sindh and others (2003 SCMR 162), Hirjina Salt Chemicals (PAK.) Ltd. vs. Union Council, Gharo and others (1982 SCMR 522), Noon Sugar Mills Ltd. vs. Market Committee and others (PLD 1989 SC 449), Azad Government of the State of Jammu & Kashmir through Chief Secretary, Azad Kashmir Government, Civil Secretariat, Muzaffarabad vs. Haji Mir Muhammad Naseer and others (1999 PLC (C.S.) 1173), Pakcom Limited and others vs. Federation of Pakistan and others (PLD 2011 SC 44), Collector of Customs and others vs. Sheikh Spinning Mills (1999 SCMR 1402), The Hingir-Rampur Coal Co vs. The State of Orissa (1961 SCR (2) 537), Sreenivasa General Traders vs. State of Andhra Pradesh (AIR 1983 SC 1246), Upaj Mandi Samiti vs. Orient Paper and Industries (1995 RRR (1) 327), Bangalore Development Authority vs. Air Craft Employee Society (2012 (1) JLJR 503), H.H. Sudhundra Thirtha Swamiar and others vs. The Commissioner for Hindu Religious and Charitable Endowments, Mysore and another (AIR 1963 SC 966), Southern Pharmaceuticals and Chemicals, Trichur and others vs. State of Kerala and others (AIR 1981 SC 1863), The Chief Commissioner, Delhi and another vs. The Delhi Cloth & General Mills Co. Ltd. and others (AIR 1978 SC 1181), Calcutta Municipal Corporation and others vs. Shrey Mercantile Pvt. Ltd. and others (AIR 2005 SC 1879), Bhagwan Dass Sood vs. State of Himachal Pradesh and others (AIR 1997 SC 1549), Bangalore Development Authority vs. Air Craft Employee Society (2012 (1) JLJR503), Kewal Krishan Puri and another vs. State of Punjab and others (AIR 1980 SC 1008), Agriculture Market Committee, Rajam and others vs. Rajam Jute and Oil Millers Association, Rajam (AIR 2003 SC 1742), Upaj Mandi Samiti vs. Orient Paper and Industries (1995 (1) RRR 327), The City Corporation of Calicut vs. Thachambalath Sadasivan and others (AIR 1985 SC 756), Kishan Lal Lakhmi Chand vs. State of Haryana (1993 Supp (4) SCC 461), The Commissioner, Hindu Religious Endowments, Madras vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (AIR 1954 SC 282), The State of West Bengal and another vs. Kesoram Industries Ltd. and others (AIR 2005 SC 1646), Municipal Corporation of Delhi and others vs. Mohd. Yasin (AIR 1983 SC 617) and Gasket Radiators Pvt. Ltd. vs. Employees' State Insurance Corporation and another (AIR 1985 SC 790).

devoid of *quid pro quo*, it is a *sine qua non* for Fee. Tax and Fee both properly belong to the world of public finance.[15]

54. A tax is a compulsory contribution to the government, imposed in the common interest of all, for the purpose of defraying the expenses incurred in carrying out the public functions or imposed for the purpose of regulation, without reference to the special benefits conferred on the one making the payment.[16] As a corollary, tax being instrumental in revenue augmentation, its quantum need not commensurate with costs incurred by such public authority. Further, tax is devoid of any *quid pro quo*. Even where any benefit seems to flow, in case of tax, it is merely incidental and not primary. In other words, there exists no connection, whether direct and immediate or broad and casual between the contributor of tax and benefits.

55. In a glaring contrast, Fee, is generally defined to be a charge for a special service rendered to individuals by some governmental agency. Ordinarily, Fees are uniform and no account is taken of the varying abilities of different recipients to pay. A Fee may either be regulatory or compensatory. Where a Fee is commensurate with the cost of rendering the service, though not in exact arithmetical equivalence, it is a compensatory Fee. On the other hand a Fee charged to regulate or control, is validly classifiable as regulatory Fee, provided it is not excessive or not dominantly intending to raise revenues for the public authority. Whilst both tax and Fee are compulsory exactions of money by public authority, their real distinction comprise in primarily what is known as *quid pro quo* test and *proportionality* of amount test.

56. Accordingly a levy to be identified as Fee must have an element of *quid pro quo* between the payer and the public authority that imposed it. This *quid pro quo* or service rendered in return envisages an intimate and immediate relationship between rendition of service and the payer, who is direct beneficiary of such service, on a one-on-one basis. This proximity between the

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[15] Pathak, Neha: "SLIPPERY SLOPES OF COMPENSATORY TAX AND FEE" – Journal of the Indian Institute 56

[16] Martin T Crowe, The Moral Obligation of Paying Just Taxes 12 (Catholic University of American Press, Washington D.C, 1944)

beneficiaries and services can also be categorized for simplicity as "*proximate quid pro quo*.[17]" So the classical approach of Fee comprises the following: a) proximate *quid pro quo* i.e., rendition of certain services to the payers by government agency which amounts to special benefit/advantage to the payer; b) proportionality i.e., the amount imposed ought to commensurate with cost of services to be rendered; c) specific fund that ensures dedicated spending from an earmarked fund for specific purpose of that service. Merger of proceeds with general revenue to be spent for general purposes was not acceptable; d) primary objective that is to enquire whether the primary purpose of imposing levy is rendition of services and it is not merely incidental to augmentation of revenue. If latter predominates, it acts as negative restriction and the levy will be a tax[18].

