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## Judgment Sheet

IN THE LAHORE HIGH COURT LAHORE

JUDICIAL DEPARTMENT

Case No: W. P. No.8763/2011.

Versus

*E.P.C.T. (Pvt.) Ltd.*

*Federation of Pakistan, etc.*

### JUDGMENT

Date of hearing	03.06.2011.
Petitioner by:	Mr. Mansoor Usman Awan, Advocate.
Respondents by:	M/s. Muhammad Ashraf Khan and Naseem Kashmiri, Deputy Attorney Generals for Pakistan. Raja Sikander Khan, Advocate for F.B.R. Mr. Moazzam Tahir Minhas, Advocate for WWF.

**Syed Mansoor Ali Shah, J:-** This judgment shall decide W.P. Nos. 8763/2011, 8766/2011, 8767/2011, 8768/2011, 3643/2011, 4216/2011 & 4217/2011, as they raise same questions of law and facts.

2. Facts of the titled petition are that the Petitioner is an “industrial establishment<sup>1</sup>” and is liable to pay Workers’ Welfare Fund (“Fund”) under the Workers’ Welfare Fund Ordinance, 1971 (“WWF Ordinance”). Grievance of the Petitioner arises out of impugned Notice dated 10-4-2011 issued under section 221 of the Income Tax Ordinance, 2001 read with section 4 of the WWF Ordinance by Respondent no.4 (an officer of Respondent no.2 i.e., Federal Board of Revenue). The impugned Notice demands payment of enhanced Workers’

<sup>1</sup> Section 2(f) Workers Welfare Fund Ordinance, 1971.

**W. P. No. 8763/2011.**

Welfare Fund under the WWF Ordinance, which is an outcome of the impugned amendments introduced in the WWF Ordinance through Finance Acts, 2006 and 2008. Petitioner impugns the enhanced liability by laying challenge to the constitutionality of the impugned amendments introduced in the WWF Ordinance by the aforesaid Finance Acts (money bills).

3. Brief background is that Sections 2 and 4 of the WWF Ordinance were amended vide Sections 12 and 4 of the Finance Acts, 2006 and 2008, respectively. The said amendments enhanced the amount of contribution to be paid by the petitioner towards Workers' Welfare Fund.

4. Counsel for the petitioner argued that the amendments brought about in the WWF Ordinance through Finance Acts 2006 and 2008 were unconstitutional, in as much as, they fell outside the purview of article 72(3) (a) to (g) of the Constitution. These amendments could not have been introduced through the money bills and could only be introduced through the regular legislative procedure provided under article 70 of the Constitution. Learned counsel for the petitioner placed reliance on Mir Muhammad Idris and others v. Federation of Pakistan through Secretary Ministry of Finance and others (PLD 2011 SC 213) and Sindh High Court Bar Association through Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others (PLD 2009 S.C. 789) in support of his

**W. P. No. 8763/2011.**

contention. He submitted that the Fund cannot be the subject matter of a money bill as it does not pass for a Tax and is in reality a Fee.

5. Learned counsel for the respondent FBR submits that the Workers' Welfare Fund is a Tax. He relied on Article 73 (2) (g) of the Constitution of Islamic Republic of Pakistan, 1973 which according to him enlarges the scope of a money bill and includes the impugned amendments made through Finance Acts, 2006 and 2008. He submitted that the Fund is a tax because it is a compulsory exaction of money and placed reliance on The Commissioner, Hindu Religious Endowments, Madras, v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (AIR 1954 S.C. 282) and Wazir Ali v. Government of Sindh and 2 others (PLD 1977 Karachi 742). He added that Fund is not a fee as there is no service being rendered to the petitioner in return. While admitting that the fund collected under the Ordinance is for the welfare of the workers as a class, in as much as, it provides for their housing, but qualified his submission by contending that there is no direct nexus of the Fund with the workers' of the petitioner. He concluded by submitting that the Fund under the Ordinance is a tax and the Ordinance has been promulgated under item 47 of the Federal Legislative List (part-1). He placed reliance on Messrs Mutual Funds Association of Pakistan (MUFAP) v. Federation of Pakistan through Secretary, Ministry of Finance, Government

*of Pakistan and another*, (2010 PLC 306) in support of his contentions.

