Syed Mansoor Ali Shah, J.-

I have had the privilege to go through the judgment of my learned brother Mushir Alam, J., with which Faisal Arab, J. has concurred. I, with respect, have not been able to agree with the majority view for the reasons discussed hereunder. As matter of background I had recorded a dissenting view in the judgment under review. While I maintain my view I hear the present review petitions not as a judge carrying a dissenting view but as a member of the Bench that delivered the judgment under review.

Constitution of a Review Bench

2. It may be pertinent to state that initially a three member Bench was constituted to hear these review petitions of which I as a dissenting judge was not a member. Perhaps for the reason that Order XXVI Rule 8 of the Supreme Court Rules, 1980, which requires that the same Bench to hear the review petition, was over-looked. Subsequently, the roster was revised and I was also made a member of the Bench, making it a four member Bench. The four-member Bench sat and unanimously decided to bring that aforesaid provisions of the Rules to the notice of the Hon'ble Chief Justice for re-constitution of the Bench, vide order dated 21.10.2020. The present Bench, which had earlier heard the case and delivered the impugned judgment, was thus constituted. This made me examine the office noting contained in the file. There seems to be lack of clarity regarding the meaning and scope of Order XXVI Rule 8 of the Supreme Court Rules, 1980. I, therefore, before going into the merits of the case wish to state the legal position in this regard.

3. Article 188 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") states that the Supreme Court shall have power, subject to the provisions of any Act of *Majlis-e-Shoora* (Parliament) and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it. The Parliament has not so far passed any Act under this Article; Order XXVI of the Supreme Court Rules, 1980, however, contains the rules that regulate the power of review of the Court. Rule 8 of that

Order is relevant to the question under discussion. It is, therefore, reproduced hereunder for ease of reference:

> 8. As far as practicable the application for review shall be posted before the same Bench that delivered the judgment or order sought to be reviewed.

Rule 8 very clearly and firmly prescribes that the application for review shall, as far as practicable, be posted before the "same Bench" that delivered the judgment or order sought to be reviewed. The expression "same Bench" leaves little room to speculate the constitution of the Bench: the "same Bench" means the same judges, as far as practicable, and the same number of judges, i.e., the same numeric strength of the Bench. There is no ambiguity in this regard, in the said rule. Mian Saqib Nisar, J., in the review[1] of *Judges' Pension case* observed:

> There is great wisdom in law, that the review, generally and ordinarily, should be heard by the same Court and the Court in this context is an interchangeable term with the Judge

4. A seven-Member Full Court Bench of this Court heard the review petition in *Zulfikar Ali Bhutto case.*[2] The main appeal[3] in that case was decided by a majority of four to three Judges. All the Judges comprising majority and minority, both, were on the Bench hearing the review of the majority judgment. While deciding an application[4] made for adding two other Judges on the review Bench, Anwarul Haq, C.J., speaking for the Bench, held:

> The position under the Supreme Court Rules is clear and unambiguous. Rule 6 of Order XXVI lays down that "as far as practicable the application for review shall be posted before the same Bench that delivered the judgment or order sought to be reviewed". Now, in the present case, the judgment under review was delivered by seven Judges of this Court, who are all available on the Bench for the disposal of the Review Petition. There is, accordingly, no justification for any departure or deviation from the relevant rule just mentioned.
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> *(Emphasis added)*

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[1] PLD 2013 SC 1024
[2] PLD 1979 SC 741
[3] PLD 1979 SC 53.
[4] 1979 SCMR 427

A question as to the inclusion of the three learned Judges who gave the dissenting judgment, in the Bench hearing the review petition also arose in that case, and it was held that as they were part of "the Bench that delivered the judgment sought to be reviewed" and were "available for the disposal of the review petition", their presence on the Bench was necessary. Muhammad Akram, J., mentioned the said decision of the Bench on this question, in his final order[5] made on the review petition, thus:

> At a subsequent stage a question arose as to the position of the three learned Judges of this Court who had recorded dissenting opinions in regard to the disposal of the petitioner's appeal. Again, relying upon the aforesaid rule 6, we took the view that as they were part of the Bench that delivered the judgment sought to be reviewed, their presence on the Bench was necessary, as they were continuing as Judges of the Supreme Court and were available for the disposal of the review petition.
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> *(Emphasis added)*

The notable point in the phrases underlined in the above quoted observations of Anwarul Haq, C.J., and Muhammad Akram, J., are that they both mentioned that the judgment sought to be reviewed was delivered by the Bench comprising seven judges of the Court. They did not consider that judgment as the judgment delivered by only four Judges comprising the majority. These observations of their lordships are in line with the language of Rule 8, which contains the expression "same Bench that delivered the judgment or order sought to be reviewed", and not the majority Members of the Bench who delivered the majority judgment or order sought to be reviewed.