57. As the economy grew, Fee was imposed to render services to a large class of people or specified sector or area as a whole. In such cases, the relationship between the beneficiary and the services rendered became more generic, broad and remote. This is because such a service is to reach a general class of people or a specified sector or a designated area and not to an individual *per se* and therefore the service may also extend to free riders who are not the payers of Fee, hence the bond of proximity stands diluted. This shift has also been termed as *"remote quid pro quo"*[19] which is used to describe the situation where services target beneficiaries which is a generic class comprising of a certain free riders but inclusive of payers. The shift from proximate to remote *quid pro quo* overtime does not mean that the service to be rendered to the payers of Fee would be any different or in any manner less. The scope and depth of service to be rendered depends on the nature of the service. Like in the instant case, the service of continuous and increased supply of natural gas, inspite of being a generic service, extending to a class of gas consumers including those who are not payers of GIDC, must still reach all the industrial gas consumers paying GIDC (Fee).

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[17] phrase used by *Pathak, Neha* (*supra* note 15)
[18] *supra* note 15
[19] ibid

58. The requisite earmarking of funds stands diluted in subsequent case law. Merely because collections for services rendered or grant of a privilege or license are taken to the consolidated fund of the state and not separately appropriated towards the expenditure for rendering the service is not by itself decisive.

59. With proximate *quid pro quo* test replaced with remote *quid pro quo* test and the *specific fund* test being considered non-determinant factor, the only test that remained untouched from the classical package was *proportionality* test. This test coupled with primary object test became new determinants of Fee. The modern approach to Fee therefore consists of three point check: (a) Primary object test- whether the plenary objective of the levy is rendition of service to specified class and this service is something other than something merely incidental; (b) Remote *quid pro quo* test- whether the payer receives a general benefit from the authority imposing levy; (c) *Proportionality* test - whether there exists a broad and generic co-relationship between services rendered and the amount of Fee charged[20].

Durrani Ceramics I and II

60. In *Durrani Ceramics* this Court held that GIDC was not a Tax but a Fee and declared Act, 2011 to be unconstitutional for having been passed as a Money Bill. Relevant extracts are as under:-

> 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

[20] ibid.

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 exemption, 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.

.....

22. Another formidable argument on behalf of the respondents was based upon the National Assembly for the Financial Years 2012-13 and 2013-14....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, Advocate Supreme Court, 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, Senior Advocate Supreme Court, 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.

....

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....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.

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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.

35. 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, Advocate Supreme Court, 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, Senior Advocate Supreme Court, 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 Nos. 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.
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> ....
>
> 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.
>
> ....
>
> 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.

61. *Durrani Ceramics* declared that setting up of the infrastructure development gas projects would ensure continuous and increased supply of gas for the gas consumers, thereby constituting a service against the Fee (GIDC) charged. The continuous and increased supply of gas to the gas consumers was an assumption drawn by the Court, as no such legislative promise is borne out from Act, 2011. However, this assumption remained

unchallenged in the review (*Durrani Ceramics-II*) by the parties and came to be the service rendered or *quid pro quo* under Act, 2011. The argument of the appellants that *Durrani Ceramics* has a limited precedential value, as it was restricted to the question of Tax and the legislative procedure of Money Bill, is not correct. This Court in answering these questions has also declared that GIDC is a Fee. This declaration was re-affirmed in review filed by the Federal Government. In the background of the jurisprudence discussed above, I see no reason to take a view different from that of *Durrani Ceramics* which simply holds that the concept of infrastructure development of gas pipeline projects leading to continuous and increased gas supply in the country constitutes service or *quid pro quo* for the appellants. The ground reality of the gas projects at the time of *Durrani Ceramics* was not so noticeable or stark as it is now (discussed hereunder) and, therefore, the delivery or actualization of the service, has come to be of critical importance.

62. Moved by the facts on the ground, I feel it necessary to re-examine the meaning and concept of Fee and the scope and extent of its inbuilt reciprocity - *quid pro quo.* The question, regarding "future service" which is of pivotal importance to this case, though raised in *Durrani Ceramics,* was not addressed or answered. I now move beyond *Durrani Ceramics* to grapple with the question of *future service* and look for a more contemporary meaning of *quid pro quo.*

FUTURE SERVICE & TIMELINE

63. Existing jurisprudence informs us that it is not that all the required services against a Fee must be in place before a Fee can be levied.[21] Merely because the benefits to be received are postponed, it cannot be said that there is no '*quid pro quo*'. It is true that ordinarily a return *in praesenti* is generally the case when Fee is levied but simultaneity or contemporaneity of payment and benefit is not the most vital or crucial test to determine whether a levy is a Fee or not, especially in long-term projects. In fact, it may

[21] Agriculture Market Committee, Rajam and others vs. Rajam Jute and Oil Millers Association, Rajam (AIR 2003 SC 1742)

often happen that the rendering of a service or the conferment of a benefit may only follow after the consolidation of a fund from the Fee levied. Hospitals, for instance, cannot be built in a day nor medical facilities or gas supply provided right from the day of the commencement of the scheme. It is only after infrastructure development is available that one may reasonably expect a compensating return. How soon a return may be expected or ought to be given must necessarily depend on the nature of the services required to be rendered and benefits required to be conferred.[22] So while "service to be rendered" or *quid pro quo* in future is permissible it is equally important that the prospects of such a future service are certain, as if tied in time, with the payment of Fee. I come to this important question later in the judgment.

- Instant case and its unique facts

64. Let's leapfrog from 2011 (imposition of GIDC) to 2014 (*Durrani Cermaics*) and finally to 2020 (current case). The facts and figures of this case are admitted and show that utilization of GIDC as per the earlier and the recent statute is for setting up infrastructure development of Iran Pakistan Pipeline Project (IP), Turkmenistan-Afghanistan-Pakistan-India (TAPI) Pipeline Project, LNG or other ancillary projects. These projects were financed through the imposition of GIDC (Fee), used as a tool of public finance. The gas consumers have been paying GIDC for almost a decade, as is established from the accounts and the status of the projects placed before us by the Interstate Gas System (Pvt) Ltd, which we are informed, is the company that is to set up these projects on behalf of the Federal Government. The figures hereunder undisputedly reveal that there has been no work on the ground and these gas projects have no physical existence, whatsoever, in Pakistan. Letter of the Finance Division, Government of Pakistan dated 18.02.2020 signed by the Deputy Secretary (Budget Resources) filed[23] in Court reveals that the total amount of GIDC accrued, collected and outstanding as on

[22] M/s. Gasket Radiators Pvt. Ltd. v. Employees' State Insurance Corporation & another (AIR 1985 SC 790)
[23] through CMA 1259/2020 in CA Nos. 1113 to 1155/2017

30.6.2019 is as under and does not include Late Payment Surcharge under section 3(3) of the Act.