6. Learned counsel for WWF raised preliminary objection that the petitioner has invoked the constitutional jurisdiction of this court without exhausting the alternate remedy under the WWF Ordinance, as well as, under the Income Ordinance, 2001. As a preliminary objection he submitted that the instant petition is hit by laches as Finance Act, 2006 has been challenged in the year 2011 and placed reliance on *Member (S&R)/Chief Settlement Commissioner, Board of Revenue, Punjab, Lahore and another v. Syed Ashfaq Ali and others* (PLD 2003 S.C. 132) and *Abdul Ghafoor and 5 others v. Administrator, Union Council No.86, Shalli Gharbi, Tehsil Chishtian, District Bahawalnagar* (1997 CLC 592). On the merits of the case the learned counsel reiterated the submissions made by the counsel for the FBR.

7. Both the Deputy Attorney Generals representing respondent no.1, and also present in response to the notice under Order 27A CPC issued by this Court, adopted the arguments of the counsel for FBR, as well as, WWF and made no additional submissions.

8. Arguments heard. Record perused.

9. The first preliminary objection raised by the counsel for WWF is that the petitioner has not availed the alternate remedy

**W. P. No. 8763/2011.**

under the WWF Ordinance and the Income Tax Ordinance, 2001. Section 4(10) of the WWF Ordinance provides for an appeal against the order of a Taxation Officer or the Commissioner before the Commissioner (Appeals). The scope of this petition is not limited to the mathematical calculation of the amount of contribution to be paid by the petitioner under the Ordinance but lays challenge to the new mode of calculation introduced in WWF Ordinance and challenges the constitutionality of the amendments introduced in WWF Ordinance through money bills i.e., Finance Acts, 2006 and 2008, hence the remedy provided under WWF Ordinance is not an adequate alternate remedy for seeking such a declaration. Second preliminary objection is regarding laches as Finance Act, 2006 has been challenged in the year 2011. Firstly, the cause of action has arisen for the first time after the issuance of the impugned Notice in the year, 2011. Secondly, the matter complained of is in the nature of a recurring wrong, the amendments made through Finance Acts 2006 and 2008 generate an annual liability against the petitioner and, therefore, the question of laches does not arise. For the above reasons, both the preliminary objections raised by the counsel for respondent WWF are overruled.

**Legal Question**

10. The legal question that needs deliberation by this Court is whether the amendments could have been introduced in the

WWF Ordinance through Finance Acts (money bills) of 2006 and 2008, respectively?

11. The amendments introduced in WWF Ordinance through Finance Acts 2006 and 2008 have been reproduced in Schedule A to this judgment for ready reference. The special procedure with respect to Money Bills is provided in Article 73 of the Constitution of Islamic Republic of Pakistan, 1973 which is reproduced hereunder:-

**“73. Procedure with respect to Money Bills.---**

(1) Notwithstanding anything contained in Article 70, a Money Bill shall originate in the National Assembly:

Provided that simultaneously when a Money Bill, including the Finance Bill containing the Annual Budget Statement, is presented in the National Assembly, a copy thereof shall be transmitted to the Senate which may, within fourteen days, make recommendations thereon to the National Assembly;

(1A) The National Assembly shall, consider the recommendations of the Senate and after the Bill has been passed by the Assembly with or without incorporating the recommendations of the Senate, it shall be presented to the President for assent.

(2) For the purpose of this Chapter, a Bill or amendment shall be deemed to be a Money Bill, **if it contains provisions dealing with all or any of the following matters**, namely:-

(a) **the imposition, abolition, remission, alteration or regulation of any tax;**

(b) the borrowing of money, or the giving of any guarantee, by the Federal Government, or the

W. P. No. 8763/2011.

amendment of the law relating to the Financial Obligations of that Government;

- (c) the custody of the Federal Consolidated Fund, the payment of moneys into, or the issue of moneys from, that Fund;
  - (d) the imposition of a charge upon the Federal Consolidated Fund, or the abolition or alternation of any such charge;
  - (e) the receipt of moneys on account of the Public Account of the Federation, the custody or issue of such moneys;
  - (f) the audit of the accounts of the Federal Government or a Provincial Government; and
  - (g) **any matter incidental to any of the matters specified in the preceding paragraphs.**
- (3) A Bill shall not be deemed to be a Money Bill by reasons only that it provides:--
- (a) For the imposition or alteration of any fine or other pecuniary penalty, or for the demand or payment of a licence fee **or a fee or charge for any service rendered**; or
  - (b) for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.
- (4) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the National Assembly thereon shall be final.
- (5) Every Money Bill presented to the President for assent shall bear a certificate under the hand of the Speaker of the National Assembly that it is a Money Bill and such certificate shall be conclusive for all

**W. P. No. 8763/2011.**

purposes and shall not be called in question.”