5. It is well-established practice of this Court that when a case is heard by a Bench of two or more Judges, the case is decided in accordance with the opinion of such Judges or of the majority of such Judges. Judgment or order of the Court is pronounced in terms of the majority opinion; such judgment or order is of the Bench that heard the case and, for that matter, of the Court, and not only of the Judges whose opinion prevailed as a majority opinion. This is why a unanimous opinion of a five-

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[5] PLD 1979 SC 741.

Member Bench on a legal question can be overruled by a majority of four Judges while sitting in a seven-Member Bench. It is the numeric strength of the whole Bench that determines the judicial power of its Members, and not the numbers of the individual Judges in majority. Justice Nariman of the Indian Supreme Court has stated this position in *Shanti Fragrances v. Union of India*,[6] as under:

> Under the present practice, it is clear that the view of four learned Judges speaking for the majority in a 7 Judge Bench will prevail over a unanimous 5 Judge Bench decision, because they happen to speak for a 7 Judge bench.[7]

It is also a well-established principle of precedent that judgment of a larger Bench of this Court is binding on the Benches of this Court consisting of Judges less than that larger Bench.[8] A smaller Bench cannot request for constitution of a larger Bench to revisit the opinion of a larger Bench on any question or principle of law; only a Bench of co-equal strength can make such request.[9] This principle also necessitates that the Judge who dissented from the majority judgment should be Member of the Bench that is to hear the review petition, as a judgment pronounced in terms of the majority opinion of a larger Bench cannot be reviewed by a smaller Bench consisting of only the Judges holding the majority opinion. It is utmost necessary to maintain quorum of the Bench that delivered the judgment under review. It is because of this legal compulsion, that new Members are added to the Bench when any of its earlier Members retires or is not available for any other reason, to maintain the quorum of the Bench for hearing the review petition. Many instances may be cited in this regard: *Gadoon Textiles Mills case*[10] was decided by a five-Member Bench with three-two majority. The review petitions[11] were filed against the majority judgment. The dissenting judges, Justices Saleem Akhtar and Fazal Karim, had retired by the time the review

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[6] (2018) 11 SCC 305.
[7] He has though expressed his desire to review this principle.
[8] See Muhammad Saleem v. Fazal Ahmad, 1997 SCMR 315; Babar Shehzad v. Said Akbar, 1999 SCMR 2518; All Pakistan Newspapers Society v. Federation, PLD 2004 SC 600; Ata Ullah v. Surraya Parveen, 2006 SCMR 1637; Azhar Siddiqui v. Federation, PLD 2012 SC 774, para 37.
[9] See Central Board of Dawoodi Bohra Community v. State of Maharashtra, AIR 2005 SC 752.
[10] Gadoon Textiles Mills v. WAPDA, 1997 SCMR 641.
[11] Gandaf Steel Industries v. Federation, 1997 SCMR 1669.

petitions were taken up for hearing; therefore, other Judges were added to the Bench to maintain the quorum of five Members, for hearing the review petitions. *Benazir Bhutto case*[12] was decided by a seven-Member Bench with six-one majority. The review petition[13] filed against the majority judgment of six Judges was heard by the Bench of seven Judges, not of six Judges. The quorum of the Bench was, thus, maintained for hearing the review petition. There are many other cases[14] of our jurisdiction as well as the Indian jurisdiction wherein the dissenting Judges were part of the Benches that heard the review petitions against the judgments of the Court pronounced in terms of the majority opinion. It can, therefore, be safely concluded that a judge who dissented from the majority judgment, if available, must be Member of the Bench for hearing the review petition filed against that majority judgment.

6. So far as the scope of jurisdiction and judicial power of such Judge in hearing the review petition against the majority judgment is concerned, there is nothing in the Constitution or the Supreme Court Rules, 1980 that limits his jurisdiction and judicial power in a review in comparison with the Judges who delivered a majority judgment. He is a Member of the Bench with same jurisdiction and power like the other Members of that Bench. As afore-explained, the judgment pronounced or order made in terms of the majority opinion is the judgment or order of the Bench, and not of the Judges holding the majority opinion.