TOTAL COLLECTION OF GIDC

Levy and Collection of GIDC				Rs. In Million
Sr.#	**Sector**	**GIDC Accrued**	**GIDC Collected**	**GIDC Outstanding**
1	Fertilizer Feed (old)	192,240.31	111,814.62	80,425.69
2	Fertilizer Feed (New)	68,281.71	1,142.89	67,138.82
3	Fertilizer – Fuel	31,772.12	15,205.66	16,566.46
4	General Industry	70,729.64	24,402.27	46,327.37
5	IPPs	60,845.19	51,713.50	9,131.69
6	KESC	40,421.05	3,912.18	36,508.87
7	GENCO/WAPDA	67,317.33	44,753.78	22,563.55
8	Captive Power	119,247.65	17,522.73	101,724.92
9	CNG Region-I	53,420.68	11,765.63	41,655.05
10	CNG Region-II	48,073.10	13,169.51	34,903.59
	Grand Total	752,348.78	**295,402.77**	456,946.01

The details of the funding and expenditure are as follows:-

INTER STATE GAS SYSTEM (PVT.) LIMITED
Summary of expenditure and funding of gas infrastructure projects:[24]

Project	**Iran Pakistan (IP) Gas Pipeline Project**	**TAPI Pipeline Project**	**North South Gas Pipeline Project**	**Underground Gas Storages**	**Total**
			All amounts in PKR		
Estimated Project Cost	271 billion	1,500 billion	405 billion	75 billion	**2,251 billion**
Pakistan share	271 billion	31.353 billion	20.25 billion	75 billion	**397.6 billion**
Development Phase expenditure – already incurred funded through GIDC (received todate)	**Nil**	0.483 billion	**Nil**	**Nil**	**0.483 billion**

[24] 1. No funds have been released to date for above gas infrastructure projects from GIDC except GOP equity contribution in TAPI Pipeline Company Limited (TPCL). The amount released is only PKR 482.57 million, an equivalent of USD 4.1 million in respect of two cash calls (First and second financial closing) from TPCL for TAPI Project. The first tranche of USD 2.65 million was released in May 2016 and the second tranche of USD 1.45 million was in June 2019. ECC of the Cabinet approved to inject 5% equity into TAPI Project vide case No.ECC-164/23/2015 dated 18th December, 2015.
2. As a stopgap arrangement, financing from GHPL for projects have been arranged by ECC.

Development Phase expenditure-already incurred funded by GHPL	3.3 billion	0.756 billion	0.135 billion	0.040 billion	**4.2 billion**
Total development and construction cost- to be funded through GIDC	271 billion	30.513 billion	20.250 billion	75 billion	**396.7 billion**

65. The Letter further states that a meeting was held in the Petroleum Division attended by relevant officers of Petroleum Division and Finance Division and the proposal for the *way forward* was that "the amount of GIDC (Rs. 295.403 billion) shall be utilized against projects to be submitted by Petroleum Division through budgetary mechanism in line with GIDC enactments." This proposal was to be approved by ECC/Cabinet. This was the state of affairs on 18.02.2020, almost nine years after the levy of GIDC.

66. Status of these projects has been attached with Letter dated 11.02.2020 issued by the Interstate Gas Systems (Pvt) Ltd and filed in Court.[25] The Project Brief on Turkmenistan-Afghanistan-Pakistan-India (TAPI) Gas Pipeline Project does not mention about the actual development of the pipeline infrastructure in Pakistan or the date when supply of gas will be made available. And the Project Brief on Iran-Pakistan (IP) Gas Pipeline Project mentions that "the current status of the Project is that Pakistan's contractual obligations are suspended under the Agreement, however, the legally binding agreement is still in place and the Government of Pakistan is still committed with the Project. The two sides have recently given themselves a further period of five years for the implementation of the Project by signing Amendment Agreement No. 3 of GSPA on 5th September, 2019." The details of the Projects as given by the Federal Government are as follows:-

INTER STATE GAS SYSTEM (PVT.) LIMITED

a. Turkmenistan – Afghanistan – Pakistan-India (TAPI) Pipeline Project

Description	**USD**	**PKR[3]**
Estimated Project Cost	10,000 million	1,500,000 million
Pakistan share @ 5% equity share under Investment Agreement	209.02 million	31,353 million
Development Phase expenditure-already		

[25] Through CMA 1058/2020 in CA Nos. 11113 to 1155 /2017

incurred		
Project development Cost – Paid by GoP through Supplementary Grant	1.5 million	153 million
Project development cost – funding through GIDC	4.1 million	**483 million**
Project development and operational expenditure – funded by GHPL	4.02 million[1]	603 million[1]
Future development cost – to be incurred	5 million[2]	750 million[2]
Future construction Cost – to be incurred	194.4 million[2]	29,160 million[2]
Total development and construction cost – to be funded through GIDC	**203.42 million**	**30,513 million**

1 The other development and operational costs were funded by GHPL, the parent company of ISGS, hence require replenishment from GIDC to settle the same with GHPL.
2 Development and construction expenditure are expected to be incurred in next 24 months.
3 All amounts have been converted @ PKR 150/US$.