*(emphasis supplied)*

12. Admittedly, the relevant sub-article applied by the respondents to the case of the petitioner is Article 73 (2) (a) of the Constitution of Islamic Republic of Pakistan, 1973 which deals with the imposition, abolition, remission, alteration or regulation of Tax, and is read with sub-article 73(2) (g) which provides for any matter incidental to matters specified in sub article (a) to (f). In terms of Article 73 (2) (a) and (g), a bill is deemed to be a money bill if it contains provisions dealing with imposition, abolition, remission, alteration or regulation of Tax. It is, therefore, necessary to first see whether the contribution to the Fund under the WWF Ordinance amounts to a Tax for the purposes of Article 73(2) (a) of the Constitution.

**Nature of Workers' Welfare Fund – Tax or Fee ?**

13. Preamble to the Workers' Welfare Fund Ordinance (Ordinance No. XXVI of 1971) provides:-

“Whereas it is expedient to provide for the establishment of a Workers Welfare Fund, **for providing residential accommodation and other facilities for workers and for matter connected therewith or incidental thereto.**”

*(emphasis supplied)*

Section 6 of the WWF Ordinance lays down the purposes to which the moneys in the Fund may be applied and states:-

“6. **Purposes to which moneys in the Fund may be applied.**--- Moneys in the Fund shall be applied to.



**W. P. No. 8763/2011.**

- (a) **the financing of projects connected with the establishment of housing estates or construction of houses for the workers;**
- (b) **the financing of other welfare measures including education training, re-skilling and apprenticeship for the welfare of the workers;**
- (c) the meeting of expenditure in respect of the cost of management and administration of the Fund;
- (d) the repayment of loans raised by the Governing Body; and
- (e) investment in government, government guarantees, non-government securities and Real Estate. (*emphasis supplied*)

Section 7 of the WWF Ordinance provides for a Governing Body entrusted with the management and administration of the Fund. Section 10 provides functions of the Governing Body which include the allocation of Fund for the purposes mentioned in clauses (a) and (b) of Section 6. Section 10-A further provides that the money allocated for the Fund shall vest in the government, agency or body corporate to whom it is allocated but it shall not be applied to any purpose other than that for which it is allocated or permitted by the Governing Body.

14. Preamble and sections 6, 7, 10 and 10A of the WWF Ordinance show that the Fund created has a specific purpose and has to be utilized specifically for the welfare of the workers e.g., *for providing residential accommodation and other facilities to the workers, financing of projects connected with*

establishment of housing estates or construction for houses for the workers, financing of other welfare measures including education training, re-skilling and apprenticeship for the welfare of the workers. There is no provision in the WWF Ordinance that allows the Fund to be used for any general or undefined purpose other than for the welfare of the workers. WWF Ordinance is, therefore, a welfare legislation for the benefit of the labourers as a class and finds its legislative sanction under items no. 26 and 44 of the erstwhile Concurrent List<sup>2</sup> which deal with welfare of labour; conditions of labour, etc. and fees in respect thereof.

15. The distinction between Tax and Fee has come up before our courts earlier. In Abdul Majid and another v. Province of West Pakistan and others (PLD 1960 Dacca 502) Akbar J. quoted the judgment of the Supreme Court of India in The Commissioner, Hindu Religious Endowments, Madras, v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (AIR 1954 S.C. 282) in the following manner:

“The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a payment for special benefit or privilege. Fees confer a special capacity, although the special advantage, as for example in the case of registration fee for documents or marriage licences, is secondary to the primary motive of

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<sup>2</sup> Concurrent Legislative List has now been omitted by the Constitution (18<sup>th</sup> Amendment Act, 2010).

regulation in the public interest.... Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives....It is the special benefit accruing to the individual which is the reason for payment in the case of fees; in the case of tax, the particular advantage, if it exists at all, is an incidental result of State action.”

In Biafo Industries v. Federation of Pakistan, (PTCL 2000 CL 384) Ali Nawaz Chowhan. J (as he then was) speaking for this Court held:

“27. Taxation is that inherent power of Government to raise fund with which it promotes general welfare and looks after the protection of citizens. State v. Kromarek 52, N. W. 2d 713, 715, 78 N.D. 769. In fact tax is a charge to pay the cost of Government without regard to special benefits conferred (In re Shurtz’s will, 46 N. W. 2d 559, 562, 242 Iowa 448).