7. Rule 1 of Order XXVI of the Supreme Court Rules, 1980 provides that subject to the law and the practice of the Court, the Court may review its judgment or order in a Civil proceeding on grounds similar to those mentioned in Order XLVII, Rule I of the Code of Civil Procedure, 1908 and in a criminal proceeding on the ground of an error apparent on the face of the record. As per Order XLVII, Rule I of the Code of Civil Procedure, 1908, the discovery of

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[12] Benazir Bhutto v. President of Pakistan, PLD 1998 SC 388.
[13] Benazir Bhutto v. President of Pakistan, PLD 2000 SC 77.
[14] See Nawaz Sharif v. Imran Khan, PLD 2018 SC 1 (Justices Asif Saeed Khosa and Gulzar Ahmed, the dissenting Judges, were on the Bench); Sheonandan Paswan v. State of Bihar, AIR 1987 SC 877 (Justice Tulzapurkar, the dissenting Judge, was on the Bench that admitted the review for hearing); Shyam Lal Sharma v. Union of India, AIR 1987 SC 1137 (Justice Thakkar, the dissenting Judge, was on the Bench to which the review petition was presented for decision by circulation.

new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the applicant or could not be produced by him at the time when the judgment was pronounced or order made, some mistake or error apparent on the face of the record, and any other sufficient reason are the grounds for review of a judgment or order made in a civil proceeding. These grounds of review which are, in fact, limitations on the power of review of this Court applies equally to the Judges whose opinion prevails for being the majority view and to the Judge whose opinion remains inoperative for being the minority view. The Judge whose opinion remained the minority view in the main case can review the Judgment of the Bench that was pronounced in terms of the majority opinion, on any of the said grounds of review, as can a Judge who delivered the majority opinion.

8. In *Zulfiqar Ali Bhutto* review case,[15] review petition was dismissed unanimously by all the seven Judges who were divided into four-three in the judgment pronounced in the main appeal case.[16] Muhammad Akram, J. speaking for the majority dismissed the review petition with the observations that "the errors and omissions pointed out by [the petitioner's counsel]…have been found by us to be of inconsequential import, having no material bearing upon the fundamental and essential conclusions reached in the majority Judgment as to the guilt of the petitioner, on the various counts on which his convictions have been upheld, as well on the question of sentence." And Dorab Patel, J. speaking for the minority also held that the review petition had to be dismissed and further agreed with the view of Akram, J. that the question of sentence could not be raised in a review petition, and if they were to alter the sentence in this review, they would be unsettling the settled law. Similar is the legal position in Indian jurisdiction: In the case of *Sheonandan Paswan v. State of Bihar*,[17] Justice Tulzapurkar, the Judge who earlier dissented with the majority judgment, was on the review-Bench, and admitted the review against the majority judgment for hearing, along-with two other

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[15] PLD 1979 SC 741.
[16] PLD 1979 SC 53.
[17] AIR 1987 SC 877.

Judges, i.e., one Judge who was earlier party to the majority judgment and the other judge added due to non-availability of a Judge[18] in majority. *Tulsiram* case[19] was decided by a five-Judge Bench of the Indian Supreme Court with four-one majority. Justice Thakkar delivered the dissenting opinion. The review petitions[20] filed against the majority judgment were dismissed *in limine* by the four Judges, but Justice Thakkar held that the issues raised in the review petitions needed examination and the Review Petitions deserved to be admitted for hearing.

9. A judgment of the Federal Court of Malaysia delivered in the case of *Terengganu Forest Products v. Cosco Container Lines*[21] may also be referred to on this point. The Federal Court, in that case, did not accept the argument that a judge who dissents at leave granting stage should not sit on the Bench hearing appeal, with the reason that the issues, considerations and arguments at the leave stage are different from that of the appeal hearing stage. Likewise, the considerations and grounds at the hearing of the review petition are different from that of the original hearing of the case; therefore, the judge who dissented at the original hearing of the case can sit on the review-Bench, and examine the considerations and grounds of review while hearing the review petition. There is another aspect of the matter to look at, i.e., when a Member newly added in the review Bench due to non-availability of an earlier Member, who was not earlier even part of the Bench, can make review of judgment, then how can any restriction or limitation be imposed on the jurisdiction and judicial power of review of the Member who earlier dissented. There are several instances when Members newly added on the Bench had recalled or reversed the original judgment or order in review jurisdiction despite contrary view of the Member who had earlier authored the judgment of the Court.[22] It can, therefore, be said with certainty that the jurisdiction and judicial power of the Judge who earlier dissented from the majority judgment of the Bench is similar and

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[18] Justice Baharul Islam, who was by that time had resigned.
[19] Union of India v. Tulsiram Patel, AIR 1985 SC 1416.
[20] Shyam Lal Sharma v. Union of India, AIR 1987 SC 1137.
[21] [2011] 1 MLJ 25.
[22] See Aamer Zaman v. Omar Ayub, 2015 SCMR 890 reviewed in 2015 SCMR 1303.

co-extensive with that of those Judges whose opinion became the majority judgment of the Bench, in hearing the review petition against that majority judgment.