INTER STATE GAS SYSTEM (PVT.) LIMITED

b. Iran Pakistan (IP) Gas Pipeline Project:

Description	USD	PKR[3]
Estimated Project Cost	1,806 million	270,900 million
Development Phase expenditure-already incurred		
Project development cost – funded from GIDC	**Nil**	**Nil**
Project development and operational cost – Funded by GHPL	22.06 million[1]	3,300 million[1]
Development cost – to be incurred	5 million[2]	750 million[2]
Construction Cost – to be incurred	1.779 million[2]	266,850 million[2]
Total development and construction cost – to be funded through GIDC	**1,806.06 million**	**270,900 million**

1 The project development and operation costs were funded by Government Holding Private Limited (GHPL), the parent company of ISGS, hence require replenishment from GIDC to settle the same with GHPL.
2 Construction of the project will take 36 months after awards of construction contract, subject to easement of International sanctions on Iran.
3 All amounts have been converted @ PKR 150/US$.

INTER STATE GAS SYSTEM (PVT.) LIMITED

c. North South Gas Pipeline Project (NSGP)

Description	USD	PKR[3]
Estimated Project Cost	2,700 million	405,000 million
Pakistan share of Cost @ 5% equity share	135 million	20,250 million
Development Phase expenditure-already incurred		
Project development cost – funded from GIDC	**Nil**	**Nil**
Project development and operational Cost – funded by GHPL	0.9 million[1]	135 million[1]
Future development cost – to be incurred	4 million	600 million

Future construction cost – to be incurred	130.1 million	19,515 million
Total development and construction cost – to be funded through GIDC	**135 million**[2]	**20,250 million**[2]

[1] The other development and operational costs were funded by GHPL, the parent company of ISGS, hence require replenishment from GIDC to settle the same with GHPL.
[2] Development and construction expenditure are expected to be incurred in next 2 to 3 years.
[3] All amounts have been converted @ PKR 150/US$.

INTER STATE GAS SYSTEM (PVT.) LIMITED

d. Underground Gas Storages

Description	USD	PKR[3]
Estimated Project Cost	500 million	75,000 million
Development Phase expenditure-already incurred		
Project development cost – funded from GIDC	**Nil**	**Nil**
Project development and operational Cost – funded by GHPL	0.27 million[1]	40 million[1]
Future development cost – to be incurred	3 million	450 million
Future construction cost – to be incurred	497 million	74,550 million
Total development and construction cost – to be funded through GIDC	**500 million**[2]	**75,000 million**[2]

[1] he other development and operational costs were funded by GHPL, the parent company of ISGS, hence require replenishment from GIDC to settle the same with GHPL.
[2] evelopment and construction expenditure are expected to be incurred in next 2 to 3 years.
[3] ll amounts have been converted @ PKR 150/US$.

67. The above record undisputedly reveals that no development phase expenditure has taken place and that project development cost funded by GIDC is Nil.[26] Even though, there is nothing on the ground, these projects were announced in 2011 and GIDC is since then being collected. The representatives of the concerned Ministries were at sea when asked to give a definite timeline for the service in return.

-Position of the Projects in the Pakistan Economic Survey

[26] except the initial payment made in TAPI

68. <u>The Pakistan Economic Survey 2014-15</u>[27] mentioned that the Government is taking steps to overcome the shortfall of natural gas by, *inter alia*, importing natural gas from Iran and Turkmenistan. It further provides as follows;

> **The two transnational gas pipelines that Pakistan has pursued for over two decades have been delayed due to reasons beyond control. The 750 MMCFD Iran-Pakistan (IP) gas pipeline has been delayed due to international sanctions (although there is hope for removal of the sanctions) and the 1,325 MMCFD Turkmenistan-Afghanistan-Pakistan-India (TAPI) pipeline has been delayed due to the security situation in Afghanistan and structural issues with project transaction.**
>
> **The Government of Pakistan is now successful to import 500 million cubic feet per day (mmcfd) of LNG from Qatar.**

The same Survey (2014-15)[28] further states:

> **During the recent visit of the Prime Minister to Turkmenistan....the review of Turkmenistan-Afghanistan-Pakistan-India (TAPI) pipeline and energy security remained main focus of the meeting. The project is expected to be materialized by end of 2017 will be providing the gas of 1.3 billion cubic feet to Pakistan.**

69. There is no mention of IP or TAPI pipeline projects in the Pakistan Economic Surveys of 2015-16, 2016-17, 2017-18, 2018-19 and 2019-20. And Chapter-14 on "Energy" in the latest Pakistan Economic Survey 2019-20 states as follows[29]:

> Pakistan is successfully overcoming energy crisis, which has direct and indirect impact on all sectors of the economy. Presently, Energy Sector is confronted with demand supply gap....in terms of energy-mix, **Pakistan's reliance on thermal which includes imported coal, local coal and RLNG and natural gas has been decreasing over the last few years. Pakistan's dependence on natural gas in the overall energy mix is on decline and the reduction of its share in the energy mix may be attributed to declining natural gas reserves as well as to the introduction of LNG since 2015**.
>
> **<u>Gas Sector</u>**
>
> Natural Gas is a clean, safe, efficient and environment friendly fuel. Its indigenous supplies contribute about 38 percent in total primary energy supply mix of the country. Pakistan produces around four (4) Billion Cubic Feet Per Day (Bcfd) of indigenous natural gas against an unconstrained demand of over six (6) Bcfd. **To meet the shortfall, the GoP has initiated the import of LNG**. *(emphasis supplied)*

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[27] pp. 241 & 242.
[28] P. 236
[29] pp. 273 & 276

70. Pakistan Economic Survey is silent regarding these projects since 2015 and shows that the shortfall in natural gas is being successfully plugged through the import of LNG, which surprisingly, is not a GIDC funded Project. The above documents show that after a decade of charging GIDC from gas consumers and after having collected Rs 295.40 billion to-date there is no sign of development of the gas pipeline projects in Pakistan. Absence of the said projects and emphasis on the import of LNG in the latest Pakistan Economic Survey hazards a guess that the Government of Pakistan is either not willing to or is unable to complete these projects and therefore the shortfall in gas supply is being increasingly plugged through LNG imported from Qatar.

