P L D 2020 Supreme Court 641

Present: Mushir Alam, Faisal Arab and Syed Mansoor Ali Shah, JJ

Messrs KHURSHID SOAP AND CHEMICAL INDUSTRIES (PVT.) LTD. through Sheikh Muhammad Ilyas and others---Petitioner

Versus

FEDERATION OF PAKISTAN through Ministry of Petroleum and Natural Resources and others---Respondents

CIVIL APPEALS NOS.1113 TO 1155 OF 2017 AND CIVIL PETITIONS NOS.3124, 387-P, 389-P, 392-P, 393-P, 394-P, 399-P, 400-P, 3027, 3028, 3029, 3030, 3138, 3241, 3259, 3260, 3327 AND 3411 OF 2017 AND 3385 OF 2018

(On appeal against the judgments dated 31.05.2017, 28.5.2019, 9.8.2017, 18.8.2017, 21.8.2017, 11.6.2015 passed by the Peshawar High Court, Peshawar in Writ Petitions Nos. 2178-P/2015 and 2729 to 2731, 3056, 3057, 3058, 3081, 3082, 3109, 3110, 3111, 3112, 3113, 3118, 3137, 3157, 3216, 3268, 3297, 3413, 3489, 3890 of 2014, 542, 858, 885, 2160 to 2166, 2179 to 2182, 2164 to 2166, 2179 to 2198, 2210 to 2233, 2254, 2263 to 2265, 2287 to 2290, 2305, 2307, 2308, 2329, 2373, 2466 to 2468, 2533, 2556, 2558, 2575, 2576, 2589 to 2591, 2593, 2606, 2607, 2608, 2723, 2820, 2852, 2870, 3133, 3163, 3496, 3881, 3915, 3974, 4074, 4522 of 2015, 19, 165, 1415, 1757, 3569, 3849 of 2016, 1601, 1650, 1849, 3270-P, 33104-P, 3302-P, 2843-P of 2017, 2293-P, 778-A, 2232-P to 2234-P, 2427-P to 2429-P, 2472-P, 2938-P, 2939-P, 2940-P, 4300-P of 2016, 589-P, 2408-P of 2017 and 3085-P of 2014).

AND

CIVIL MISCELLANEOUS APPLICATIONS NOS. 20, 86, 812, 813, 814, 815, 1022, 2014 OF 2020 AND 8277, 8278, 8279, 3076, 9149, 9186, 9301, 9305, 9521, 9746, 9844, 10608 OF 2019, 8497 OF 2018, 5307 AND 9153 OF 2017.

(Applications for Impleadment)

AND

CIVIL MISCELLANEOUS APPLICATIONS NOS. 5295, 5511, 5635, 5637, 5639, 5641, 5643, 5645, 5647, 5649, 5651, 5678 TO 5686, 5689 TO 5696, 5699, 5701, 5703, 5705, 5707, 5709, 5711, 5713 AND 5715 TO 5721 OF 2017.

(Applications for Stay)

Per Faisal Arab, J; Mushir Alam, J agreeing; [Majority view]

(a) Res judicata, principle of---

----Scope---Principle of res judicata was a principle of peace---Once a controversy with regard to a right in property or a right to office was adjudicated upon and attained finality through a judicial pronouncement of a competent Court of law, it no more remained open to challenge in any subsequent judicial proceedings between the same parties on the same subject matter---Said principle was intended not to afford a litigant more than one opportunity for resolution of a judicial dispute and thus eliminated the chances of repetitious and successive litigation against a party on the same issue---Maxim "that there should be an end to litigation" was germane to such matters.

(b) Res judicata, principle of---

----Applicability and scope---Vires of a statute---Conflicting judgments of two High Courts---In case of conflicting decisions on the vires of a legislative enactment of two High Courts, when decision of one remained unchallenged in the hierarchy as no appeal was preferred and the other was challenged before the Supreme Court, then the verdict of the High Court that went unchallenged, which was in conflict with the final decision of the Supreme Court had to be treated as outmoded and no longer executable---Such a situation warranted departure from the doctrine of res judicata.

Any relief which a litigant sought in a judicial proceeding with regard to any power or a right or an obligation connected with some property or an office which power or right or obligation was not dependent upon the legitimacy of a legislative enactment and stood or fell on its own strength then in such cases when the decision rendered by a court of competent jurisdiction attained finality, there was no difficulty in applying the principle of res judicata to such a decision. However, it would be difficult to apply such a principle in matters where a power or a right or an obligation solely depended upon the very legitimacy of the enactment that had come under challenge in a Court of law on the touchstone of the Constitution. In such a situation the existence of such power or right or obligation would solely depend on the final adjudication as to the legal validity of the enactment itself. This could be understood from a situation where a controversy as regards constitutional validity of an enactment had come under challenge before two High Courts, one declaring the enactment ultra vires the Constitution and the other intra vires. If the principle of res judicata was applied to the decision of the High Court that declared the law ultra vires as the same was not challenged any further by the Government then two conflicting declarations would stand side by side on the legitimacy of a legislative enactment, one party treating the law valid and the other invalid. This would lead to treating an Act of the parliament valid for some and invalid for others though both the set of persons were similarly placed. If the decision rendered by the High Court that declared the law intra vires the Constitution was only challenged before the Supreme Court and after examining the merits of the case the enactment was declared by the Supreme Court to be intra vires the Constitution, then in such peculiar situation when the Supreme Court finally validated the legislative enactment then the same had to be applied uniformly to every person falling within its ambit. Such final judicial determination on the legitimacy of a legislative enactment had to be treated as a judgment in rem regardless of the fact that the judgment of the High Court that invalidated the very same enactment was not challenged before the Supreme Court. Such a situation warranted departure from the doctrine of res judicata. Omission of a public functionary to file appeal could not put fetters on the universal application of a legislative enactment declared by the Supreme Court to be constitutionally valid as it would amount to repealing the statute for some and treating it valid for others.

Hence where there were conflicting decisions on the vires of a legislative enactment of two High Courts, and decision of one remained unchallenged in the hierarchy as no appeal was preferred and the other was challenged before the Supreme Court, then the verdict of the High Court that went unchallenged, which was in conflict with the final decision of the Supreme Court had to be treated as outmoded and no longer executable.

United States v. Stone and Downer Co. [274 U.S. 225 (1927)] ref.

Pir Bukhsh and others v. Chairman Allotment Committee PLD 1987 SC 145 distinguished.

The final determination of the Supreme Court on the legitimacy of a law had to apply even to those who had succeeded in obtaining a judgment from a Court lower in the hierarchy that the law was ultra vires the Constitution, they too would be bound by the judgment of the Supreme Court, if it had through a judicial pronouncement declared a legislative enactment to be valid.

(c) Limitation Act (IX of 1908)---

----S. 3---Matter instituted after period of limitation---Connected case filed within limitation period---Matter filed after the period of limitation could also be decided on merits with a connected case that was filed within time.

Mehran Zaibun Nisa and others v. Land Commissioner, Multan and others PLD 1975 SC 397 and Province of Punjab v. Muhammad Tayyab 1989 SCMR 1621 ref.

(d) Constitution of Pakistan---

----Arts. 73, 77 & Fourth Sched. Pt. II, Entries Nos. 47 to 53---Taxes and fees, levy of---Prerogative of the Legislature---Under the Constitution it was the prerogative of the legislature to raise revenue for the government on matters that fell within its legislative competence---Legislature enjoyed the privilege to identify the base of the levy i.e. those upon whom the incidence of the levy would fall and also determine the quantum to be charged from them, which could either be at a fixed rate or ad valorem---Under the Constitution the legislature could levy taxes as well as fees.

(e) Fee---

----Fee imposing legislative enactments, types of---'Fee-simplicitor' and 'Cess-fee'---Distinction---Basic difference between an enactment where fee simplicitor was imposed and where Cess-fee was imposed was that in the former a service or a privilege was made available to the payer directly on the strict principle of quid pro quo whereas in the latter case, the declared purpose came with a promise to bring some benefit or advantage in future which was basically meant for its payers---In order to remain as a fee-levying enactment, the purpose for which the Cess was to be charged should be well spelled out and defined in the enactments as narrowly as possible lest it may convert it into a tax-levying enactment---Proceeds of Cess should be clearly identifiable in the accounts by using separate accounting codes so that its collection and utilization was reconcilable with the purposes stated in the enactment.

There were two kinds of fee-imposing legislative enactments. One was based purely on the principle of quid pro quo i.e. a charge was payable for rendering a specific service or extending a specific privilege which the payers could avail subject to the conditions that may be attached to it. In other words, it could be called as 'fee-simplicitor'. In such an enactment there was direct and immediate correlation in absolute terms between the service that was rendered and the fee that was charged for it. The other kind of a fee-levying legislation was where 'Cess' was imposed as a compulsory exaction in the same manner where taxes were imposed with the distinction that it was 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. Such benefit or privilege once made available on the ground may be availed by others as well but that would not change the status of such fee-levying enactment. It would remain a specie of fee-levying enactment in contradistinction to tax-levying enactment in which no specific purpose or specific service needed to be disclosed by the legislature in order to justify its imposition. Cess-fee could be described as 'purpose specific'. In such a form of levy, the specified purpose was pre-committed to the payers before the revenue was collected under the legislation. For example, Cess was 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 did not exist in the same sense as it existed in a case where an existing service was rendered or a privilege was extended directly to the payer for a fee. What needed to be taken into consideration was whether the enactment had 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 were imposed with no precondition attached for their spending.

Hinger-Rampur Coal Co. Ltd. and others v. The State of Orissa AIR 1961 SC 459; Sona Chandi Oal Committee v. State of Maharashtra AIR 2005 SC 635; State of West Bengal v. Kesoram Industries Limited AIR 2005 SC 1646 and Messrs Gasket Radiators Pvt. Ltd. v. Employees' State Insurance Corporation and another AIR 1985 SC 790 ref.

When Cess as a fee was levied to meet an earmarked financial exigency spelt out in an enactment, it preserved the levy for such purpose only even with the change in the government setup. It could not be levied as a general revenue collecting tool and the government would not be justified to collect it if the funds were diverted to some other expenditure. So it was like a 'promised spending' to be applied to the specific purpose described in the enactment. Hence, in order to remain as a fee-levying enactment, the purpose for which the Cess was to be charged should be well spelled out and defined in the enactments as narrowly as possible lest it may convert it into a tax-levying enactment. The proceeds of Cess should be clearly identifiable in the accounts by using separate accounting codes so that its collection and utilization was 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 such manner the earmarked levy also provided information on the amount collected and spent. This also inculcated confidence in the payers as it contained 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. When the revenue could 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 stood served, the justification for its imposition also came 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 was achieved, the government lost its right to collect Cess regardless of the fact that the enactment continued to remain in force.

(f) Legislation---

----Legislature, powers of---Re-enacting a law on the same subject with retrospective effect---Scope---Legislature had the right to re-enact a law on the same subject, which on account of legal infirmities in its enactment process had been declared invalid by a Court of law, by removing the causes that led to its invalidity---Legislature was also competent to make the re-enacted law applicable retrospectively in order to bind even the past transactions that had been declared invalid.

Molasses Trading and Export (Pvt.) Limited v. Federation of Pakistan 1993 SCMR 1905; Mamukanjan Cotton Factory v. Punjab Province PLD 1975 SC 50; FECTO Belarus Tractor Ltd v. Government of Pakistan through Finance Economic Affairs PLD 2005 SC 605; Dr. Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265 and Contempt Proceedings against Chief Secretary, Sindh 2014 PLC (C.S.) 82 ref.

(g) Interpretation of statutes---

----Constitutionality of a statute---Courts should lean towards the constitutionality of a legislative enactment instead of destroying it, keeping in view the rules of constitutional interpretations.

Dr. Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265 ref.

(h) Constitution of Pakistan---

----Fourth Sched.---Entries in Legislative Lists----Liberal interpretation---Entries to the Legislative Lists were not the source of legislative power but were merely topics of fields of legislation and allocation of the subjects to the lists was not by way of scientific or logical definition but by way of mere simple enumeration of broad catalogue---Such entries must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense---If a legislation purporting to be under a particular legislative entry was assailed for lack of legislative competence, the State could always show that the law was supportable under any other entry within its legislative competence.

Ujagar Prints v. Union of India and others AIR 1989 SC 516 and Elahi Cotton Mills Ltd. v. Federation of Pakistan PLD 1997 SC 582 ref.

Per Faisal Arab, J; Mushir Alam, J. agreeing; Syed Mansoor Ali Shah, J. dissenting.