Grounds of Review

10. A number of grounds highlighting errors apparent on the face of the record were agitated seeking review of the impugned judgment. It was argued: (i) that the principle of co-relation between the collection and expenditure of the amount of Cess as settled in the judgment under review was applied to stop further recovery of Cess, but it was not extended to restrain the collection of arrears of Cess, inspite of the fact that no developmental expenditure has taken place since 2011 and the Government has already collected Cess in excess of what is required for the foreseeable Projects; (ii) that the Court ordered that in case no work is carried out on North-South Gas Pipeline within six months, the Gas Infrastructure Development Cess Act, 2015 **("GIDC Act")** would become permanently in-operational and considered dead for all intents and purposes, but has not made any order regarding return of the Cess collected to their payers or how and for what purpose the Cess collected would then be expended; (iii) that the decision of the Sindh High Court in 377 suits declaring the GIDC Act to be *ultra vires* the Constitution, being *res judicata,* has attained finality between the parties to those suits as it went unchallenged by the Federal Government, hence arrears, as well as, recovery of Cess in future could not be demanded of the petitioners who are decree holders in those suits. It was urged that the view expressed by a four-member Bench of this Court in *Pir Bakhsh*[23] was not fully appreciated; (iv) that the Second Schedule of the Act giving different maximum rates of Cess for different sectors is discriminatory as it lacks reasonable classification, giving no *intelligible differentia* that has any rational nexus with the object sought to be achieved by the statute in question; (v) that while interpreting Entry 51 of Part I of the Federal Legislative List the impugned judgment has disagreed with, rather overruled, the interpretation made in *Durrani Ceramics*. It

[23] PLD 1987 SC 145

was urged that this point was never pleaded before the Court by the parties and no arguments were heard on the point besides this Bench being of co-equal strength could not have so done as per the settled principles of precedent; (vi) that the GIDC Act does not fall within the scope of Entry No.27 of Part-I of the Federal Legislative List. It was submitted that the petitioners were not heard on this point before holding the said Entry applicable to the GIDC Act; (vii) that the petitioners have been wrongly deprived of the benefit of the first proviso to Section 8(2) of the GIDC Act by making order of recovering arrears of the Cess that are exempted under that proviso; and (viii) that the statement made in the impugned judgment that the Cess collected may form part of the Federal Consolidated Fund is not consistent with the Constitutional provisions.

11. My learned brothers have dealt with only two grounds: one, relating to *res judicata* and the other, regarding proviso to Section 8(2) of the GIDC Act. They have disposed of other grounds with the observation that "Several other grounds also urged before us but none of the grounds in our considered view call for review". I, thus, do not have the advantage to see the reasons that prevailed with their lordships in rejecting those grounds. My learned brothers have clarified that the impugned judgment has not held that "the benefit granted under Section 8(2) ibid, which has been extended to a particular class of the consumers of gas on certain conditions shall not be extended." I respectfully agree with this clarification. However, on the ground of *res judicata* I have a different view that I shall explain later herein.

Co-relation of collection and expenditure of Cess.

12. I now advert to the question whether there is any visible co-relation between the collection of Cess and expenditure therefrom. The impugned judgment held:

> 20…….The other kind of a fee-levying legislation is where Cess is imposed as a compulsory exaction in the same manner where taxes are imposed with the distinction that it is imposed for achieving a specific purpose promised in the enactment itself which when realized would bring some advantage or benefit for the

payers in future. It can be described as 'purpose specific' and in many judicial pronouncements have been termed as 'Cess-fee'. In such a form of levy, the specified purpose is pre-committed to the payers before the revenue is collected under the legislation. To quote a few examples, Cess is imposed to meet the extraordinary costs involved in providing infrastructure such as construction of dams or for importing oil or gas from abroad through pipelines or to build farm to mill roads in order to facilitate marketing of the agricultural produce or for conducting research and development in some specialized field. In such a form of levy the rule of *quid pro quo* does not exist in the same sense as it exists in a case where an existing service is rendered or a privilege is extended directly to the payer for a fee. What needs to be taken into consideration is whether the enactment has promised some benefit or advantage for the payers to be made available in future by utilizing the revenue, making it more akin to a fee then a pure revenue raising measure like taxes in general are imposed with no precondition attached for their spending.

25. When Cess as a fee is levied to meet an earmarked financial exigency spelt out in an enactment, it preserves the levy for such purpose only even with the change in the government setup. It cannot be levied as a general revenue collecting tool and the government would not be justified to collect it if the funds are diverted to some other expenditure.....The proceeds of Cess should be clearly identifiable in the accounts by using separate accounting codes so that its collection and utilization is reconcilable with the purposes stated in the enactment. A correlation between the revenue collected and the expenditure incurred for the promised specific purpose should always be maintained. In this manner the earmarked levy also provides information on the amount collected and spent. This also inculcates confidence in the payers as it contains the promise that the revenue would be utilized for the specific purpose only for which it was collected and they would have a claim to transparency and accountability of the utilization of the revenue so collected. They can claim that the revenue cannot be utilized for any other purpose other than for which they have been charged. When the revenue can only be utilized for the purpose promised in the fee-levying enactment then in that sense the levy could also be regarded as a temporary levy. Once the purpose for which it was imposed stands served, the justification for its imposition also comes to an end. The collection of Cess therefore should be based on some calculation keeping in view the funding requirements and as and when the purpose is achieved, the government loses it right to collect Cess regardless of the fact that the enactment continues to remain in force.