- Annual Reporting to the Parliament under section 4(2) of the Act & Parliamentary Practice.

71. The Act, in its wisdom, considering the long-term nature of the infrastructure development gas pipeline projects required the Federal Government to inform both the Houses of the Parliament regarding the utilization of GIDC by tabling an Annual Report under Section 4 (2) of the Act, which provides as follows:

> The annual report in respect of the utilization of the cess shall be laid before the both houses of Majlis-e-Shoora (Parliament) after three months at the end of each fiscal year.

72. This is the closest the Act came to realizing that the levy of Fee is not contemporaneous and entails a time-lag and therefore requires a Parliamentary oversight on the utilization of GIDC. This was to ensure that the Government delivers the promised service of continuous and increased gas supply, to the gas consumers, at the earliest and also to check that the funds collected are earmarked and utilized for these projects only. It is an admitted position that not a single Annual Report was tabled before the Houses of the Parliament except the one placed before the Parliament on 30.06.2019 after the filing of these cases. The Government has unabashedly and successively hoodwinked the Parliamentary oversight, paying little heed to the Energy crisis in the country; the interest of the gas consumers who have been regularly paying GIDC and the welfare of the general public. More disturbingly, the Parliament itself, inspite of acute Energy crisis in the country,

never took the Federal Government to task and allowed a decade to pass by. The Executive and the Legislature both have failed the appellants and public expectations besides wasting valuable time and opportunity to utilize and divert the money collected to some other projects to alleviate the gas shortage in the country. I completely disagree with Majority View that the Executive has not been at fault. Had the Executive apprised the Parliament under the Act, legislative intervention may have followed, saving everyone this long drawn litigation and better financial management and use of Rs.295 Billion, which is sitting unused with the Federal Government.[30]

73. According to the legislative design behind section 4(2) of the Act, these Annual Reports would have disclosed the status of the projects and their funding to the Parliament. In case of inordinate delay or non-development of the projects the Parliament could take appropriate action. Under the Rules of Procedure and Conduct of Business of the National Assembly, 2007 (“**Rules**”) these Annual Reports under section 4(2) of the Act would stand referred to a Standing Committee concerned under Rule 181 read with Rules 198, 201 and 235 of the Rules. The Rules provide that the Standing Committees can examine the expenditure, administration and policies of the Ministry concerned and may forward its report of findings and recommendations to the Ministry to submit its reply to the Committee. This never happened as the Government admittedly failed to submit Annual Report regarding GIDC and the Projects to the Parliament. Timely interference by the Parliament would have borne different results.

74. It might not be out of place to mention that Parliament today has become more and more a multi-functional institution performing variety of roles. Some of the cardinal roles and functions of the Parliament are: Legislation, Oversight of the Government actions and Financial Accountability of the Government and the public sector. Parliament makes laws, authorizes the Government to spend public money, scrutinizes the Government activities and is a forum for debate on national issues.

[30] Subject to some payments made as indicated above.

75. The worst thing that the Government in a parliamentary system can do is to deny information to the Parliament. The Executive is answerable to the Parliament. Article 91(6) of the Constitution declares it in unequivocal terms that the Cabinet, together with the Ministers of State, shall be collectively responsible to the Senate and the National Assembly. It is the function of Parliament to exercise political and financial control over the Executive. To call for information is perhaps the greatest power of Parliament. Even otherwise, it is the duty of the Government itself to feed Parliament with information, which is full, truthful, precise and supplied in time. This is seen by Ministers making statements on the floor of the House, laying reports and papers on the Table of the House. All these constitute a wealth of information, which becomes immediately public and can be issued to raise discussion in the House.[31] Nothing of the sort took place in the Parliament on GIDC and almost ten years passed without a whimper. This failure on the part of the two prime institutions of the country reflects poor governance and unsatisfactory performance of their constitutional duties, to say the least.

Timeline – essential requirement for quid pro quo

76. I now re-visit the constitutional concept of Fee, a levy which appears as "Fee for any service rendered" in Articles 72(3)(a), 115(3)(a), 165(3) and as "Fee" in Articles 203B(c), 270AA(7), 279 and item nos. 54 and 15 of Parts I and II of the Federal Legislative List, respectively. In the present case, Fee is being charged as a tool of public finance for raising funds for the infrastructure development of gas projects, with the corresponding service of continuous and increased supply of natural gas for the gas consumers, to meet the energy shortfall in the country. It is axiomatic that, in this case, service rendered in return or *quid pro quo* will materialize after the gas pipeline projects are set up, hence the service will be rendered after a time-lag and will therefore be a *future service*.

77. It is jurisprudentially settled that the concept of Fee, as opposed to Tax, is premised on a service in return or *quid pro quo*.

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[31] *Subhash C Kashyap*, Parliamentary Procedure. Universal. 2006 pp. 19, 23 & 25

This essential constituent of Fee needs further elaboration in the backdrop of the present case. Examination of the existing jurisprudence shows that courts have over time laboured to determine whether in a particular case there existed a service in return in order to justify the levy as a Fee as opposed to a Tax. The question never arose regarding the actual delivery of the service, perhaps for the reason that in most of the cases either the service was available or was easily made available in short span of time, so the payer never had a concern regarding the actual delivery of the service. This dimension of time has not come up for discussion in the existing jurisprudence or writings on "Tax vs Fee" in any detail. The facts of the present case have prompted me to consider the time dimension of service to be rendered in return for the payment of a Fee. It cannot be denied that words and phrases take colour, shape and character in a context and mean differently in different contexts. It is worthwhile to remember that there is a living content behind words and phrases, which breathes, and so, expands and contracts with changing times.