(i) Gas Infrastructure Development Cess Act (IV of 2015)---

----Ss. 3 & 4---Constitution of Pakistan, Arts. 18, 24(1), 25, 70 & Fourth Sched., Pt. I, Entry Nos. 27, 51 & 54---Industrial and commercial consumers of natural gas---Gas Infrastructure Development Cess('GIDC cess')---Gas Infrastructure Development Cess Act, 2015 ('GIDC Act, 2015), vires of---[Per Faisal Arab, J [Majority view]: Entries 27, 51 & 54 of Part I of the Federal Legislative List contained in the Fourth Schedule to the Constitution enabled the legislature to legislate GIDC Act, 2015---Fee imposed under the GIDC Act, 2015 was clearly intended to facilitate import into Pakistan of natural gas on the basis of trade agreements executed with foreign countries which acts clearly fell within the ambit of Entry No. 27---Whole purpose of enacting GIDC Act, 2015 was to facilitate import of natural gas / LNG into the country from nearby countries in order to meet the ever expanding energy needs of the country and the cheapest way to import it was through overland transnational pipelines---As the GIDC Act, 2015 contained a well-defined object meant for making future availability of natural gas more convenient and without interruption that would mainly benefit the industrial and commercial consumers, therefore, in pith and substance the GIDC Act, 2015 was a fee-imposing enactment---Object which the Parliament had promised in the GIDC Act, 2015 was clearly 'purpose based' which was distinctly defined and carried with it an element of quid pro quo, making it a fee-imposing enactment instead of a tax-imposing enactment---Whatever Cess had been collected to date had been accounted for by the Federal Government in its annual accounts recording it under separate code numbers and was thus identifiable separately from the other revenues of the Federal Government---Provisions of S.8 of the GIDC Act 2015, which gave retrospective effect to the charge and recovery of GIDC cess levied from the year 2011 were also valid being within the legislative competence of the Parliament---Levy imposed under Gas Infrastructure Development Cess Act, 2015 was in accordance with the provisions of the Constitution---Per Syed Mansoor Ali Shah, J., dissenting. [Minority view]: Gas consumers had been paying GIDC cess for almost a decade, however, there had been no work on the ground for the projects for which the cess was being collected---Admittedly not a single Annual Report, as required under S.4(2) of the GIDC Act, 2015, was tabled before the Houses of the Parliament except the one placed before the Parliament after the filing of present cases---Government had hoodwinked the Parliamentary oversight, paying little heed to the energy crisis in the country; the interest of the gas consumers who had been regularly paying GIDC cess and the welfare of the general public---Any fiscal legislation that imposed a Fee, must clearly spell out the nature of service to be rendered and the reasonable timeline for the delivery of such service---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 was delayed or could not be executed in the proposed timeline, respectively---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---Present GIDC Act, 2015 did not meet such fundamental requirements of a Fee levying legislation, resulting in imposing an unconstitutional levy in the garb of a Fee---Such unlawful exaction (levy) offended the rights to property, trade and non-discrimination of the industrial gas consumers---GIDC cess imposed under the GIDC Act, 2015 was declared to be unconstitutional and illegal in its present form]---Appeals, petitions and applications were disposed of accordingly with relevant directions.

Per Faisal Arab, J. [Majority view]: Legislature introduced the bill of Gas Infrastructure Development Cess Act, 2015 ('GIDC Act, 2015) under Article 70 of the Constitution which was passed by both the houses of the Parliament as a fee-levying enactment. National Assembly was fully competent to impose tax on natural gas through a Money Bill on the strength of Entry No.51 of Part I of the Federal Legislative List contained in the Fourth Schedule [pp. 677, 687] L & EE

The provision of the Constitution that enabled the legislature to legislate GIDC Act, 2015 was Entry No.54 of Part I of the Federal Legislative List. Said entry stated 'Fees in respect of any of the matters in this Part, but not including fees taken in any court.' Furthermore Entry No.27 of Part I of the Federal Legislative List provided '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'. Said entry, inter alia, covered legislation that related to subjects of import into Pakistan and trade with foreign countries and the mode through which natural gas could be cheaply and efficiently imported from nearby countries through overland pipeline where it was more than sufficient for their needs. This was exactly the purpose and object of the GIDC Act, 2015 as reflected by its section 4 which provided that the revenue that was to be generated from the GIDC cess shall be utilized for facilitating import of natural gas into Pakistan through two separate transnational pipelines and for ancillary projects. For such purpose trade agreements had also been executed with two countries (Iran and Turkmenistan) separately. In addition to this section 4 of the GIDC Act, 2015 also provided that the GIDC cess was required for the purposes of LNG which under a trade agreement with Qatar was being imported on ships and after its discharge at the port of Karachi and gasification, was planned to be transported upcountry through a pipeline project named 'North South pipeline'. From this it had become evident that the whole purpose of enacting GIDC Act, 2015 was to facilitate import of natural gas, a very important source of energy from the nearby countries under trade agreements executed with them. The fee imposed under the GIDC Act, 2015 was clearly intended to facilitate import into Pakistan of natural gas on the basis of trade agreements executed with foreign countries which acts clearly fell within the ambit of Entry No. 27 of Part I of the Federal Legislative List contained in the Fourth Schedule to the Constitution.

Whole purpose of enacting GIDC Act, 2015 was to facilitate import into the country of a very important source of energy i.e. natural gas / LNG from nearby countries in order to meet the ever expanding energy needs of the country as our own resources of energy were fast depleting and the cheapest way to import it was through overland transnational pipelines. The supply of imported LNG to various parts of the country after its import on ships through trans-provincial pipeline was also a project of the Federal Government. The incidence of the cost involved in doing so fell on the industrial and commercial consumers whose consumption accounted for more than three-fourth of the total supply of natural gas. The industrial and commercial consumers of natural gas in the country, from whom GIDC cess was being collected, consumed about 76% of the total supply of natural gas. They would be mainly benefited once the promised projects were completed. It did not matter if domestic consumers of natural gas would also be benefitted.

As the GIDC Act, 2015 contained a well-defined object meant for making future availability of natural gas more convenient and without interruption that would mainly benefit the industrial and commercial consumers, therefore, in pith and substance the GIDC Act, 2015 was a fee-imposing enactment and use of terms like 'levied' or 'charged' would not change the object with which it was legislated.

The object which the Parliament had promised in the GIDC Act, 2015 was clearly 'purpose based' which was distinctly defined and carried with it an element of quid pro quo, making it a fee-imposing enactment instead of a pure revenue raising measure like taxes in general were imposed with no precondition attached for their spending. After seeing the purpose of the enactment and the fact that its revenue was duly accounted for and had also not been diverted to any other use, the imposition of GIDC cess under GIDC Act, 2015 was not a tax-imposing enactment.

Whatever GIDC cess had been collected right from the day when the erstwhile Gas Infrastructure Development Cess Act, 2011 (since declared unconstitutional), came into force had been accounted for by the Federal Government in its annual accounts recording it under separate code numbers and was thus identifiable separately from the other revenues of the Federal Government. This would facilitate in seeking information on the amount collected as against the amount that was going to be spent for the purposes promised in the GIDC Act, 2015. Thus a correlation between the revenue collected and the expenditure which was going to be incurred for the promised specific purpose could be maintained. It mattered not if the revenue so collected formed part of the Federal Consolidated Fund as it was the mandate of Article 78 of the Constitution itself that all revenues of the Federal Government had to made part of Federal Consolidated Fund.

The provisions of Section 8 of the GIDC Act, 2015, which gave retrospective effect to the charge and recovery of GIDC cess levied from the year 2011 were also valid being within the legislative competence of the Parliament.

Mamukanjan Cotton Factory v. Punjab Province PLD 1975 SC 50 ref.

Levy imposed under Gas Infrastructure Development Cess Act, 2015 was in accordance with the provisions of the Constitution.

Supreme Court disposed of the appeals, petitions and applications with the following directions:

(i) From the date of present judgment, the Federal Government was restrained from charging GIDC cess, which power of the Federal Government shall remain suspended until the Cess-revenue collected and that which was accrued so far but not yet collected was expended on the projects listed in section 4 of the GIDC Act, 2015;

(ii) In the remaining period of the financial year 2020-21 while considering fixation of sale price of Compressed Natural Gas (CNG), the Oil and Gas Regulatory Authority (OGRA) shall not take into consideration the element of GIDC cess under GIDC Act, 2015 as one of the costs of sale of GNG;

(iii) As all industrial and commercial entities which consumed gas for their business activities passed on the burden to their customers / clients therefore all arrears of 'GIDC cess' that had become due upto 31-07-2020 and had not been recovered so far shall be recovered by the companies responsible under the GIDC Act, 2015 from their consumers. However, as a concession, the same be recovered in twenty-four equal monthly instalments starting from 01-08-2020 without the component of late payment surcharge. The late payment surcharge shall only become payable for the delays that may occur in the payment of any of the twenty-four instalments; and

(iv) The Federal government shall take all steps to commence work on the laying of the North-South pipeline within six months and on TAPI pipeline as soon as its laying in Afghanistan reached the stage where the work of laying pipeline on Pakistan soil could conveniently start and on IP pipeline as soon as the sanctions on Iran were no more an impediment in its laying. In case no work was carried out on North-South pipeline within the prescribed time and for laying any of the two other major pipelines (IP and TAPI) though the political conditions became conducive, the purpose of levying GIDC 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.

Per Syed Mansoor Ali Shah, J. dissenting [Minority view]:

Utilization of GIDC cess as per the earlier and the recent GIDC Act, 2015 was 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 had been paying GIDC cess for almost a decade, and a total of Rs 295.40 billion had been collected to-date, however, there had been no work on the ground and these gas projects had no physical existence, whatsoever, in Pakistan. No development phase expenditure had taken place and project development cost funded by GIDC cess was nil. Even though, there was nothing on the ground, these projects were announced in the year 2011 and GIDC cess was since then being collected.

The GIDC Act, 2015 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 cess by tabling an Annual Report under Section 4(2) of the Act. Admittedly not a single Annual Report was tabled before the Houses of the Parliament except the one placed before the Parliament after the filing of present cases. The Government had unabashedly and successively hoodwinked the Parliamentary oversight, paying little heed to the energy crisis in the country; the interest of the gas consumers who had been regularly paying GIDC cess 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 had failed the industrial gas consumers 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. Had the Executive apprised the Parliament under the GIDC Act, 2015 legislative intervention may have followed, saving everyone the long drawn litigation and better financial management and use of Rs.295 Billion, which was sitting unused with the Federal Government.

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. It was by all means a legitimate expectation of the payer of Fee to know when will the service be delivered. Any law that levied 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. Legislature must also consider the entire mechanism at work behind such relationship of reciprocity e.g., the obligations of the provider of Fee, the consequences of delay and failure to render service including refund. The GIDC Act, 2015 was silent on all these counts and therefore passed for colourable legislation as it actually imposed a levy unknown to the Constitution in the garb of a Fee. The GIDC Act, 2015 did not provide a level playing field for the parties and was devoid of the basic fairness, protection and due process that was required to be meted out to a payer who was the source of the public finance required for funding the long-term gas projects. Such a law offended and renders constitutional protections of right to property, business and non-discrimination, absolutely hollow and meaningless. The GIDC Act, 2015 imposed an unconstitutional levy in the garb of a Fee.

As a consequence, the amount of GIDC cess collected over the years should be returned and refunded to the payers in full, unless in some cases, it was impractical to so do. The Federal Government shall constitute a Committee to work out a mechanism for refund of GIDC cess so that payers of the said cess were fully restituted; be it the gas consumers under the GIDC Act, 2015 or the final consumers. Even if the gas consumers had passed on the Fee to its customers, technology may be available to credit such customers, so that there was 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. [Minority view]

Per Faisal Arab, J [Majority view]

(j) Interpretation of statutes---

----Fiscal statute---Fee imposing enactment---Use of terms 'levy' or 'charge'---When terms like 'levy' or 'charge' were used in any revenue raising enactment, it did not mean that it could not be a fee imposing enactment---Terms 'levied' or 'charged' meant 'to impose by legal authority'---Whether tax was being imposed or a fee, it entirely depended upon the object of the legislation and had nothing to do with the use of such terms---Mere use of terms like 'levied' or 'charged' could not be made basis to describe a law as tax imposing enactment.