The principle settled by this Court was that there must exist a visible co-relation between the collection of Cess and its expenditure. In a case where the fee is to be utilized for service that is to be rendered in future, it is important to see how the moneys collected are being expended and whether there is a transparent and confidence inspiring co-relation between the two. The other principle settled was that the amount of Cess so collected is for a specified purpose and must be accounted for accordingly. It is not the collection of general revenue which can be utilized anywhere. Relying on these principles settled in the impugned judgment, further collection of Cess was stopped in the following manner:

> 42. .....However, keeping in view the ground realities discussed in the preceding paragraph and the fact that around 295 billion rupees have already been collected towards Cess-revenue and together with the outstanding amount the total sum by the end of this month would be in the vicinity of seven hundred billion rupees, which is more than what is the estimated cost of the projects mentioned in Section 4 of the GIDC Act, 2015, we are constraint to issue following directions: -
>
> > (i) From the date of this judgment, we restrain the Federal Government from charging Cess which power of the Federal Government shall remain suspended until the Cess-revenue collected and that which is accrued so far but not yet collected is expanded on the projects listed in Section 4 of the GIDC Act, 2015.

According to the figures given by the Government the Cess collected as on 30.06.2019 was as under:

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

TOTAL EXPENDITURE OF GIDC

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**
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**

TOTAL AMOUNT COLLECTED	Rs.295.403
Expenditure required for (1) TAPI + North South Gas Pipeline (2) +Underground Gas Storage (3)	Rs.125.763
Balance after deducting (1 + 2 + 3)	Rs.169.643
Required for Iran Pak (IP) Gas Pipeline Balance available for IP	Rs.271.000 Rs.169.643
Excess- required if at all IP proceeds	Rs.101.357
Collection Ordered Excess	Rs.456.946 **Rs.355.589**

The above working shows that the Government already has Rs. 101.357 in excess after factoring in the expenditure to be incurred on TAPI Gas Pipeline, North South Gas Pipeline and Underground Gas Storages unless the Iran Pak (IP) Project is put into motion. The co-relation between the collection and the expenditure stands completely frozen since 2011 raising fingers on the credibility and transparency of the Projects and on the

availability of service (supply of natural gas) against the fee charged, in the near future. The direction for further collection of arrears in the sum of Rs 456.946 billion leading to an excess of Rs 355.589 billion unduly promotes unjust enrichment and seriously offends the right to property and business of the petitioners guaranteed under the Constitution. The status of the Projects submitted before this Court during the hearing of these review petitions reveals that the Government plans to start the North South Gas Pipeline (NSGP) Project only. This Project will not generate natural gas but is a support infrastructural Project and will not redress the shortage of natural gas in the country. The Government without any further collection of fresh amount of Cess or the arrears has an excess amount in the sum of Rs.101 billion including the expenditure for TAPI which has not even begun as yet. The impugned judgment though stops further collection of Cess on the principle that there has been no expenditure and no development on the Projects mentioned in the Act yet at the same time allows recovery of arrears in the sum of Rs. 456.946 billion. Reference is made to Chapter 14 on "Energy" in the Pakistan Economic Survey 2019-2020 which states:

> 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**.
>
> **Gas Sector**
> 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)*

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. There is a huge disconnect between the principle settled by the Court and its application leading to a material omission in assessing the correct ground and factual reality. The direction to recover arrears is, therefore, against the principle settled by this Court and is not justified and legally sustainable and is liable to be recalled.

Deposit of Cess (GIDC) in the Federal Consolidated Fund

13. The other principle established in the impugned judgment was:

> 25. ……It cannot be levied as a general revenue collecting tool and the government would not be justified to collect it if the funds are diverted to some other expenditure…..The proceeds of Cess should be clearly identifiable in the accounts by using separate accounting codes so that its collection and utilization is reconcilable with the purposes stated in the enactment. A correlation between the revenue collected and the expenditure incurred for the promised specific purpose should always be maintained.
>
> 38…it matters not if the revenue so collected forms part of the Federal Consolidated Fund as it is the mandate of Article 78 of the Constitution itself that all revenues of the Federal Government has to made part of Federal Consolidated Fund.