78. The staggering facts of this case beg the question whether the fundamental constituent of Fee i.e., service in return or *quid pro quo* or *future service* should have a certain timeline? Service in return or *quid pro quo* seems to exist at two levels. First, at the *theoretical level* - the examination of the legislative design should show that there is a *quid pro quo* or service to be rendered in return for the Fee. Second, at the *applied level* - this deals with the actual delivery of the service or a definite timeline for the delivery of future service. The legitimization of Fee requires the existence of service at both the levels: theoretical, as well as, applied. It will be absurd and illogical to conceive that a payer of Fee, who is subject to compulsory exaction of money by the State, is left to grope in the dark, guessing when the promised service is to be rendered. Fee is a constitutional levy against a service rendered, which cannot be structured on assumptions, suppositions, expectations and verbal commitments of the Executive but require a clear, crisp and certain statutory timeline. For the Fee to have a constitutional existence, the service to be rendered in return or the *quid pro quo* must be certain, clear, unambiguous and within a definite time-

frame. *Durrani Ceramics* settles the case at the theoretical level only. The case did not touch the *applied level*, because the facts of the case in the year 2014 did not necessitate the examination of this aspect, as the Court and the parties assumed at that time that the service would be rendered in a reasonable period of time.

79. The underlying theme of a Fee is based on relationship of reciprocity and mutuality- the *quid pro quo*. The legislation that imposes a Fee must cater for this reciprocity and guard this relationship premised on *quid pro quo.* While there is an obligation of the payer to deposit Fee on time which is subject to a surcharge for late payment, there must also be a corresponding obligation on the State or the authority responsible to provide the service in return, to do the same within a definite timeline. Without this corresponding obligation, the legislation fails to recognize the core ingredient of a Fee – the *quid pro quo.* It is by all means a legitimate expectation of the payer of Fee to know when will the service be delivered. His rights to property, trade and business under the Constitution require it. The payment of Fee by the payer cannot be towards a service that floats in a timeless zone; is open-ended and uncertain. Any service to be rendered in such like cases becomes a disservice. The relationship in a Fee must exist till the end. Failure in providing future service within reasonable timeline, deprives the Fee of its essential character, sheds its complexion as a Fee and gives that of a Tax, as such failure and the uncertainty of time diminishes the requisite degree of correlation between the payment of Fee and provision of service in return. This indefiniteness negates the concept of Fee and partakes the character of a Tax. Therefore, service against a Fee is not simply a theoretical recognition of the service to be rendered but must also have certainty in its applied form i.e., the timeline for the actual delivery. The theoretical and applied constituents of the levy must exist in the legislative design, for the levy to stand as a Fee under the Constitution otherwise it passes for a Tax.

80. The Act is silent on these counts and therefore passes for colourable legislation as it actually imposes a levy unknown to the constitution in the garb of a Fee. The Act does not provide a level-playing field for the parties and is devoid of the basic fairness,

protection and due process that is required to be meted out to a payer who is the source of the public finance required for funding these long-term gas projects. Such a law offends and renders constitutional protections of right to property, business and non-discrimination, absolutely hollow and meaningless.

81. This unexpected delay and uncertainty in the supply of gas (service to be rendered or *quid pro quo*) is both a Legislative and an Executive failure. The Federal Government should have tabled Annual Reports before both the Houses of the Parliament under section 4(2) of the Act and apprised the Parliament of the delay and its reasons or furnished a timeline for the completion of these projects. Irrespective of these responsibilities, Executive is there only to implement the law and if the law is silent regarding the timeline of delivery of service, the Executive carries no obligation to provide the service, except an expectation or assumption of a reasonable time, which is not actionable under the law, as the law envisages no penalty for such an omission. There is even no penalty for not tabling the Annual Reports before the Parliament by the Executive. In the absence of any statutory obligation and corresponding penalty, the real failure is of the legislative design.

-nature of fiscal statute

82. The above discussion becomes more nuanced when considered in the backdrop of a fiscal statute. The principles of interpretation of a fiscal statute apply equally to a Fee as they do to a Tax - both being compulsory exactions of money by the State. It was expressed by Rowlatt J. in *Cape Brandy Syndicate v. IRC*[32] that 'in a taxing statute, one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can look fairly at the language used[33].' It is settled that interpreting a taxing statute, equitable

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[32] Cape Brandy Syndicate vs. IRC ([1921] 1KB 64).

[33] Pakistan Television Corporation Limited vs. Commissioner Inland Revenue (Legal), LTU, Islamabad and others (2017 SCMR 1136), Commissioner of Income Tax and another vs. Baluchistan Concrete and Block Works Ltd. and others (2017 SCMR 1), Chairman, Federal Board of Revenue, Islamabad vs. Al-Technique Corporation of Pakistan Ltd. and others (PLD 2017 SC 99), Commissioner of Income Tax Legal Division, Lahore and others v. Khurshid Ahmad and others (PLD 2016 SC 545), Zila Council Jehlum through District Coordination Officer vs. Pakistan Tobacco Company Ltd. and others (PLD 2016 SC 398).

consideration are entirely out of place. Nor can taxing statute be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. The court cannot imply anything that is not expressed, it cannot import provisions in the statutes so as to supply an assumed deficiency.[34] A taxing statues, if it professes to impose a charge, its intention must be expressed in clear, unequivocal and unambiguous language. A hunt into the intention to find a charge is impermissible. No equitable construction of a charging section is to be applied. The charging section is to be construed strictly regardless of its consequences that may appear to the judicial mind to be. It is not the function of the court to hunt out ambiguities by strained and unnatural meaning.[35] Fiscal legislation requires that any law that levies a Fee must first unambiguously and clearly spell out the nature of the service to be rendered in return (*quid pro quo*) and then provide for a reasonable and definite timeline for the delivery of such service. The legislature must also consider the entire mechanism at work behind this relationship of reciprocity – for example, the obligations of the provider of Fee, the consequences of delay and failure to render service including refund.