(k) Interpretation of statutes---

----Commencement date---Enforcement---When an Act of Parliament provided that it will come into force at once then every provision of it became enforceable from the day the Act received the assent of the President unless any provision of the Act itself suggested that it would come into force only when some authority nominated in such behalf so decided or on the happening of an event---Where the legislature intended to leave a matter for the Federal Government to decide before it was given effect to then it specifically stated so in the law itself.

(l) Gas Infrastructure Development Cess Act (IV of 2015)---

----S. 3(1)---Industrial and commercial consumers of natural gas---Gas Infrastructure Development Cess ('GIDC cess')---Whether excluding domestic users from the ambit of the cess/levy was discriminatory---Held, that GIDC cess which the industrial and commercial concerns paid became part of the cost of the goods which they sold or the cost of the services they rendered and thus was ultimately borne by the buyers of their goods and services---Domestic consumers were indirectly burdened with the incidence of GIDC cess in a way that whatever product or service they bought/availed from an industrial or commercial enterprise, the element of cost of cess having already been factored in the price of their purchases, it ultimately passed on to them---Every industrial and commercial entity using natural gas for its business activity was entitled to claim the burden of GIDC cess as their business expense, being part of the cost of their goods sold or services rendered, and get it adjusted against their business profits---GIDC cess had been levied only on those consumers of natural gas who on account of their industrial or commercial dealings passed on its burden to their customers/clients; this was not the case with the domestic consumers of gas as the question of passing on the burden in their case obviously did not arise---Domestic consumers of natural gas being treated as a distinct class of consumers from industrial and commercial consumers, no discrimination in favour of domestic consumers emerged on account of their exclusion from the levy of GIDC cess.

(m) Constitution of Pakistan---

----Fourth Sched. Pt. I, Entry No. 51---Expression 'Taxes on mineral oil, natural gas and minerals for the use in generation of nuclear energy'---Interpretation---'Mineral oil' and 'natural gas' though being sources of energy were distinct from the source that generated nuclear energy, thus, 'mineral oil' and 'natural gas' appearing in Entry No. 51 of Part I of the Federal Legislative List were to be read disjunctively from 'nuclear energy'.

Regarding generation of nuclear energy, the scientific reality was that it originated from splitting of atoms of the uranium which generated heat. This process of splitting the atoms of uranium was called fission. The heat so generated helped in producing steam which was then used to operate turbines to generate electricity. As nuclear energy was produced only through the process of fission, fuels such as mineral oil or natural gas could not be used for such purpose. There were several other primary sources of generating energy such as fossil fuels like coal, petroleum, natural gas and sources like hydroelectric, solar and wind. None could be used as nuclear fuel to generate nuclear energy except uranium and its by-product plutonium. When such was the scientific reality then mineral oil and natural gas appearing in Entry No.51 of Part I of the Federal Legislative List on which the process of fission could not apply to generate nuclear energy were to be read disjunctively, as both were sources of energy other than nuclear energy.

Per Syed Mansoor Ali Shah, J. dissenting [Minority view]

(n) Tax---

----'Fee' and 'tax'---Salient features of a 'tax' and 'Fee' and distinction between the two concepts stated. [Minority view]

Normatively, theoretically and legislatively three prominent tasks had 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, had a narrower scope and was premised on a corresponding service in return or quid pro quo. Whereas tax was devoid of quid pro quo, it was a sine qua non for Fee.

Haji Dossa Limited, Karachi v. Province of Punjab through Collector, Sahiwal and others 1973 SCMR 2; Workers' Welfare Funds, Ministry of Human Resources Development, Islamabad through Secretary and others v. East Pakistan Chrome Tannery Pvt. Through G.M. Finance Lahore and others PLD 2017 SC 28; Sheikh Muhammad Ismail & Co. Ltd., Lahore v. The Chief Cotton Inspector, Multan Division, Multan and others PLD 1966 SC 388; Pakistan Flour Mills Association and another v. Government of Sindh and others 2003 SCMR 162; Hirjina Salt Chemicals (PAK.) Ltd. v. Union Council, Gharo and others 1982 SCMR 522; Noon Sugar Mills Ltd. v. Market Committee and others PLD 1989 SC 449; Azad Government of the State of Jammu and Kashmir through Chief Secretary, Azad Kashmir Government, Civil Secretariat, Muzaffarabad v. Haji Mir Muhammad Naseer and others 1999 PLC (C.S.) 1173; Pakcom Limited and others v. Federation of Pakistan and others PLD 2011 SC 44; Collector of Customs and others v. Sheikh Spinning Mills 1999 SCMR 1402; The Hingir-Rampur Coal Co. v. The State of Orissa 1961 SCR (2) 537; Sreenivasa General Traders v. State of Andhra Pradesh AIR 1983 SC 1246; Upaj Mandi Samiti v. Orient Paper and Industries 1995 RRR (1) 327; Bangalore Development Authority v. Air Craft Employee Society 2012 (1) JLJR 503; H.H. Sudhundra Thirtha Swamiar and others v. The Commissioner for Hindu Religious and Charitable Endowments, Mysore and another AIR 1963 SC 966; Southern Pharmaceuticals and Chemicals, Trichur and others

v. State of Kerala and others AIR 1981 SC 1863; The Chief Commissioner, Delhi and another v. The Delhi Cloth and General Mills Co. Ltd. and others AIR 1978 SC 1181; Calcutta Municipal Corporation and others v. Shrey Mercantile Pvt. Ltd. and others AIR 2005 SC 1879; Bhagwan Dass Sood v. State of Himachal Pradesh and others AIR 1997 SC 1549; Kewal Krishan Puri and another v. State of Punjab and others AIR 1980 SC 1008; Agriculture Market Committee, Rajam and others v. Rajam Jute and Oil Millers Association, Rajam AIR 2003 SC 1742; The City Corporation of Calicut v. Thachambalath Sadasivan and others AIR 1985 SC 756; Kishan Lal Lakhmi Chand v. State of Haryana 1993 Supp (4) SCC 461; The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt AIR 1954 SC 282; The State of West Bengal and another v. Kesoram Industries Ltd. and others AIR 2005 SC 1646; Municipal Corporation of Delhi and others v. Mohd. Yasin AIR 1983 SC 617 and Gasket Radiators Pvt. Ltd. v. Employees' State Insurance Corporation and another AIR 1985 SC 790 ref.

A tax was 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. As a corollary, tax being instrumental in revenue augmentation, its quantum need not commensurate with costs incurred by such public authority. Further, tax was devoid of any quid pro quo. Even where any benefit seemed to flow, in case of tax, it was merely incidental and not primary. In other words, there existed no connection, whether direct and immediate or broad and casual between the contributor of tax and benefits.

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

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

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 envisaged an intimate and immediate relationship between rendition of service and the payer, who was direct beneficiary of such service, on a one-on-one basis. This proximity between the beneficiaries and services could also be categorized for simplicity as "proximate quid pro quo". So the classical approach of Fee comprised the following: a proximate quid pro quo i.e., rendition of certain services to the payers by government agency which amounted to special benefit/advantage to the payer; proportionality i.e., the amount imposed ought to commensurate with cost of services to be rendered; specific fund that ensured 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; and primary objective that was to enquire whether the primary purpose of imposing levy was rendition of services and it was not merely incidental to augmentation of revenue. If latter predominated, it acted as negative restriction and the levy would be tax.

With passing of time as economies 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 was because such a service was 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 were not the payers of Fee, hence the bond of proximity stood diluted. This shift has also been termed as "remote quid pro quo" which is used to describe the situation where services targeted beneficiaries which was a generic class comprising of a certain free riders but inclusive of payers. The shift from proximate to remote quid pro quo overtime did 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 depended on the nature of the service.

Merely because collections for services rendered or grant of a privilege or license were taken to the consolidated fund of the state and not separately appropriated towards the expenditure for rendering the service was not by itself decisive.

The modern approach to Fee therefore consisted of three-point check: Primary object test- whether the plenary objective of the levy was rendition of service to specified class and this service was something other than something merely incidental; Remote quid pro quotest- whether the payer received a general benefit from the authority imposing levy; Proportionality test- whether there existed a broad and generic co-relationship between services rendered and the amount of Fee charged. [Minority view]

(o) Fee---

----'Quid pro quo in future'---'Service to be rendered'---'Time dimension' of service to be rendered---Scope---Simultaneity or contemporaneity of payment and benefit was not the most vital or crucial test to determine whether a levy was a Fee or not, especially in long-term projects---While "service to be rendered" or quid pro quo in future was permissible it was equally important that the prospects of such a future service were certain, as if tied in time, with the payment of Fee---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---Payment of Fee by the payer could not be towards a service that floated in a timeless zone; was open-ended and uncertain---Failure in providing future service within reasonable timeline, deprived the Fee of its essential character, and gave it the complexion of a tax.

It was not a requirement that all the required services against a Fee must be in place before a Fee could be levied. Merely because the benefits to be received were postponed, it could not be said that there was no 'quid pro quo'. It was true that ordinarily a return 'in praesenti' was generally the case when Fee was levied but simultaneity or contemporaneity of payment and benefit was not the most vital or crucial test to determine whether a levy was a Fee or not, especially in long-term projects. In fact, it may 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, could not be built in a day nor medical facilities or gas supply provided right from the day of the commencement of the scheme. It was only after infrastructure development was 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. So while "service to be rendered" or quid pro quo in future was permissible it was equally important that the prospects of such a future service were certain, as if tied in time, with the payment of Fee.

Agriculture Market Committee, Rajam and others v. Rajam Jute and Oil Millers Association, Rajam AIR 2003 SC 1742 and Messrs Gasket Radiators Pvt. Ltd. v. Employees' State Insurance Corporation and another AIR 1985 SC 790 ref.

Fee was a constitutional levy against a service rendered, which could not be structured on assumptions, suppositions, expectations and verbal commitments of the Executive but required 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. While there was an obligation of the payer to deposit Fee on time which was 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 failed to recognize the core ingredient of a Fee - the quid pro quo. It was by all means a legitimate expectation of the payer of Fee to know when would the service be delivered. The payment of Fee by the payer could not be towards a service that floated in a timeless zone; was open-ended and uncertain. Any service to be rendered in such like cases became a disservice. The relationship in a Fee must exist till the end. Failure in providing future service within reasonable timeline, deprived the Fee of its essential character, sheds its complexion as a Fee and gave that of a Tax. As such failure and the uncertainty of time diminished the requisite degree of correlation between the payment of Fee and provision of service in return. This indefiniteness negated the concept of Fee and partakes the character of a Tax. Therefore, service against a Fee was 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. If the constituent of time was missing the service became practically non-existent and the levy no more retained the character of Fee and became a tax rendering the levy (of fee) unconstitutional. [Minority view]

(p) Constitution of Pakistan---

----Arts. 50 & 91(6)---Parliament, functions of---Executive answerable to the Parliament---Scope---Parliament was a multi-functional institution performing variety of roles---Some of the cardinal roles and functions of the Parliament were: Legislation, Oversight of the Government actions and Financial Accountability of the Government and the public sector---Parliament made laws, authorized the Government to spend public money, scrutinized the Government activities and was a forum for debate on national issues---Worst thing that the Government in a parliamentary system could do was to deny information to the Parliament---Executive was answerable to the Parliament---Article 91(6) of the Constitution declared it in unequivocal terms that the Cabinet, together with the Ministers of the State, shall be collectively responsible to the Senate and the National Assembly---One of the functions of the Parliament was to exercise political and financial control over the Executive---To call for information was perhaps the greatest power of Parliament---Even otherwise, it was the duty of the Government itself to feed Parliament with information, which was full, truthful, precise and supplied in time---Ministers made statements on the floor of the House, and laid reports and papers on the Table of the House---All these constituted a wealth of information, which became immediately public and could be issued to raise discussion in the House.

Subhash C Kashyap, Parliamentary Procedure, Universal 2006 pp. 19, 23 and 25 ref.

(q) Interpretation of statutes---

----Fiscal statute---Fee---Principles of interpretation of a fiscal statute applied equally to a Fee as they did to a tax - both being compulsory exactions of money by the State.

(r) Interpretation of statutes---

----Fiscal statute---In interpreting a taxing statute, equitable considerations were entirely out of place---Nor could taxing statute be interpreted on any presumptions or assumptions---Court must look squarely at the words of the statute and interpret them---Court could not imply anything that was not expressed, it could not import provisions in the statutes so as to supply an assumed deficiency---Taxing statues, if it professed to impose a charge, its intention must be expressed in clear, unequivocal and unambiguous language---Hunting into the intention to find a charge was impermissible---No equitable construction of a charging section was to be applied---Charging section was to be construed strictly regardless of its consequences that may appear to the judicial mind to be---Function of the court was not to hunt out ambiguities by strained and unnatural meaning.