The learned DAG was asked time and again during the hearing to provide the statement of GIDC account within the Federal Consolidated Fund but he failed to furnish the statement of account and instead furnished a general statement showing the amount so far collected to be Rs. 307.23 billion as on 30.07.2020. Initial reluctance and then the failure on the part of the Federal

Government to place on record the statement of the account of GIDC gives rise to an adverse inference against the Federal Government under Article 129(g) of the Qanun-e-Shahdat Order, 1984. It shows that the collected amount of Rs. 307.23 billion is not physically present in the account and has already been expended elsewhere. This offends the principle settled by the Court. Additionally, it is also highlighted that even today the amount of GIDC has been shown as a Tax Revenue in the Annual Budget Statements for the year 2019-2020 and 2020-2021 as under:

FEDERAL BUDGET 2019–2020
ANNUAL BUDGET STATEMENT

REVENUE RECEIPTS
Tax Revenue

(Rs in million)

Object Code	Description	Budges Estimates 2018-19	Revised Estimates 2018-19	Budges Estimates 2019-20
B.	**Tax Revenue**			
	a. FBR Taxes (i+ii)	**4,435,000**	**4,150,000**	**5,555,000**
B01	**i.Direct Taxes**	**1,735,000**	**1,659,000**	**2,081,945**
B011	Taxes on Income	1,709,939	1,651,584	2,073,000
B015	Worker's Welfare Fund	18,636	4,186	5,050
B017-18	Capital Value Tax (CVT)	6,425	3,230	3,895
B02	**ii.Indirect Taxes**	**2,700,000**	**2,491,000**	**3,473,055**
B020-22	Customs Duties	735,000	735,000	1,000,500
B023	Sales Tax	1,700,000	1,490,000	2,107,738
B024-25	Federal Excise	265,000	266,000	364,817
	b. Other Taxes	**453,645**	**243,876**	**267,160**
B026-30	Other Indirect Taxes	37,555	7,492	11,100
B03064	Airport Tax	90	30	35
B03083	Gas Infrastructure Development Cess	100,000	25,000	30,000
B03084	Natural Gas Development Surcharge	16,000	8,000	10,000
B03085	Petroleum Levy	300,000	203,354	216,025
	Total Tax Revenue (a+b)	**4,888,645**	**4,393,876**	**5,822,160**

FEDERAL BUDGET 2019–2020

ANNUAL BUDGET STATEMENT

REVENUE RECEIPTS

Tax Revenue

(Rs in million)

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B015	Worker's Welfare Fund	18,636	4,186	5,050
B017-18	Capital Value Tax (CVT)	6,425	3,230	3,895
B02	**ii.Indirect Taxes**	**2,700,000**	**2,491,000**	**3,473,055**
B020-22	Customs Duties	735,000	735,000	1,000,500
B023	Sales Tax	1,700,000	1,490,000	2,107,738
B024-25	Federal Excise	265,000	266,000	364,817
	b. Other Taxes	**453,645**	**243,876**	**267,160**
B026-30	Other Indirect Taxes	37,555	7,492	11,100
B03064	Airport Tax	90	30	35
B03083	Gas Infrastructure Development Cess	100,000	25,000	30,000
B03084	Natural Gas Development Surcharge	16,000	8,000	10,000
B03085	Petroleum Levy	300,000	203,354	216,025
	Total Tax Revenue (a+b)	**4,888,645**	**4,393,876**	**5,822,160**

14. The above Annual Budget Statements for the year 2019-2020 and 2020-2021 show the said collection under the head "other tax revenue" as a part of Federal Consolidated Fund. Provinces are paid their respective shares under the National Finance Commission Award[24] from the Federal Consolidated Fund, and the possibility of the amount of GIDC being distributed amongst the Provinces cannot be ruled out. This Court, in the

[24] Prescribed Share of all Provinces under the Distribution of Revenues and Grants-in-Aids Order, 2010

impugned judgment, held that "it matters not if the revenue so collected forms part of the Federal Consolidated Fund as it is the mandate of Article 78 of the Constitution itself that all revenues of the Federal Government has to made part of Federal Consolidated Fund."[25] The Court in the impugned judgment ordered that "in case no work is carried out on North-South Gas Pipeline within the prescribed time and for laying any of the two other major pipelines (IP and TAPI) though the political conditions become conducive, the purpose of levying Cess shall be deemed to have been frustrated and the GIDC Act, 2015 would become permanently in-operational and considered dead for all intents and purposes." In that eventuality, the amount of Fee already collected under the GIDC Act will have to be refunded to the payers of fee. It would not be possible for the Federal Government to refund the same, if the amount of GIDC is made part of the Federal Consolidated Fund and shown as an amount available for general expenditures of the Government in the Annual Budget Statement.