- *Our Constitution and the living tree doctrine*

83. I know that the Constitution is organic and a living testament of the aspirations of the people it governs. The "living tree" doctrine[36] allows the Constitution to change and evolve over time while still acknowledging its original intentions. The doctrine achieves a balance between two seemingly contradictory goals: predictability and flexibility. To be effective, the Constitution must

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[34] Bechu Company vs. Assistant Commissioner. (2003 STC (132) 68) (also See *N.S. Bindra's* – Interpretation of Statutes. p.863 (12th Edition).

[35] Film Exhibiter's Guild vs. State of Andhra Pardesh (AIR 1987 AP 110) (also See *N.S. Bindra's* – Interpretation of Statutes. p.863-864 (12th Edition).

[36] The *Living Tree doctrine* was first conceived of in a 1929 decision, *Edwards vs Canada* otherwise known as the 'Persons Case', issued by the Canada's highest court at the time, the Judicial Committee of the Privy Council (JCPC) in Britain. After analyzing the Constitution's use of the term 'persons', which had always referred to men, the JCPC decided that both men and women were now 'persons', and therefore could be equally called to sit in the Canadian senate. According to the historically celebrated words of Justice Sankey, while constitutional stability and integrity are of crucial importance, the Constitution 'also planted in Canada a living tree capable of growth and expansion within its natural limits'. Women may not have been able to vote or hold office in 1867, but times had changed and so had to change constitutional interpretation: the decision led women to gain a measure of equality to men in the political arena[36].

consist of a predictable set of rules. On the other hand, flexible interpretation accommodates the realities of changing modern life. If the Constitution could not be interpreted this way, it would be frozen in time and become more obsolete than useful. Therefore, contemporary interpreters must focus on what the originators intended it to accomplish rather than what the text actually states before allowing the Constitution to evolve or remain unchanged.[37] I know that stability without change is degeneration. Change without stability is anarchy. The role of a judge is to help bridge the gap between the needs of the society and the law without allowing the legal system to degenerate or collapse into anarchy. The judge must ensure stability with change, and change with stability. Like the eagle in the sky, which maintains its stability only when it is moving, so too is the law stable only when it is moving. The life of law is complex. It is not mere logic. It is not mere experience. It is both logic and experience together.[38] As Roscoe Pound said "the law must be stable, yet it cannot stand still."[39] Progressive interpretation is to preserve the vitality of the constitution: unless interpreted in this way, it would be frozen in time and become more obsolete than useful. Our courts have repeatedly underlined that our Constitution is a living document and encouraged its progressive interpretation.[40] Therefore, the word "Fee" and the phrase "service rendered in return" or "*quid pro quo*" must also evolve to meet the new fiscal realities of the State. Fee, therefore, under the Constitution today would mean a fiscal levy that clearly and unambiguously describes the service rendered in return, so that Courts don't have to unnecessarily hunt the meaning and nature of the levy in the letter of the law. Secondly,

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[37] *Living Tree Doctrine*, Centre for Constitutional Studies. Also see: Edwards vs. Canada (Attorney General) (1930 AC 124) and Reference Re Same Sex Marriage*,* (2004 SCC 79) (CanLII)[Same-Sex]

[38] *Barak*, The Judge in Democracy. Princeton University Press. 2006

[39] "Hence all thinking about law has struggled to reconcile the conflicting demands of the need to stability and of the need of change. Law must be stable and yet it cannot stand still." Interpretations of Legal History 1 (1923)

[40] Sindh Revenue Board through Chairman Government of Sindh and another vs. The Civil Aviation Authority of Pakistan through Airport Manager (2017 SCMR 1344), Lahore Development Authority through D.G. and others vs. Ms. Imrana Tiwana and others (2015 SCMR 1739), Province of Sindh through Chief Secretary and others vs. M.Q.M. through Deputy Convener and others (PLD 2014 SC 531), Reference by the President of Pakistan under Article 186 of the Constitution of Islamic Republic of Pakistan, 1973 (PLD 2013 SC 279); Rana Aamer Raza Ashfaq and another vs. Dr. Minhaj Ahmad Khan and another (2012 SCMR 6); Al-Raham Travels and Tours (Pvt) Ltd and others vs. Ministry of Religious Affairs, Hajj, Zakat and Ushr through Secretary and others (2011 SCMR 1621), Arshad Mehmood and Others vs. Government of Punjab through Secretary, Transport Civil Secretariat, Lahore and others (PLD 2005 SC 193);

the reciprocal service to be rendered in return or the *quid pro quo* must be structured to have a reasonably certain and definite timeline. If the constituent of time is missing (the applied part), the service becomes practically non-existent and the levy no more retains the character of Fee and becomes a Tax rendering the levy unconstitutional.