Cape Brandy Syndicate v. IRC [1921] 1KB 64; Pakistan Television Corporation Limited v. Commissioner Inland Revenue (Legal), LTU, Islamabad and others 2017 SCMR 1136; Commissioner of Income Tax and another v. Baluchistan Concrete and Block Works Ltd. and others 2017 SCMR 1;

Chairman, Federal Board of Revenue, Islamabad v. 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 v. Pakistan Tobacco Company Ltd. and others PLD 2016 SC 398; Bechu Company v. Assistant Commissioner 2003 STC (132) 68 (also See N.S. Bindra's - Interpretation of Statutes. p.863 (12th Edition) and Film Exhibiter's Guild v. State of Andhra Pardesh AIR 1987 AP 110 ref.

(s) Interpretation of statutes---

----Fiscal statute---Fee---Fiscal legislation required that any law that levied 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---Legislature must also consider the entire mechanism at work behind such relationship of reciprocity -e.g., the obligations of the provider of Fee, the consequences of delay and failure to render service including refund. [Minority view]

(t) Interpretation of Constitution---

----Progressive interpretation---'Living tree', doctrine of---Scope---Constitution was organic and a living testament of the aspirations of the people it governed---"Living tree" doctrine allowed the Constitution to change and evolve over time while still acknowledging its original intentions---Said doctrine achieved a balance between two seemingly contradictory goals: predictability and flexibility---To be effective, the Constitution must consist of a predictable set of rules---On the other hand, flexible interpretation accommodated the realities of changing modern life---If the Constitution could not be interpreted in such way, it would be frozen in time and become more obsolete than useful---Contemporary interpreters must focus on what the originators intended the Constitution to accomplish rather than what the text actually stated before allowing the Constitution to evolve or remain unchanged---Progressive interpretation was (important) to preserve the vitality of the Constitution---Courts have repeatedly underlined that the Constitution was a living document and encouraged its progressive interpretation.

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

(u) Precedent---

----'Distinguishing' a precedent---Scope---If a new case was dissimilar to an earlier case in ways that seemed important, the court would '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---In such way the former decision might be said to be "rerationalized"---Precedent, whether persuasive or binding, need not be applied or followed if it could be distinguished; that is, there was a material distinction between the facts of the precedent case and the case in question---Technique of distinguishing a past case was a powerful engine of legal change---Crucial question was, whether there were 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 presented no problem for the doctrine of precedent.

Bryan A Garner. The Law of Judicial Precedent, 2016 p.97; Joseph Raz, The Authority of Law 186 (1979); Theodore, The Rule of Precedent, op cit. p. 99; Raz, The Authority of Law, p. 185 and Muhammad Munir, Precedent in Pakistan Law, Oxford, 2014. P.219 ref.

(v) Gas Infrastructure Development Cess Act (IV of 2015)---

----S. 3 & Second Sched.---Industrial and commercial consumers of natural gas---Gas Infrastructure Development Cess ('GIDC cess')---Different rates of GIDC cess fixed for different industries under Second Schedule to the Gas Infrastructure Development Cess Act, 2015 ('GIDC Act, 2015')---Discriminatory---Held, that purpose of the GIDC Act, 2015 was to raise public finance for the infrastructure development of the gas projects mentioned in the Act through levy of Fee on different categories of industrial gas consumers---No intelligible differentia was found amongst the different gas consumers mentioned in the Second Schedule for the purposes of the GIDC Act, 2015---One justification for charging different rates from amongst the industrial gas consumers could have been their overall consumption of natural gas, however the data provided to the court showed that differentiation of rates was not based on the consumption pattern of the gas consumers---Rates of GIDC cess fixed for different gas consumers were, therefore, ex-facie discriminatory and could not be allowed to stand. [Minority view]

Makhdoom Ali Khan, Senior Advocate Supreme Court, Saad Hashmi, Advocate for Appellants (in C.As. Nos. 1150 to 1155 of 2017).

Rashid Anwar, Advocate Supreme Court (via video link @ Karachi) and Syed Rifaqat Hussain Shah, Advocate-on-Record for Appellants (in C.As. Nos. 1115 to 1123 of 2017).

Isaac Ali Qazi, Advocate Supreme Court (via video link @ Peshawar) and M.S. Khattak, Advocate-on-Record for Appellants (in C.As. Nos. 1124 to 1127, 1133, 1134 of 2017, C.Ps. Nos. 3027 to 3030 and 3411 of 2017).

Anwar Kamal, Senior Advocate Supreme Court and Br. Ahmed Pervaiz for Appellants (in C.M.A. No. 86 of 2020).

Kh. Muhammad Saeed, Advocate Supreme Court for Appellants (in C.A. No. 1114 of 2017).

Syed Haziq Ali Shah, Advocate Supreme Court and M. S. Khattak, Advocate-on-Record for Appellants (in C.As. Nos. 1128 to 1131, 1135 to 1140 of 2017, C.Ps. Nos. 3124, 3259 and 3260 of 2017).

Sardar Muhammad Ghazi, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Appellants (in C.A. No. 1132 of 2017, C.M.As. Nos. 8277, 8278 and 9521 of 2019).

Ms. Navin Merchant, Advocate Supreme Court for Appellants (in C.M.A. No. 9746 of 2019).

Abid S. Zuberi, Advocate Supreme Court for Appellants (in C.M.A. No. 9153 of 2019)

Qazi Ghulam Dastgir, Advocate Supreme Court for Appellants (in C.As. Nos. 1113, 1141 to 1149 of 2017, 3076 of 2019).

Salman Akram Raja, Advocate Supreme Court (via video link @ Lahore) and Mehmood A. Sheikh, Advocate-on-Record for Appellants (in C.P. No. 3138 of 2017 and C.M.As. Nos. 9186, 9301 of 2019).

Ijaz Ahmed Zahid, Advocate Supreme Court and Habib Bhatti, Advocate Supreme Court for Appellants (in C.M.A. No. 1022 of 2020).

Abdul Munim Khan, Advocate Supreme Court and Tasleem Hussain, Advocate-on-Record (via video link @ Peshawar) for Appellants (in C.Ps. Nos. 387-P, 389-P, 3327 of 2017).

Tasleem Hussain, Advocate Supreme Court/Advocate-on-Record (via video link @ Peshawar) for Appellants (in C.Ps. Nos. 392-P to 394-P, 399-P, 400-P and 3241 of 2017).

Muneer A. Malik, Sr. Advocate Supreme Court, Ch. Atif Rafique, Advocate Supreme Court (via video link @ Karachi) Kassim Mirjat, Advocate-on-Record and Syed Rifaqat Hussain Shah, Advocate-on-Record for Appellants (in C.M.As. Nos. 8497 of 2018 and 9149 of 2019).

Syed Iqbal Hashmi, Advocate Supreme Court and Ch. Akhtar Ali, Advocate-on-Record for Appellants (in C.M.A. No. 9746 of 2019).

Waqar Ahmed Rana, Advocate Supreme Court for SNGPL (in all Appeals/ Petitions).

Br. Mian Belal, Advocate Supreme Court and Br. Muhammad Adil Fayyaz for SNGPL (in C.M.As. Nos. 812-815 of 2020).

Anwar Mansoor Khan, Attorney General, Ch. Aamir Rehman, Addl. AGP, Sohail Mehmood, D.A.G. and Sajjid Ilyas Bhatti, Addl. AG for the Federation.

Niaz Ullah Niazi, Advocate General for ICT.

M. Ayaz Swati, Addl. A.G. and M. Farid Dogar, A.A.G. for Government of Balochistan.

Ch. Faisal Farid, Addl. A.G. for the Government of Punjab.

Shumail Butt, A.G. for Government of Khyber Pakhtunkhwa.

Sardar Azmat Shafi, Accountant General of Pakistan in person.

Rizwan ul Haq, Sr. Executive Director (Litigation) (OGRA), Mrs. Taybbah Ahsan, JED, Finance (OGRA) Ms. Samia Khalid, Advocate Supreme Court (OGRA), Aatif Sajjad, Executive Director Finance (OGRA) Sajid Zahid Rauf, JED Gas (OGRA), Syed Faisal Ishtiaq, Law Officer (OGRA), Dr. Abdul Basit Qureshi, Registrar, OGRA, Atif Hussain, JED Finance OGRA and Asif, JED (Gas) OGRA for OGRA.

Anwar, Sr. JS Finance Division, Tanvir Butt, Sr. JS (Budget) Finance Division, Sajjad Azhar, Deputy Secretary Budget Resources and Javed Iqbal Khan, JS, B-II Finance Division for Finance Division, Government of Pakistan.

Mobeen Solat, MD, ISGCL for ISGCL.

Abdul Maqsood Malik, EDG, Dir. Petroleum for Ministry of Petroleum.

Dates of hearing: 3rd, 10th, 11th, 12th, 13th, 17th, 18th, 19th and 20th February, 2020.

JUDGMENT

FAISAL ARAB, J.---The appellants as well as the petitioners and the intervenors all utilize natural gas for their industrial and commercial activities. Some of them even use natural gas as fuel for their in-house power generation facilities. Those who own CNG stations use natural gas for converting it into Compressed Natural Gas (CNG) at their filling stations and then sell it to their customers.

2. Before discussing the controversy involved in the case we find it appropriate to briefly discuss the background of the laws that imposed Cess from the year 2011.

3. In the year 2011 the Gas Infrastructure Development Cess Act, 2011 (GIDC Act, 2011) was legislated through a bill introduced in the National Assembly as a Money Bill by treating the imposition thereunder as a specie of 'tax' whereby Cess was imposed on industrial and commercial consumers of natural gas. This was done to finance the cost which Pakistan has to bear for laying the overland pipelines through which natural gas was to be imported into the country from Iran and Turkmenistan. Apart from import of natural gas from the above two countries, LNG imported from Qatar on ships, after its discharge at the Karachi port, was to be gasified and transported up-country through a pipeline called North-South pipeline. The said Act was challenged by the industrial and commercial consumers of natural gas located in the Province of Khyber Pakhtunkhwa in the Peshawar High Court in the year 2011 and they succeeded in seeking a declaration that it is ultra vires the Constitution in the year 2013. The Federal Government appealed which was dismissed by this Court on 22.08.2014 after holding that the GIDC Act, 2011 in its character is a fee-imposing enactment, its bill could not have been introduced in the National Assembly as a Money Bill under the provisions of Article 73 of the Constitution. The said Act was thus declared to be ultra vires the Constitution, which decision has come to be known as Durrani Ceramics case reported in 2014 SCMR 1630.

4. Soon after the decision in Durrani Ceramics case, the President on 25.09.2014 promulgated the Gas Infrastructure Development Cess Ordinance, 2014 through which Cess on natural gas was again imposed, which Ordinance was also given retrospective effect from 15.12.2011, the date when the GIDC Act, 2011 came into effect. While the GIDC Ordinance, 2014 was still in the field, the Federal Government sought review of Durrani Ceramics case which was dismissed by this Court vide judgment dated 15.04.2015 reported as Federation of Pakistan v. Durrani Ceramics (PLD 2015 SC 354).

5. Within a month of the dismissal of the review petition, the Parliament on 15.05.2015 passed the Gas Infrastructure Development Cess Act, 2015 (GIDC Act, 2015) whereby Cess was again imposed on all consumers of natural gas excluding the domestic sector consumers. The purpose of its imposition was the same as was stated in the GIDC Act, 2011. In terms of Section 8 of GIDC Act, 2015 the levy and collection of Cess made under the GIDC Act, 2011 as well as under GIDC Ordinance, 2014 was also legitimized with retrospective effect.

6. In this second round of litigation the industrial and commercial consumers assailed the vires of the GIDC Act, 2015 before the Sindh High Court as well as in the Peshawar High Court claiming that

like GIDC Act, 2011 the GIDC Act, 2015 be also declared ultra vires the Constitution as it has been enacted by the parliament beyond its legislative competence. The Sindh High Court declared the levy unconstitutional vide judgment dated 26.10.2016 whereas the Peshawar High Court upheld the levy vide judgment passed on 31.05.2017 declaring the GIDC Act, 2015 to be intra vires the Constitution. These appeals have arisen from such decision with the leave of this Court.