15. Article 78(1) of the Constitution provides that all revenues received by the Federal Government, all loans raised by that Government, and all moneys received by it in repayment of loans shall form part of consolidated fund, to be known as the Federal Consolidated Fund. While all other moneys received by or on behalf of the Federal Government, or received by or deposited with the Supreme Court or any other court established under the authority of the Federation are to be credited to the Public Account of the Federation as per Article 78(2) of the Constitution. The expression "all revenues" used in Article 78(1) covers the revenues (taxes, duties, etc) raised for Governmental purposes, and does not include the revenue that cannot be used for any Governmental purpose, like the compensatory fee collected for rendering any service to the payers of that fee. Such compensatory fee falls within the expression "all other moneys" used in Article 78(2) and is to be credited to the Public Account, and not to the Federal Consolidated Fund. This view is supported by *Ratilal Gandhi v. State of Bombay,*[26] wherein the provisions of Article 266 of the Indian

[25] Para 38 of Impugned Judgment (Majority View)
[26] AIR 1953 Bom 242.

Constitution that are similar to that of Article 78 were interpreted in the following manner:

> It is only taxes raised and revenues raised for Governmental purposes that form part of this fund. But when moneys are received as a result of fees imposed for a specific purpose and when the fund collected is earmarked and set apart, such a fund does not form part [of the Consolidated Fund contemplated under Article 266 of the Indian Constitution].

The Cess amount collected under the GIDC Act is to be credited in the Public Account with an entity distinct from the other revenues credited to it, and must be earmarked for utilization for the purposes specified in the GIDC Act only. No disbursement can be made from the Cess amount for general governmental expenditures or any other purpose. The Court was not assisted on this point at the time of the hearing of the main case, and made the observations regarding deposit of the Cess amount in the Federal Consolidated Fund in the impugned judgment without appreciating the difference between the Federal Consolidated Fund and the Public Account under Article 78 of the Constitution. The said observations are, therefore, liable to be recalled in review. Further it is clarified that in case the GIDC Act becomes in-operational on failure of the Federal Government to take steps to commence work on the laying of the North South Gas Pipeline within six months, the amount of the Cess collected are liable to be returned and refunded to the payers.

Discrimination

16. The Act provides for the following maximum rates of cess for different Sectors:

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

On the question of discrimination, the impugned judgment, with respect, did not consider the rationale behind fixing different rates within different sectors but instead discussed the question of discrimination between the industrial/commercial consumers and the domestic consumers, which was not the question agitated by the petitioners. There appears to be no *intelligible differentia* amongst the different Industrial and Commercial gas consumers mentioned in the Schedule for the purposes of the GIDC Act. The upper limit of GIDC for the Industry, KESC/GENCO and IPPs has been fixed as Rs.100 per MMBTU, while remaining categories of gas consumers have been allowed to be charged at the rate higher than that. This discrimination, with respect, was overlooked in the impugned judgment, and thus provides a valid ground to review it. As per Article 25 of the Constitution which ensure equality and equal treatment among equals, the Federal Government cannot charge the Cess at the rate more than Rs.100 per MMBTU from any category of gas consumers.

Principle of Res-Judicata

17. On the ground of res-judicata, the petitioners vehemently relied upon *Pir Bukhsh*. My learned brothers have distinguished that case in the impugned judgment by highlighting the difference of facts of that case and the facts of the present case, and have repelled the ground of review by quoting the observations made in paras 10 and 11 by them in the impugned judgment. I am afraid if this is the correct approach to distinguish a principle of law declared by a larger Bench of this Court, which is binding on this Bench. *Pir Bukhsh* was decided by a four-member Bench of this Court in 1987 almost 33 years ago and still holds the field. The Court, in that case, elaborately discussed and expounded the doctrine of *res judicata* and its application between the parties both on questions of law and fact. The Court, in that case, approvingly referred to a judgment of Full Bench of the Calcutta High Court delivered in *Tarini Charan*[27] wherein it was held:

> To say…that the previous decision was wrong and that it was wrong on a point of fact, or on a pure point of law, and that therefore, it may be disregarded, is an

[27] *Tarini Charan v. Kedar Nuth* (***A I R 1928 Cal. 777***)

> indefensible form of reasoning. For this purpose, it is not true that a point of law is always open to a party.

Finally, this Court in *Pir Bakhsh* came to the conclusion that in a controversy raising a dispute inter parties, the matter adjudged is conclusive as between the parties both on question of fact and question of law. However, an exception to this principle declared by a larger Bench was created in the judgment under review by holding that it would be difficult to apply such a principle in matters where a power or a right or an obligation solely depends upon the very legitimacy of the enactment that has come under challenge in a Court of law on the touchstone of the Constitution. It was, with respect, not appropriate for a three-member Bench to deviate from principle of *res judicata* laid down by an earlier four-member Bench. This Bench had two options: first, to follow the law declared by that Bench; or second, to refer the matter to a four-member Bench to decide whether that opinion should be reconsidered by a larger Bench. As the majority did not opt for the second option, the principle of *res judicata* as settled in *Pir Bukhsh* is fully applicable to the decree holders in the suit decided by the Sind High Court.