Distinguishing Durrani Ceramics

84. The factual matrix of the instant case is very different from that of *Durrani Ceramics*. It is settled law that if a new case is dissimilar to an earlier case in ways that seem important, the court will 'distinguish" it and reach a result different from what the precedent would otherwise suggest or even dictate. In common parlance, either the precedent or the pending case may be said to be "distinguished" from the other.[41] In this way, the former decision might be said to be "rerationalized[42]." A precedent, whether persuasive or binding, need not be applied or followed if it can be distinguished; that is, there is a material distinction between the facts of the precedent case and the case in question. According to Zander, 'distinguishing between factual situations and applying the appropriate rule of law is one of the lawyer's and judge's most crucial functions."[43] The technique of distinguishing past case is a powerful engine of legal change.[44] Distinguishing means that each case was decided correctly based solely on its own facts because the facts were materially different. Joseph Raz argues that the boundaries of distinguishing "are far from fixed," he asserts that, the [boundaries] undergo continual change."[45] The crucial question is: Are there any material differences between the facts of the case at bar and the facts of the prior cases to warrant the rule being different? In principle, the distinguishing of an apparent decision presents no problem for the doctrine of precedent.[46] The facts of this case, showing that the gas projects have not even started for almost a decade yet the Fee is being constantly charged since 2011 present us with new facts that were

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[41] Bryan A Garner. The Law of Judicial Precedent, 2016 p.97
[42] Joseph Raz, The Authority of Law 186 (1979)
[43] Zander, The Law, p.270 (Also see Muhammad Munir, Precedent in Pakistan Law, Oxford, 2014)
[44] Theodore, The Rule of Precedent, op cit. p. 99
[45] Raz, The Authority of Law, p. 185
[46] Muhammad Munir, Precedent in Pakistan Law, Oxford, 2014. P.219

not so gravely present at the time of *Durrani Ceramics*, hence the said precedent is clearly distinguishable and stands on its own facts.

Cess Rates- discriminatory

85. The Act provides for the following rates for different Industrial Gas consumers:-

SECOND SCHEDULE OF THE ACT

S.No.	Sector	Maximum Rate of Cess (Rs./MMBTU)
(1)	(2)	(3)
1.	Fertilizer-Feed (Old)	300.00
2.	Fertilizer-Feed (New)	300.00
3.	Fertilizer-Fuel	150.00
4.	Captive Power	200.00
5.	Industry	100.00
6.	KESC/GENCO	100.00
7.	IPPs	100.00

The purpose of the Act is to raise public finance for the infrastructure development of the gas projects mentioned in section 4 of the Act through levy of Fee on the above-mentioned gas consumers. There appears to be no intelligible differentia amongst the different gas consumers mentioned in the Schedule for the purposes of the Act. One justification for charging different rates from amongst the industrial gas consumers could have been their overall consumption of natural gas. The data provided by the latest Pakistan Energy Year Book 2018[47] shows as follows:

Natural Gas Consumption by Sector 2017-2018

Sr. No.	Industry	Consumption(%)	Maximum Rate of Cess (Rs./MMBTU)
1.	Fertilizer (feedstock)	12.49%	300
2.	Fertilizer (fuel)	4.57%	150
3.	Power	37.44%	200 (captive power); 100 (IPPs); 100 (KESC/GENCO)
4.	Gen. Industry	18.84%	100
5.	Transport (CNG)	4.84%	263.56 (Region-1) and 200 (Region-II)

[47] Issued by Ministry of Energy (Petroleum Division) and Hydrocarbon Development Institute of Pakistan.

The above shows that the differentiation of rates is not based on the consumption pattern of the gas consumers. The rates of GIDC fixed for different gas consumers are, therefore, ex-facie discriminatory and cannot be allowed to stand.

86. I, therefore, hold that any fiscal legislation that imposes a Fee, must clearly spell out the nature of service to be rendered and the reasonable timeline for the delivery of such service. The legislation (including subordinate legislation) must provide a complete mechanism including the consequences of stoppage of collection of Fee or extension of time or refund of Fee in case the project is delayed or cannot be executed in the proposed timeline, respectively. The legislation must safeguard and protect the reciprocity behind a Fee (unlike a tax) by providing corresponding obligations and duties on the parties to the levy. The present Act does not meet this fundamental requirement of a Fee levying legislation, resulting in imposing an unconstitutional levy in the garb of a Fee. This unlawful exaction (levy) offends the rights to property, trade and non-discrimination of the appellants and is hereby declared to be unconstitutional and illegal in its present form.

Refund of the amount collected

87. As a consequence, the amount of GIDC collected over the years should be returned and refunded to the payers in full, unless in some cases, it is impractical to so do. The Federal Government shall constitute a Committee to work out a mechanism for refund of GIDC so that payers of GIDC are fully restituted; be it the gas consumers under the Act or the final consumers (people of Pakistan). Even if the gas consumers have passed on the Fee to its customers, technology may be available to credit such customers, so that there is no unjust enrichment on the part of the State. The amount of GIDC that cannot be refunded after exploring all other avenues, shall remain earmarked and be utilized only for the infrastructure development of the gas sector.

Refund after Six Months

88. I cannot lose sight of the fact that Energy is vital to industry, transport, infrastructure, information technology, agriculture, household users and more. Any nation with a growing economy and improving living standards must secure a robust energy supply. The future of economic development hinges on energy security. Shortage of natural gas in the country is still a reality and the Energy Sector is confronted with demand supply gap which needs to be filled up. According to the latest Pakistan Economic Survey, 2019-20 the indigenous natural gas contributes around 38% in total primary energy supply mix of the country. Pakistan produces around 4 Billion Cubic Feet Per Day (Bcfd) against an unconstrained demand of 6 (Bcfd); the gas pipeline projects in question are based on bilateral and multilateral international agreements with other countries; a sum of Rs.295 billion has been collected as GIDC for the last almost 10 years. Keeping these facts in mind, and especially the issue of energy security, in the larger national interest, I allow the Federal Government a period of six months to initiate appropriate legislation in the light of the principles settled in this judgment including a clear description of the services being rendered, provision of a reasonable timeline for the delivery of service (supply of natural gas) to the gas consumers and a statutory mechanism of obligations and consequences that may arise, if the service is delayed or is not delivered at all. In case the Federal Government fails to do so, it shall refund the amount of GIDC, in the manner mentioned above.

89. These appeals are allowed in the above terms and the petitions are converted into appeals and also allowed.

Islamabad,
APPROVED FOR REPORTING
Iqbal

Judge