7. On 22.10.2019 when this case came up for hearing, it was pointed out to us by Mr. Muneer A. Malik, one of the counsel for the intervenors that 377 suits were filed by invoking Original jurisdiction of the Sindh High Court in which the vires of GIDC Act, 2015 were challenged and all were decreed vide common judgment dated 26.10.2016 whereby the GIDC Act, 2015 was declared to be ultra vires the Constitution. He further pointed out that the Federal Government has filed only one appeal bearing High Court Appeal No. 361 of 2016 against the plaintiff of one suit and not against the plaintiffs of the remaining 376 suits, including his client. They were not even made party in the said appeal and the time for filing appeal against them had already gone by. He contended that on account of such omission the decision rendered by the Single Judge has attained finality on the principle of res judicata for the rest of the plaintiffs and accordingly the GIDC Act, 2015 in their cases is to be treated as ultra vires the Constitution and Cess cannot be charged from them. In support of this argument Mr. Muneer A. Malik relied upon the judgment of this Court rendered in the case of Pir Bukhsh and others v. Chairman Allotment Committee (PLD 1987 SC 145). As these appeals and connected petitions have emanated only from the decision of the Peshawar High Court which declared the GIDC Act, 2015 to be intra vires the Constitution this led us to pass an order on the said date that in identical matters pending in other High Courts opportunity be given to such litigants and their counsel to present their case before us on the merits of the controversy. This was done so that the challenge to the vires of the said Act be adjudicated upon once and for all at this Court's level. Pursuant to our order dated 22.10.2019 several miscellaneous applications for joining in these proceedings as party were filed by those who had challenged the vires of the GIDC Act, 2015 in various other High Courts. All of them were given opportunity to present their point of view on the merits of the controversy. Certain other petitions which were filed against the judgment of the Peshawar High Court but did not come up for hearing at the time of grant of leave of these appeals were also taken up for hearing so that the same could be decided together with the appeals.

8. Before we proceed to decide the merits of the main controversy we prefer to address the plea of res judicata raised by the intervenors first.

9. The principle of res judicata is a principle of peace. Once a controversy with regard to a right in property or a right to office is adjudicated upon and attains finality through a judicial pronouncement of a competent Court of law, it no more remains open to challenge in any subsequent judicial proceedings between the same parties on the same subject matter. This principle is intended not to afford a litigant more than one opportunity for resolution of a judicial dispute and thus eliminates the chances of repetitious and successive litigation against a party on the same issue. The maxim that there should be an end to litigation is germane to such matters.

10. Any relief which a litigant seeks in a judicial proceeding with regard to any power or a right or an obligation connected with some property or an office which power or right or obligation is not dependent upon the legitimacy of a legislative enactment and stands or falls on its own strength then in such cases when the decision rendered by a court of competent jurisdiction attains finality, there is no difficulty in applying the principle of res judicata to such a decision. However, it would be difficult to apply such a principle in matters where a power or a right or an obligation solely depend upon the very legitimacy of the enactment that has come under challenge in a Court of law on the touchstone of the Constitution. In such a situation the existence of such power or right or obligation would solely depend on the final adjudication as to the legal validity of the enactment itself. This could be understood from a situation where a controversy as regards constitutional validity of an enactment has

come under challenge before two High Courts, one declaring the enactment ultra vires the Constitution and the other intra vires. If the principle of res judicata is applied to the decision of the High Court that declared the law ultra vires as the same was not challenged any further by the Government then two conflicting declarations would stand side by side on the legitimacy of a legislative enactment, one party treating the law valid and the other invalid. This would lead to treating an Act of the parliament valid for some and invalid for others though both the set of persons are similarly placed. If the decision rendered by the High Court that declared the law intra vires the Constitution is only challenged before the Supreme Court and after examining the merits of the case the enactment is declared by this Court to be intra vires the Constitution, then in such peculiar situation when this Court finally validates the legislative enactment then the same has to be applied uniformly to every person falling within its ambit. Such final judicial determination on the legitimacy of a legislative enactment has to be treated as a judgment in rem regardless of the fact that the judgment of the High Court that invalidated the very same enactment was not challenged before this Court. Such a situation warrants departure from the doctrine of res judicata. Omission of a public functionary to file appeal cannot put fetters on the universal application of a legislative enactment declared by this Court to be constitutionally valid as it would amount to repealing the statute for some and treating it valid for others. Hence conflicting decisions on the vires of a legislative enactment of two High Courts, decision of one remains unchallenged in the hierarchy as no appeal was preferred and the other is challenged before this Court, then the verdict of the High Court that went unchallenged, which is in conflict with the final decision of this Court has to be treated as outmoded and no longer executable. The Supreme Court of the United States of America took note of a similar situation in the case of United States v. Stone and Downer Co. [274 U.S. 225 (1927)] and held that if some of the persons are released from the application of a provision of legislative enactment on the principle of res judicata, it will lead to inequalities and discrimination causing injustice and confusion. It was held that in such a situation the plea of res judicata cannot be sustained. Following passages from the said judgment of the Supreme Court where it refused to apply the principle of res judicata in a revenue matter can be quoted with considerable advantage:

.One large importing house may secure a judgment in its favour from the Customs Court on a question of fact as to the merchandise of a particular importation or a question of construction in the classifying statute. If that house can rely upon a conclusion in early litigation as one which is to remain final as to it and not to be reheard in any way, while a similar importation made by another importing house may be tried and heard and a different conclusion reached, a most embarrassing situation is presented. The importing house which has by the principle of the thing adjudged obtained a favourable decision permanently binding on the government will be able to import the goods at a much better rate than that enjoyed by other importing houses, its competitors. Such a result would lead to inequality in the administration of the customs law, to discrimination and to great injustice and confusion. In the same way, if the first decision were against a large importing house and its competitors instituted subsequent litigation on the same issues with new evidence or without it and succeeded in securing a different conclusion, the first litigant, bound by the judgment against it in favour of the government must permanently do business in importations of the same merchandise at great and inequitable disadvantage with its competitors.

These were doubtless the reasons which actuated the Court of Customs Appeals when the question was first presented to it to hold that the general principle of res judicata should have only limited application to its judgments The fact that objection to the practice has never been made before in the history of this court or in history of the Court of Customs Appeals in 18 years of its life is strong evidence, not only of the wisdom of the practice, but of general acquiescence in its validity. The plea of res judicata cannot be sustained in this case.'

11. In the case of Pir Bukhsh and others v. Chairman Allotment Committee (PLD 1987 SC 145), on which much reliance was placed by Mr. Muneer A. Malik, the learned counsel for one of the intervenors, the controversy was with regard to a right of allotment of land which did not depend on the constitutionality of a legislative enactment. In that case, the principle of res judicata clearly applied but this principle, as discussed above, cannot be applied in the same manner to a case where any power or a right or an obligation of a person solely depend upon the legitimacy of a legislative enactment without which such power or right or obligation has no existence of its own. Hence, when the power of the government to charge and the obligation of the persons to pay a tax or a fee depends on the determination of vires of a legislative enactment then the final determination of this Court has to be uniformly applied on all those upon whom the law was intended to apply otherwise it would be applied in a discriminatingly manner to a section of persons belonging to one and the same class of persons. The final determination of this Court on the legitimacy of a law has to apply even to those who had succeeded in obtaining a judgment from a Court lower in the hierarchy that the law is ultra vires the Constitution, they too would be bound by the judgment of this Court which being the final Court of the judicature has through a judicial pronouncement declared a legislative enactment to be valid. The power of the Federal Government to charge the Cess and the obligation of the payers to pay under GIDC Act, 2015 would depend upon such final determination by this Court. Such power or obligation arising from an enactment will not cease to exist for the reason that the High Court in some other proceedings has declared the said Act ultra vires the Constitution which remained unchallenged. We in our minds are therefore clear that where there are two conflicting adjudications with regard to the constitutionality of a legislative enactment, standing side by side, then the one that has the binding effect on the other has to become the law of the land on the subject without any distinction whatsoever as an Act of the Parliament in its application cannot be allowed to be regarded as intra vires the Constitution for one set of persons and ultra vires for another at the same time when both belong to the same class of persons. If this is allowed, it would result in discrimination as some would be bound to discharge the obligation arising from the Act of the Parliament thereby putting them in disadvantageous position against those who are discharged from the obligation on the principle of res judicata. Such a position cannot be allowed to be sustained.

12. The validity of the plea of res judicata can be looked at from another angle also. The learned Additional Attorney General has pointed out that one High Court Appeal has been filed against the common judgment of the Single Judge of the Sindh High Court rendered in 377 suits and those decree holders who have been left out in that appeal would be made party in the pending appeal. If that has already been done then this Court in similar situation has held in the cases of Mehran Zaibun Nisa and others v. Land Commissioner, Multan and others (PLD 1975 SC 397) and Province of Punjab v. Muhammad Tayyab (1989 SCMR 1621) that a matter filed after the period of limitation can also be decided on merits with a connected case that was filed within time. So belated joining of some of the parties in the appeal as respondents who were initially not made party would not be of much consequence. In any case, the right of the Federal Government to challenge the judgment of the Single Judge of the Sindh High Court cannot be said to be altogether lost as one appeal is still pending. So, the decision of the Sindh High Court cannot be said to have attained finality in the strict sense of the word. Even otherwise, the right of the Federal Government to defend the decision of the Peshawar High Court in these proceedings before us does not get swallowed by the judgment of the Sindh High Court. That right also still subsists. There is yet another aspect of the matter. We vide our order dated 22.10.2019 had decided to hear all the parties who have challenged the GIDC Act, 2015 in the High Courts so that their point of view on the controversy could also be heard on merits. So, as intervenors, not only the plaintiff against whom High Court Appeal has been filed joined the proceedings and through its counsel addressed this Court on the merits of the main controversy but the counsel of those plaintiffs against whom no appeal was filed have also addressed this Court on merits of the controversy

so that the controversy relating to the validity of GIDC Act, 2015 is finally decided. For this reason too the principle of res judicata would also not come in the way of the Federal Government. In these circumstances the maxim that there should be end to litigation once the matter has been finally decided is not attracted as finality with regard to validity or otherwise of the GIDC Act, 2015 is yet to be reached in these proceedings. In the peculiar situation stated above, the plea of res judicata cannot be sustained.

13. We shall now proceed to examine the merits of the main controversy.

14. The bill of GIDC Act, 2015 was introduced under the provisions of Article 70 of the Constitution by treating it as a specie of fee-levying enactment which was accordingly passed by both houses of the Parliament. This was done for the reason that when the bill of GIDC Act, 2011 was introduced in the National Assembly through a Money Bill as a tax-imposing enactment the same was struck down in Durrani Ceramics case for the reason that the levy being a fee imposing enactment, its bill could not have been introduced in the National Assembly under Article 73 of the Constitution as a Money Bill.

15. Mr. Makhdoom Ali Khan as lead counsel for the appellants argued the case, whose arguments were adopted by several counsel appearing on behalf of the appellants, petitioners and the intervenors. The counsel who also made additional submissions were Mr. Muneer A. Malik, Mr. Salman Akram Raja, Mr. Rashid Anwar, Mr. Isaac Ali Qazi, Mr. Anwar Kamal, Syed Haziq Ali Shah, Sardar Muhammad Ghazi, Mr. Abid S. Zuberi, Qazi Ghulam Dastgir, Mr. Ijaz Ahmed, Mr. Abdul Munim Khan and Mr. Tasleem Hussain. Barrister Mian Bilal argued on behalf of Sui Northern Gas Pipeline Limited and Chaudhry Aamir Rehman, learned Additional Attorney General argued on behalf of the Federation.