Interpretation of Entry No.51 of Part 1 of the Federal Legislative List

18. The Court, in the impugned judgment while interpreting Entry No.51 of Part I of the Federal Legislative List contained in the Fourth Schedule to the Constitution took a view[28] contrary to that of Bench of co-equal strength expressed in *Durrani Ceramics*[29] by stating that "the National Assembly was fully competent to impose tax on natural gas through a Money Bill on the strength of Entry no.51 of the Federal Legislative List." This

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[28] In *Durrani Ceramics* case all items contained in Entry No.51 were read conjunctively, meaning thereby that Federal Government can levy tax on natural gas and mineral oil only if these sources of energy can be used to generate nuclear energy. It appears that no proper assistance on scientific lines was rendered by the law officers to this Court during the hearing of the *Durrani Ceramics* case hence the scientific fact that it was not possible to generate nuclear energy from mineral oil and natural gas, as these sources cannot be used as nuclear fuel was not taken into consideration. (Para 41 of the judgment under review)

[29] *Federation of Pakistan through Secretary Petroleum & Natural Resources v. Durrani Ceramic (2014 SCMR 1630 : PLD 2015 SC 354: 2014 PTD 2016)*

finding, it is submitted with respect, is against settled principles of the law of precedent[30] and needs to be recalled.

Entry No.27 of Part-I of the Federal Legislative List

19. The Federation had defended its authority to legislate the GIDC Act on the basis of Entry No. 2 read with Entry No. 15 of Part II of the Federal Legislative List in the present case, and on Entry No. 51 of Part I of the Federal Legislative List in *Durrani Ceramics*. It was never the case of the Federation that it has competence to legislate a law relating to tax or fee on natural gas on the basis of Entry No. 27 of Part I of the Federal Legislative List. Entry No.27 reads as follows: "Import and export across customs frontiers as defined by the Federal Government, inter-provincial trade and commerce, trade and commerce with foreign countries; standard of quality of goods to be exported out of Pakistan." This entry clearly relates to trade with foreign countries (import and export), and inter-provincial trade and commerce, and in no way covers the subject of "natural gas". The GIDC Act has not taxed or charged fee on the foreign or inter-provincial trade and commerce. It has charged fee on use of natural gas. Entry No.27, in no terms, justify the legislative power of the Federation to enact the GIDC Act. The parties were not heard on this point at the time of original hearing of the case; this point, therefore, escaped notice of the Bench, and this error appears to be apparent of the face of the record and is liable to be recalled.

20. In view of the above errors that have been found apparent on the face of the record, the review petitions are allowed in the following terms:

(i) The benefit available under the provisos to section 8(2) of the GIDC Act shall not be affected by the judgment under review.

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[30] The Province of East Pakistan v. Dr. Azizul Islam, PLD 1963 SC 296; the Province of East Pakistan v. Abdul Basher Cohwdhury, PLD 1966 SC 854; Multiline Associates v. Ardeshir Cowasjee, PLD 1995 SC 423; Ardeshir Cowasjee v. Karachi Building Control Authority, 1999 SCMR 2883; Gulshan Ara v. the State, 2010 SCMR 1162; Zahid Rehman v. the State, P L D 2015 Supreme Court 77; Messrs WAK limited Multan Road v. Collector Central Excise and Sales Tax, 2018 S C M R 1474; Shafqat @ Shafaat v. the State, P L D 2019 Supreme Court 43;

(ii) The direction to recover arrears of Cess is recalled.

(iii) In case the GIDC Act becomes in-operational on failure of the Federal Government to take steps to commence work on the laying of the North South Gas Pipeline within six months, the amount of the Cess collected shall be returned and refunded to the payers.

(iv) The principle of *res judicata* as settled in *Pir Bukhsh*, is fully applicable to the decree holders in the suits decided by the Sind High Court.

(v) The Federal Government shall not charge the Cess at the rate more than Rs.100 per MMBTU from any category of gas consumers in view of Article 25 of the Constitution.

(vi) The observation that "it matters not if the revenue so collected forms part of the Federal Consolidated Fund" is recalled and the amount of GIDC is to credited to the Public Account under Article 78(2) of the Constitution while maintaining a separate statement of account.

(vii) The finding on Entry No. 27 of Part I of the Federal Legislative List is recalled. The GIDC Act falls under Entry No. 2 read with Entry No.15 of Part II of the Federal Legislative List.

(viii) The observations as to the interpretation of Entry No. 51 of Part I of the Federal Legislative List in the judgment under review being contrary to the judgment of co-equal Bench in *Durrani Ceramics* are recalled.

(Syed Mansoor Ali Shah)
Judge

Islamabad,
the 07th December, 2020.
Approved for Reporting.