16. The arguments that were advanced on behalf of the counsel for appellants / petitioners / intervenors, which are relevant for the disposal of these cases on merits of the main controversy can be summarized as follows:-

a) The GIDC Act, 2015 would survive only if the Federation can demonstrate that it is a fee-levying enactment and that too within the ambit of Entry 2 read with Entry 15 of Part II of the Federal Legislative List contained in the Fourth Schedule to the Constitution. The GIDC, Act, 2015 is neither a tax nor a fee which places it outside the Fourth Schedule, hence ultra vires the Constitution.

b) Fee can only be levied and collected if the state provides a service directly in return to the payer otherwise it would be a tax-imposing enactment. It is the direct nature of the service which marks the boundary between tax and fee. The Federation could not show that any direct or special service would be provided to the appellants as a reward or recompense for payment of the fee. There is no quid pro quo in the enactment.

c) There can be compulsory exactions but must be based on services which are available or may be made available immediately or shortly after the payment of the fee. It is not necessary that a service is rendered in full immediately on payment of fee as it can be rendered incrementally. There may also be a gap between the payment of fee and provision of service, however the provision of the service cannot be indefinitely postponed on a hope to be provided in the unforeseeable future.

d) Section 4 of the Act, 2015 provides that Cess is to be used for the development of Iran-Pakistan Pipeline Project (IP) as well as Turkmenistan-Afghanistan-Pakistan-India Pipeline Project (TAPI). Both projects mentioned in Section 4 of the Act 2015 have neither commenced nor has the government given any tangible timeframe for their launch or completion. The two terminals that are operated by Engro and PGPCL at Karachi port are financed from other sources so the Cess is no longer to be utilised for LNG and now can only be utilised for IP and TAPI projects and projects ancillary thereto.

e) Under Section 4 of GIDC Act, 2015, the Cess is a specific purpose levy, the Federation is not free to use it as it pleases. There was no evidence of the amount collected towards Cess ever having been spent for the specified purposes. Between 2011 and 30th June 2019 a sum of Rs.295,402,787,597.67 has been collected out of which Rs.279,575,000 and Rs.207,664,501 have been spent. The Government has failed to justify the collection of Cess.

f) Revenue of Cess so far collected has not been put in any special fund but has been made part of general revenues of the state and retained in the Federal Consolidated Fund.

g) The Second Schedule to GIDC Act, 2015 only mentions the maximum rates of tax but the actual rate of tax to be charged was not specified.

h) The supply of gas in the province of Khyber Pakhtunkhwa is in excess of the demand, therefore, the GIDC Act, 2015 conferred no benefit on its residents. The shortage was created for reasons extraneous to the demand in the Province.

i) Section 3(1) of the GIDC Act, 2015 used the terms 'levied' and 'charged' which indicate that it is a tax imposing enactment and not 'fee' and while enacting GIDC Act, 2011 which is a similar Act, legislated as a tax-imposing enactment.

17. In support of their arguments learned counsel for the appellants / petitioners / intervenors have placed reliance on the cases of Collector of Customs v. Shaikh Spinning Mills (1999 SCMR 1402), Abdul Majid v. Province of East Pakistan (PLD 1960 Dacca 502), Sohail Jute Mills v. Federation of Pakistan (PLD 1991 SC 329), Nishat Tek Ltd., Lahore v. Federation of Pakistan (PLD 1994 Lahore 347), Messrs Fatima Enterprises Ltd. v. Federation of Pakistan (1999 MLD 2889), Messrs Coca-Cola Beverages v. Cantonment Board Chaklala Rawalpindi (2011 MLD 1987), Soneri Bank Ltd. v. Federation of Pakistan (2013 PLC Labour 134), East Pakistan Chrome Tannery (Pvt.) Ltd. v. Federation of Pakistan and others (2011 PTD 2643), Pakcom Ltd. v. Federation of Pakistan (PLD 2011 SC 44), Azgard Nine v. Government of Pakistan (2013 PTD 1030), Tata Textile Mills v. Federation of Pakistan (2013 PTD 1459), Messrs Shahbaz Garments Pvt. Ltd. v. Federation of Pakistan (2013 PTD 969), Associated Industries Ltd. v. Government of Pakistan (2015 PTD 193), Workers' Welfare Funds, Ministry of Human Resources Development, Islamabad and others v. East Pakistan Chrome Tannery (Pvt.) Ltd. and others (PLD 2017 SC 28), Flying Cement Company v. Federation of Pakistan (PLD 2016 Lahore 35), Dr. Mahmood-ur-Rehman Faisal v. Secretary Ministry of Law (PLD 1992 FSC 195), ABN Amro Bank N.V. v. M.D KW&SB (2006 CLC 597), Kewal Krishan Puri and others v. State of Punjab and others (1980) 1 SCC 416), State of Maharashtra v. Salvation Army (AIR 1975 SC 846), Al-Samrez Enterprises v. Federation of Pakistan (1986 SCMR 1917), The Hingri-rempur Coal Co. Ltd. and others v. The State of Orissa and others (AIR 1961 SC 459), Sona Chandi Oaz Committee v. State of Maharashtra (AIR 2005 SC 635), FECTO Belarus Tractor Ltd. v. Government of Pakistan (PLD 2005 SC 605), Dr. Mohashir Hassan v. Federation of Pakistan (PLD 2010 SC 265), Contempt Proceedings against Chief Secretary, Sindh (2014 PLC (C.S.) 82), Pir Baksh v. The Chairman, Allotment Committee (PLD 1987 SC 145). Human Rights Case No. 14392 of 2013 and Suo Motu Case No.1 of 2013 (2014 PTD 243), Shahtaj Sugar Mills Ltd. v. Province of Punjab (1998 SCMR 2492), The Town Municipal Committee, Amravati v. Ramchandra Vasudeo Chimote and another (AIR 1964 SC 1166), Messrs Ujagar Prints and others v. Union of India and others (AIR 1989 SC 516), Baz Muhammad Kakar v. Federation of Pakistan (PLD 2012 SC 923), Kewel Krishan v. State of Punjab (AIR 1980 SC 1008) and State of Maharashtra v. Salvation Army (AIR 1975 SC 846).

18. Learned Additional Attorney General has placed reliance on the cases of B. S.E. Brokers' Forum, Bombay and others v. Securities and Exchange Board of India and others (2001 (3) SCC 482), Krishi Utpadan Mandi Samiti v. Ashok Kumar Dinesh Chandra and another (1996 (10) SCC 100), The City Corporation of Calicut v. Thachambalath Sadasivan and others (AIR 1985 SC 756), Messrs Gasket Radiators Pvt. Ltd. v. Employees' State Insurance Corporation and another (AIR 1985 SC 790). Barrister Mian Bilal has placed reliance on the case of The City Corporation of Calicut v.

Thachambalath Sadasivan (AIR 1985 SC Court 756), Gasket Radiators (Pvt.) Limited v. Employees' State Insurance Corporation (AIR 1985 SC 790), The Hinger-Ramper Coal Co. Ltd. v. The State of Orissa and others (AIR 1961 SC 459), Municipal Corporation of Delhi v. Mohd. Yasin (AIR 1983 SC 617), Sudhindra Thirtha Swamiar v. The Commissioner for Hindu Religious and Charitable Endowments, Mysore (AIR 1963 SC 966) and Jaora Sugar Mills (Pvt.) Limited v. The State of Madhya Pradesh (AIR 1966 SC 416).

19. Under the Constitution it is the prerogative of the legislature to raise revenue for the government on matters that fall within its legislative competence. The legislature enjoys the privilege to identify the base of the levy i.e. those upon whom the incidence of the levy would fall and also determine the quantum to be charged from them, which could either be at a fixed rate or ad valorem. Under our Constitution the legislature can levy taxes as well as fees. As GIDC Act, 2015 has been enacted by the Parliament as a fee-levying enactment, we deem it appropriate to briefly discuss the legal concept of such enactments.

20. There are two kinds of fee-imposing legislative enactments which have been defined in various judicial pronouncements, both from our as well as foreign jurisdictions. One is based purely on the principle of quid pro quo i.e. a charge is payable for rendering a specific service or extending a specific privilege which the payers can avail subject to the conditions that may be attached to it. In other words, it can be called as 'fee-simplicitor'. In such an enactment there is direct and immediate correlation in absolute terms between the service that is rendered and the fee that is charged for it. 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. In a case from the Indian jurisdiction cited by one of the counsel of the appellants reported as Hinger-Rampur Coal Co. Ltd. and others v. The State of Orissa (AIR 1961 SC 459) the Supreme Court of India in paragraphs 9 and 10 while discussing a fee-imposing enactment observed as follows:

> 'If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business, the cess is distinguishable from a tax and is described as a fee.'

21. In the case of Sona Chandi Oal Committee v. State of Maharashtra (AIR 2005 SC 635) the Indian Supreme Court while describing fee based levy observed as follows:

> ' .The levy does not cease to be a fee merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have a direct relation to the actual service rendered by the authority to each individual who obtains the benefit of the service. Quid pro quo in the strict sense was not always a sine qua non for a fee. All that is necessary is that there should be a reasonable relationship between the levy of fee and the services rendered and it is not necessary to establish that those who pay the fee must receive

direct or special benefit or advantage of the services rendered for which the fee was being paid. It was held that if one who is liable to pay, receives general benefit from the authority levying the fee, the element of service required for collecting the fee is satisfied.'

22. Then in the case of State of West Bengal v. Kesoram Industries Limited (AIR 2005 SC 1646) the Indian Supreme Court in paragraph 145 of its judgment observed as under:

' . The impugned cess can, therefore, be justified as a fee for rendering such services as would improve the infrastructure and general development of the area, the benefits whereof would be availed even by the stone-crushers.'

23. Barrister Mian Bilal has placed reliance on the case of Messrs Gasket Radiators Pvt. Ltd. v. Employees' State Insurance Corporation and another (AIR 1985 SC 790) wherein it has been held as under:-

"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 present 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. In fact, it may 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 provided right from the day of the commencement of the scheme. It is only after a sufficient nucleus is available that one may reasonably expect a compensating return. The question of how soon a return may be expected or ought to be given must necessarily depend on the nature of the services required to be performed and benefits required to be conferred."

24. The basic difference between the enactment where fee-simplicitor is imposed and where Cess-fee is imposed is that in the former a service or a privilege is made available to the payer directly on the strict principle of quid pro quo whereas in the latter case, the declared purpose comes with a promise to bring some benefit or advantage in future which is basically meant for its payers. Such benefit or privilege once made available on the ground may be availed by others as well but that would not change the status of such fee-levying enactment. It would remain a specie of fee-levying enactment in contradistinction to tax-levying enactment in which no specific purpose or specific service needs to be disclosed by the legislature in order to justify its imposition.

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. So it is like a 'promised spending' to be applied to the specific purpose described in the enactment. Hence, in order to remain as a fee-levying enactment, the purpose for which the Cess is to be charged should be well spelled out and defined in the enactments as narrowly as possible lest it may convert it into a tax-levying enactment. 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.

26. After discussing the two kinds of fee-levying enactments, we shall now proceed to examine whether the GIDC Act, 2015 is a fee or tax-levying enactment and whether it was legislated within the legislative competence of the Parliament.

27. The counsel for the appellants in support of their argument that the Cess levied under GIDC Act, 2015 is a tax, basically made its comparison with such fee-levying enactments where the principle of quid pro quo was the only consideration i.e. comparison was made with service specific enactments describable as 'fee-simplicitor'. The controversy in the present case is comparable with the enactments that impose fee for a specific purpose that is promised to be achieved for the benefit of the payers in future i.e. a category described in various judicial pronouncements as 'Cess-fee'. In Durrani Ceramics case also it was held that practically the Federal Government has demonstrated that GIDC Act, 2011 was a fee imposing enactment, which for its object and purpose was no different from GIDC Act, 2015. In paragraph 22 of Durrani Ceramics case it was observed ' ..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... . 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.' Thus what invalidated the GIDC Act, 2011 in Durrani Ceramics case, as is evident from its paragraph 22 was that GIDC Act 2011 being a fee-levying enactment its bill could not have been introduced in the National Assembly as a Money Bill under Article 73 of the Constitution. This is precisely the ratio of Durrani Ceramics case which is evident from its concluding paragraph 45 also.

28. Keeping in mind the above legal infirmity with which the legislative process suffered in the legislation of GIDC Act, 2011 which led this Court in Durrani Ceramics Case to declare it invalid, the legislature introduced the bill of GIDC Act, 2015 under Article 70 of the Constitution which was passed by both the houses of the Parliament as a fee-levying enactment. By recasting the GIDC Act, 2015 as a fee-levying instead of tax-levying enactment the constitutional requirements that lacked in the GIDC Act, 2011 were met. This Court in several cases has recognized the right of the legislature to re-enact a law on the same subject, which on account of legal infirmities in its enactment process had been declared invalid by a Court of law, by removing the causes that led to its invalidity. The legislature is also competent to make the re-enacted law applicable retrospectively in order to bind even the past transactions that had been declared invalid. In the case of Molasses Trading and Export (Pvt.) Limited v. Federation of Pakistan (1993 SCMR 1905) this Court at page 1920 held as follows:-

> "Before considering this question it would be appropriate to make certain general observations with regard to the power of validation possessed by the legislature in the domain of taxing statute. It has been held that when a legislature intend to validate a tax declared by a Court to be illegally collected under an invalid law, the cause for ineffectiveness or invalidity must be removed before the validation can be said to take place effectively. It will not be sufficient merely to pronounce in the statute by means of a non-obstinate clause that the decision of the Court shall not bind the authority, because that will amount to reversing a judicial decision rendered in exercise of the judicial power, which is not within the domain of the Legislature. It is therefore necessary that the conditions on which the decision of the Court intended to be avoided is based, must be altered so fundamentally, that the decision would not any longer be applicable to the altered circumstances. One of the accepted modes of achieving this object by the Legislature is to re-enact retrospectively a valid and legal taxing provision, and adopting the fiction to make the tax already collected to stand under the re-enacted law. The Legislature

can even give its own meaning and interpretation of the law under which the tax was collected and by `legislative fiat' make the new meaning biding upon Court. It is in one of these ways that the Legislature can neutralize the earlier decision of the Court. The Legislature has within the bound of the Constitutional Limitation the power to make such a law and give it retrospective effect so as to bind even past transaction. In ultimate analysis therefore a primary test of validating piece of legislation is whether the new provision removes the defect, which the Court had found in the existing law, and whether adequate provisions in the validating law for a valid imposition of tax were made."

29. In the case of Mamukanjan Cotton Factory v. Punjab Province (PLD 1975 SC 50) this Court at pages 53-54 held as follows:-

"Mr. A. K. Brohi, appearing in support of these two petitions, frankly conceded, that he did not find it possible to question the vires of the validating Ordinance on the grounds canvassed in the High Court. With the permission of this Court, learned counsel, however, attacked the vires of the Ordinance and the resultant action of the Provincial Government on a fresh ground. His argument in nutshell was that the validating Ordinance purports to enable the Provincial Government to retain and claim, what according to the judgments of the High Court, the Government could not have at the material time, levied and collected. These judgments are rendered by the High Court, in exercise of its jurisdiction conferred by the Constitution itself. The validating Ordinance on the other hand, is sub-constitutional legislation, which according to learned counsel cannot undo or destroy, what he described as the "end product" of the Constitutional jurisdiction.

The argument, in my opinion, is without substance and which is accepted would indeed lead to startling results. It would strike at the very root of the power of Legislature, otherwise competent to legislate on a particular subject, to undertake any remedial or curative legislation after discovery of defect in an existing law as a result of the, judgment of a superior Court in exercise of its constitutional jurisdiction. The argument overlooks the fact, that the remedial or curative legislation is also "the end product" of constitutional jurisdiction in the cognate field. The argument if accepted, would also seek to throw into serious disarray the pivotal arrangement in the Constitution regarding the division of sovereign power of the State among its principal organs; namely, the executive, the Legislature and the judiciary each being the master in its own assigned field under the Constitution.

The argument of learned counsel also conveniently overlooks string of cases, in which the vires of the remedial legislation, competently made, was upheld by this Court, notwithstanding the earlier judgments of the Superior Courts, in exercise of their constitutional jurisdiction, to the contrary effect. The foremost and exactly in point among these cases is the judgment in Dossa Ltd. v. The Province of the Punjab, in which as in these cases, the vires of the validating Ordinance of 1971, was called in question. It was inter alia observed in that case:-

"The last contention, namely, that the Ordinance of 1971 could not validate something which was void ab initio in terms of the Act of 1949, loses sight of the fact that it is open to the Legislature to confer retrospective operation on the laws made by it. A reference to the provisions of this Ordinance leaves no doubt that the law maker expressly made its operation retrospective with the avowed object of conferring validity on a demand which was not valid under the original Act of 1949.

30. To the same effect are the judgments of this Court rendered in the cases of Molasses Trading and Export (Pvt.) Ltd. v. Federation of Pakistan (1993 SCMR 1905), FECTO Belarus Tractor Ltd. v. Government of Pakistan through Finance Economic Affairs (PLD 2005 SC 605), Dr. Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265) and Contempt Proceedings against Chief Secretary, Sindh (2014 PLC (C.S.) 82).

31. In many landmark cases this Court has also held that Courts should lean towards the constitutionality of a legislative enactment instead of destroying it, keeping in view the rules of constitutional interpretations. A seventeen member full Court in paragraph 39 of its judgment rendered in the case Dr. Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265) in paragraph 39 stated as follows:-

'There is another principle of law, which casts duty upon this Court to the effect that it should normally lean in favour of constitutionality of a statute and efforts should be made to save the same instead of destroying it. This principle of law has been discussed by this Court on a number of occasions. Reference in this behalf may be made to the cases of Abdul Aziz v. Province of West Pakistan (PLD 1958 SC 499), Province of East Pakistan v. Siraj-ul-Haq Patwari (PLD 1966 SC 854), Inam-ur-Rehman v. Federation of Pakistan (1992 SCMR 563), Sabir Shah v. Shad Muhammad Khan (PLD 1995 SC 66), Multiline Associates v. Ardeshir Cowasjee (PLD 1995 SC 423), Tariq Nawaz v. Government of Pakistan (2000 SCMR 1956), Asif Islam v. Muhammad Asif (PLD 2001 SC 499) and Federation of Pakistan v. Muhammad Sadiq (PLD 2007 SC 133). This principle has been appropriately dealt with in the case of Elahi Cotton Mills Ltd. v. Federation of Pakistan (PLD 1997 SC 582) in the following terms:-

"that the law should be saved rather than be destroyed and the Court must lean in favour of upholding the constitutionality of legislation, keeping in view that the rule of constitutional interpretation is that there is a presumption in favour of the constitutionality of the legislative enactments unless ex facie it is violative of a constitutional provision."'

32. As to the legislative competence of the Parliament to pass the GIDC Act, 2015 as a fee-imposing enactment, in a case from the Indian jurisdiction reported as Ujagar Prints v. Union of India and others (AIR 1989 SC 516) cited by one of the counsel of the appellants the Indian Supreme Court in paragraph 23 while discussing the application of legislative entries to an enactment observed that entries to the Legislative Lists are not the source of legislative power but are merely topics of fields of legislation and must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. In paragraph 25 it was further observed that if a legislation purporting to be under a particular legislative entry is assailed for lack of legislative competence, the State can always show that the law was supportable under any other entry within its legislative competence. In the case of Elahi Cotton Mills Ltd. v. Federation of Pakistan (PLD 1997 SC 582) relied upon by one of the appellants' counsel this Court held that the entries in the Legislative List of the Constitution are not powers of legislation but only fields of legislative heads and allocation of the subjects to the lists is not by way of scientific or logical definition but by way of mere simple enumeration of broad catalogue.

33. The provision of the Constitution that enables the legislature to legislate GIDC Act, 2015 is Entry No.54 of Part I of the Federal Legislative List contained in the Fourth Schedule. This entry states 'Fees in respect of any of the matters in this Part, but not including fees taken in any court.' When we glance through the entries of Part I of the Federal Legislative List in order to see which specific entry enables the Parliament to cover the subject stated in the GIDC Act, 2015, we find Entry No.27. It provides '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, inter alia, covers legislation that relates to subjects of import into Pakistan and trade with foreign countries and the mode through which natural gas can be cheaply and efficiently imported from nearby countries where it is more than sufficient for their needs is through overland pipeline. This is exactly the purpose and object of the GIDC Act, 2015 as reflected by its Section 4 which provides that the revenue that is to be generated from Cess shall be utilized for facilitating import of natural gas into Pakistan through two separate transnational pipelines and for ancillary projects. It states 'The cess shall be utilized by the Federal Government for or in connection with infrastructure development of Iran-Pakistan Pipeline Project, Turkmenistan-

Afghanistan-Pakistan-India (TAPI) Pipeline Project, LNG or other ancillary projects.' For such purpose trade agreements have also been executed with Iran and Turkmenistan separately. In addition to this Section 4 of the GIDC Act, 2015 also provides that the Cess was required for the purposes of LNG which under a trade agreement with Qatar is being imported on ships and after its discharge at the port of Karachi and gasification, is planned to be transported upcountry through a pipeline project named 'North-South pipeline'. From this it has become evident that the whole purpose of enacting GIDC Act, 2015 was to facilitate import of natural gas, a very important source of energy from the nearby countries under trade agreements executed with them. The fee imposed under the GIDC Act, 2015 is clearly intended to facilitate import into Pakistan natural gas on the basis of trade agreements executed with foreign countries which acts clearly fall within the ambit of Entry No. 27 of Part I of the Federal Legislative List contained in the Fourth Schedule to the Constitution.

34. The industrial and commercial consumers of natural gas of this country, from whom Cess is being collected, consume about 76% of the total supply of natural gas, which fact was also brought to the notice of this Court in the Durrani Ceramics case. They would be mainly benefited once the promised projects are completed. It does not matter if domestic consumers of natural gas would also be benefitted. Mr. Salman Akram Raja had argued that as his client is getting sufficient supply of natural gas from the wellhead located very near to its installation therefore the imported gas would be of no benefit for his client who may be exempted from the levy of Cess as there exists no quid pro quo. In a legislative enactment where there is an element of compulsion, which can be even in an impost such as Cess-fee, the payer does not enjoy the privilege of avoiding the obligation at his choice. If such a plea is accepted then every consumer would be able to take it and that would virtually nullify the Act itself at the choice of the payers. In the case of Hinger-Rampur Coal Co. Ltd. v. The State of Orissa (AIR 1961 SC 459) the Indian Supreme Court in its paragraph 10 has observed:-

> 'There is, however, an element of compulsion in the imposition of both tax and fee. When the Legislature decides to render a specific service to any area or to any class of persons, it is not open to the said area or to the said class of persons to plead that they do not want the service and therefore they should be exempted from the payment of the cess.'

35. It was also argued that in Section 3(1) of the GIDC Act, 2015 the terms 'levied' and 'charged' are used which demonstrate that it is a tax imposing enactment and not 'fee'. The learned counsel attempted to strengthen this argument by relying on the stand which the Federal Government in Durrani Ceramics case took that the levy in the GIDC Act, 2011 was a tax-imposing enactment. When the terms like 'levy' or 'charge' are used in any revenue raising enactment, it does not mean that it cannot be a fee imposing enactment. A plea taken by a party on a point of law which was not accepted by a Court in an earlier round of litigation cannot be used against such party which on account of such decision has accordingly changed its plea in subsequent legal proceedings. In any case the terms 'levied' or 'charged' mean 'to impose by legal authority'. Whether tax is being imposed or a fee, it entirely depends upon the object of the legislation and has nothing to do with the use of such terms. Even in Article 279 of the Constitution the term 'levied' is used for tax as well as for fee imposing legislations. So mere use of terms like 'levied' or 'charged' cannot be made basis to describe a law as tax imposing enactment. As the GIDC Act, 2015 contains a well-defined object meant for making future availability of natural gas more convenient and without interruption that would mainly benefit the industrial and commercial consumers which the appellants, the petitioners and the intervenors undeniably are, therefore, in pith and substance the GIDC Act, 2015 is a fee-imposing enactment and use of terms like 'levied' or 'charged' would not change the object with which it was legislated.

36. It was also argued that in Section 3 (1) of the GIDC Act, 2015 it is stated that Cess shall be levied and charged by the Federal Government which means that Federal Government has been empowered to levy it as and when it so decides which decision is yet to come. It was contended that until the Federal Cabinet so decides and upon such decision the Federal Government issues notification

in this behalf, Section 3 (1) would remain inoperative. When an Act of Parliament provides that it will come into force at once then every provision of it becomes enforceable from the day the Act receives the assent of the President unless any provision of the Act itself suggests that it will come into force only when some authority nominated in this behalf so decides or on the happening of an event. No such precondition has been attached to Section 3(1) for its coming into operation. It clearly states that the Cess shall be levied and charged by the Federal Government from the gas consumers of the companies which are listed in the First Schedule and such companies shall be responsible for billing and collection and making onward payment of the Cess so collected from the gas consumers to the Federal Government. When such is the unqualified mandate of Section 3(1) of GIDC Act, 2015 and the responsibility of billing and collection has already been cast upon the companies listed in the First Schedule from the day when it comes into effect then the Cess becomes chargeable from that very day without leaving it to the Federal Government to first decide when to bring Section 3(1) into operation. On the other hand, where the legislature intends to leave a matter for the Federal Government to decide before it is given effect to then it specifically states so in the law itself. This can be seen from the contents of Section 7 of the GIDC Act, 2015 which provides 'The Federal Government may, by notification in the official Gazette, make such amendments in the First Schedule as it deems fit.' No such precondition is contained in Section 3 (1) of the GIDC Act, 2015.

37. It was also argued that the GIDC Act, 2015 is discriminatory as the domestic consumers of natural gas have been excluded from the levy. From the contents of Section 3 (1) of the GIDC Act, 2015 it is evident that the incidence of Cess falls only on commercial and industrial concerns. In our opinion this may have been for the reason that the Cess which the industrial and commercial concerns pay becomes part of the cost of the goods which they sell or the cost of the services they render and thus is ultimately borne by the buyers of their goods and services. Same is the case with the consumers of CNG. The burden of the Cess payable by the owners of CNG stations on their purchases of natural gas gets factored in towards fixation of sale price of CNG. Every industrial and commercial entity using natural gas for its business activity is entitled to claim the burden of Cess as their business expense, being part of the cost of their goods sold or services rendered, and get it adjusted against their business profits. They must have already done so in their books of account and the annual returns of their income must have been filed before the Income tax authorities accordingly. Thus the Cess under GIDC Act, 2015 has been levied only on those consumers of natural gas who on account of their industrial or commercial dealings pass on its burden to their customers/ clients. This is not the case with the domestic consumers of gas as the question of passing on the burden in their case obviously does not arise. For this reason, the domestic consumers may have been treated an altogether different class of gas consumers and consciously excluded from the levy of Cess, which reason appears to be very sound. This could be the only distinction on the basis of which the domestic consumers were not burdened with the incidence of Cess under GIDC Act, 2015. Needless to point out that the domestic consumers are indirectly burdened with the incidence of Cess in a way that whatever product or service they buy/avail from an industrial or commercial enterprise or purchase CNG from a CNG station, the element of cost of Cess having already been factored in the price of their purchases, it ultimately passes on to them. So looking from that angle too, the domestic consumer or an ordinary person becomes the ultimate payer of the Cess that is levied on industrial or commercial concerns who consume natural gas for their business activity. What emerges from this is that domestic consumers of natural gas being treated as a distinct class of consumers from industrial and commercial consumers, no discrimination in favour of domestic consumers emerges on account of their exclusion from the levy of Cess under GIDC Act, 2015.

38. Whatever Cess has been collected right from the day when when GIDC Act, 2011 came into force has been accounted for by the Federal Government in its annual accounts recording it under separate code numbers and is thus identifiable separately from the other revenues of the Federal

Government. This would facilitate in seeking information on the amount collected as against the amount that is going to be spent for the purposes promised in the GIDC Act, 2015. Thus a correlation between the revenue collected and the expenditure which is going to be incurred for the promised specific purpose can be maintained. 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.

39. The background of the legal history of the controversy in question can be traced back to 2011, when the levy under GIDC Act, 2011 was challenged before the Peshawar High Court which in 2013 declared the levy as ultra vires the Constitution and struck down the GIDC Act, 2011. The Islamabad High Court followed the same course in its judgment in 2014. As a result of these decisions, the matter came before this Court in the case which has come to be known as Durrani Ceramics case. This Court in its judgment refused to interfere with the decision rendered by the Peshawar High Court and declared the GIDC Act, 2011 as unconstitutional, holding that the levy in question was in fact a fee and not a tax, hence, it could not have been imposed through a Money Bill. The case came before this Court again in review, which was dismissed in 2015. Later, the Government enacted the GIDC Act, 2015 as a fee imposing enactment. The constitutional validity of the said Act was also challenged before the High Courts. The Sindh High Court declared the levy unconstitutional vide its judgment dated 26.10.2016 whereas the Peshawar High Court upheld the constitutionality of the new Act vide its judgment dated 31.05.2017. While several other similar matters awaited adjudication before other High Courts issue came before this Court for a second time, in which we vide order dated 22.10.2019 allowed the parties concerned to join the present proceedings as intervenors so that they can have a chance to assist us in the present proceedings and get an opportunity to present their version of the case before us. If we look at this matter in retrospect, there has been continuous litigation pertaining to the constitutional validity of the GIDC cess right from 2011 till July 2020 when we are finally deciding the controversy in these proceedings. Apart from continuous litigation on the issue, we were also told that due to international sanctions on Iran, the response to international tender for EPC contract was very poor as no contractor was willing to undertake the project. On TAPI it is stated that land acquisition proceedings is at an advance stage however work on laying of the pipeline could not start in Afghanistan on account of the insurgency in Afghanistan. It is also stated at the bar that now there are signs that work on laying the pipeline in Afghanistan may commence soon as the final draft of TAPI Project Land Management Law is on final review of the Government of Afghanistan. Hence the delay in the commencement of work on laying the pipelines on account of continuous proceedings in the High Courts as well as before this Court and the levy under both the enactments having been struck down as unconstitutional in the year 2013 and 2016, geopolitical situations in the neighboring countries which are beyond the control of the Federal Government. This means that the projects have not been deliberately abandoned and there is also no material on record to doubt the intentions of Federal Government in this behalf. The Executive, therefore, cannot be blamed for not laying down the pipelines in question. In such a situation where work has not yet started on the laying of the pipelines and no contract has been awarded it would also be premature to ask for laying any report before the National Assembly.

40. At this stage, we like to refer to Entry No.51 of Part I of the Federal Legislative List contained in the Fourth Schedule to the Constitution. It reads 'Taxes on mineral oil, natural gas and minerals for the use in generation of nuclear energy.' As regards generation of nuclear energy is concerned, the scientific reality is that it originates from splitting of atoms of the uranium which generates heat. This process of splitting the atoms of uranium is called fission. The heat so generated helps in producing steam which is then used to operate turbines to generate electricity. As nuclear energy is produced only through the process of fission, fuels such as mineral oil or natural gas cannot be used for such purpose. Resultantly, no greenhouse gas emissions are produced while generating nuclear energy, hence it is

also a clean source of energy. There are several other primary sources of generating energy such as fossil fuels like coal, petroleum, natural gas and sources like hydroelectric, solar and wind. None can be used as nuclear fuel to generate nuclear energy except uranium and its by-product plutonium. When such is the scientific reality then mineral oil and natural gas appearing in Entry No.51 on which the process of fission cannot apply to generate nuclear energy are to be read disjunctively, as both are sources of energy other than nuclear energy.

41. While discussing the scope of Entry No.51 of Part I of the Federal Legislative List contained in the Fourth Schedule to the Constitution which was also examined in Durrani Ceramics case, we feel the need to highlight the fact that prior to the framing of the 1956 Constitution the subject of mineral development was under the exclusive domain of the Federal Government for legislation which was administered under the federal law i.e. 'The Regulation Mines and Oil Fields and Mineral Development (Government Control) Act, 1948'. Hence legislation with regard to all minerals before 1956 Constitution came into force, fell within the domain of the Federal Government. Under the 1956 Constitution only two sources of energy, the mineral oil and natural gas were exclusively retained by the Federal Legislature as is evident from its Entry No.15 and iron, coal and other minerals were placed under Entry 12 of the Part II of the Concurrent List and under Entry No.41 regulation of mines and mineral development, excluding those mentioned in the Federal and Concurrent Lists fell in the Provincial List. Now for the first time an item described as 'mineral resources for generation of nuclear energy' was added in the 1962 Constitution under Entry No. 23 of the Federal Legislative List and mineral oil and natural gas were listed under Entry No.24 of the Federal Legislative List. This also recognizes the fact that mineral oil and natural gas though being sources of energy are distinct from the source that generates nuclear energy. In the 1973 Constitution mineral oil, natural gas and minerals for use in generation of nuclear energy were clubbed together under Entry No.51 for the simple reason that all three denote a common feature i.e. these are all sources of energy which the Federal legislature continued to retain for itself for legislation. Placing all three items under one and the same Entry is understandable. However, mere mention of all three sources of energy in one and the same entry does not mean that scientific reality has changed and the first two sources of energy i.e. mineral oil and natural gas can now also be used to generate nuclear energy. In the 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. In view of the fact that nuclear energy can only be generated from uranium and its by-product plutonium and not from natural gas or mineral oil, 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. However, in these proceedings we leave this aspect at that as the law which was the subject matter of the controversy in Durrani Ceramics case is not in existence anymore and in light of decision in that case, the Federal Government also changed its stance and opted to impose fee.

42. From what has been discussed above it can be concluded that the whole purpose of enacting GIDC Act, 2015 was to facilitate import into the country a very important source of energy i.e. natural gas / LNG from nearby countries in order to meet the ever expanding energy needs of the country as our own resources of energy are fast depleting and the cheapest way to import it is through overland transnational pipelines. The supply of imported LNG to various parts of the country after its import on ships through trans-provincial pipeline is also a project of the Federal Government. The incidence of the cost involved in doing so falls on the industrial and commercial consumers whose consumption account for more than three-fourth of the total supply of natural gas, which fact was also brought to

the notice of this Court in Durrani Ceramics case. Such consumers, apart from being major beneficiaries of the imported gas, would on account of their business activity pass on the burden to their clients/customers being part of the cost of their goods or services which they sell to their customers/clients. The object which the Parliament has promised in the GIDC Act, 2015 is clearly 'purpose based' which is distinctly defined and carries with it an element of quid pro quo, making it a fee-imposing enactment instead of a pure revenue raising measure like taxes in general are imposed with no precondition attached for their spending. After seeing the purpose of the enactment clearly and the fact that its revenue is duly accounted for and has also not been diverted to any other use, we hold that the imposition of Cess under GIDC Act, 2015 is not a tax-imposing enactment. It was passed through a bill moved in the Parliament under Article 70 of the Constitution deriving its legislative competence from Entry 54 read with the enabling Entry No. 27 of Part I of the Federal Legislative List contained in the Forth Schedule to the Constitution thereby curing the defect which lead to the invalidation of the GIDC Act, 2011 in Durrani Ceramics case. The provisions of Section 8 of the Act, which give retrospective effect to the charge and recovery of 'Cess' levied from the year 2011 are also declared to be valid being within the legislative competence of the Parliament. Exercise of such a power has been recognized by this Court in the Case of Mamukanjan Cotton Factory v. Punjab Province (PLD 1975 SC 50). The levy imposed under Gas Infrastructure Development Cess Act, 2015 is therefore in accordance with the provisions of the Constitution. 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 Govern-ment 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.

(ii) In the remaining period of the financial year 2020-21 while considering fixation of sale price of CNG, OGRA shall not take into consideration the element of Cess under GIDC Act, 2015 as one of the cost of sale of GNG.

(iii) As all industrial and commercial entities which consume gas for their business activities pass on the burden to their customers / clients therefore all arrears of 'Cess' that have become due upto 31.07.2020 and have not been recovered so far shall be recovered by the Companies responsible under the GIDC Act, 2015 to recover from their consumers. However, as a concession, the same be recovered in twenty-four equal monthly installments starting from 01.08.2020 without the component of late payment surcharge. The late payment surcharge shall only become payable for the delays that may occur in the payment of any of the twenty-four installments.

(iv) The Federal government shall take all steps to commence work on the laying of the North-South pipeline within six months and on TAPI pipeline as soon as its laying in Afghanistan reaches the stage where the work of laying pipeline on Pakistan soil can conveniently start and on IP pipeline as soon as the sanctions on Iran are no more an impediment in its laying. In case no work is carried out on North-South 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.

43. Subject to the directions contained herein above, all these appeals and connected petitions are dismissed. In the light of this decision and the directions contained therein all listed applications also stand disposed of.

Sd/-

Faial Arab

Judge

Sd/-

Mushir Alam

Judge

I with respect disagree with the reasoning and conclusion of the majority judgment and have therefore appended my own judgment separately.

Sd/-

Syed Mansoor Ali Shah

Judge

44. **SYED MANSOOR ALI SHAH, J**.---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 time line? 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.

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 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; and 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 of CCI. 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 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 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).

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 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.

....

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.

....

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 AND 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 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 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	Under ground 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

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 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'	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[3]

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$.

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

68. The Pakistan Economic Survey 2014-15[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.

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)

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 highlighting the import of LNG in the latest Pakistan Economic Survey hazards a guess that the Government of Pakistan is not willing to or is unable to complete these projects anymore 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 and 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.

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. 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 v. 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 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 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, 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 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-I) and 200 (Region-II)

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, achieve this during this period, the Federal Government shall refund the amount of GIDC, in the manner mentioned above.

89. These appeals are allowed in the above terms.

Sd/-

Syed Mansoor Ali Shah

Judge

ORDER OF THE COURT

By majority of two to one (Syed Mansoor Ali Shah, J dissenting), all these appeals and petitions are dismissed. In the light of this decision and the directions contained therein all listed applications also stand disposed of.

Sd/-

Mushir Alam

Judge

Sd/-

Faisal Arab

Judge

Sd/-

Syed Mansoor Ali Shah

Judge

MWA/K-6/SC Appeals dismissed.