28. A fee on the other hand is distinguishable from a tax inasmuch as it is meant to defray the cost of particular services rendered to particular individuals. In an Australian case-60 CLC 263 and which has been recurringly quoted Latham, CJ defines both tax and fee in the following words:-

A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered. A fee may be generally defined to be a charge for a special service rendered to individuals by some Government Agency. The amount of the fee levied is supposed to be

based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. **A fee may be compulsory levied as well as a tax and the distinction between them lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege.** The special advantage may assume a secondary importance as compared with the primary motive of regulation in the public interest, as, for example, in the case of registration fee for documents or marriage licences.

29. Therefore, the distinction between tax and fee lies primarily in the fact that tax is levied as a part of a common burden and constitutes general revenue, while fee is a payment for special benefit or privilege. This distinction between tax and fee was adopted in the case of Abdul Majid and others *PLD 1960 Dacca 502* and in the case of Mahboob Yar Khan *PLD 1975 Lah. 748*. However, it should not be forgotten that there is no generic difference between a tax and fee. **Both are compulsory exaction of money by public authorities. A tax is imposed for public purposes and is not supported by any consideration of service rendered in return. Whereas a fee is levied in view of services rendered.** Consequently, there is an element of *quid pro quo* between the payer of the fee and the authority which imposes it.” (*emphasis supplied*)

The above distinction has been reiterated in *Collector of Customs and others v. Sheikh Spinning Mills, (1999 SCMR 1402)*, *Government of North West Frontier Province through*

*Secretary Agriculture v. Rahim ullah and others* (1992 SCMR 750), *Sheikh Muhammad Ismail & Co. Ltd., Lahore v. The Chief Cotton Inspector, Multan Division, Multan and others*, (PLD 1966 S.C. 388), *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), *Rahimullah Khan and 65 others v. Government of N.W.F.P. through Secretary Agricultural Forest and Co-operation Department, Peshawar and 5 others*, (1990 CLC 550), *Messrs Sapphire Textile Mills Limited v. Pakistan through the Secretary, Ministry of Finance and 2 others*, (2006 CLD 1523), *Mahboob Yar Khan and another v. Municipal Committee, Mian Channu and 2 others*, (PLD 1975 Lahore 748), *Messrs Fatima Enterprises Ltd. v. The Federation of Pakistan through Secretary, Education, Ministry of Education, Islamabad and others*, (1999 MLD 2889), *Messrs Quetta Textile Mills Limited through Chief Executive v. Province of Sindh through Secretary Excise and Taxation, Karachi and another*, (PLD 2005 Karachi 55), *Mian Ejaz Shafi and others v. Federation of Pakistan and others*, (PLD 1997 Karachi 604).

16. According to TAXMANN'S Interpretation of Taxing Statutes<sup>3</sup>:

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<sup>3</sup> August, 2008- By Dr. K.N. Chaturvedi – para 2.2 page 14.

“2.2. The traditional view that there must be actual quid pro quo for a fee has undergone a sea change in the subsequent decision. The distinction between tax and fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary motive of regulation in public interest. If the element of revenue for general purpose of the State predominates, the levy becomes tax. In regard to fees there is, and must always be, correlation between the fee collected and the service intended to be rendered. **In determining whether a levy is fee, the true test must be whether its primary and essential purpose is to render specific services to a specified area or class, it may be of no consequence that the State may ultimately and indirectly be benefited by it.** The power of any Legislature to levy fee is conditioned by the fact that it must be ‘by and large’ a quid pro quo for the services rendered. However co-relationship between the levy and the services rendered (sic) or expected is one of general character and not of mathematical exactitude. All that is necessary is that there should be a reasonable relationship between the levy of the fee and the services rendered....Another important case on the distinction between tax and fee is *Municipal Corporation of Delhi v. Mohd. Hasin*<sup>4</sup>. In this case the M.C.D. enhanced the rate for the slaughter of animals in its slaughterhouses. The increase was assailed as an arbitrary tax. The Court made certain observations which have direct bearing

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<sup>4</sup> AIR 1983 SC 617

on the distinction between “tax” and “fee”. The court observed: Tax and fee properly belong to the world of Public Finance but since the Constitution and laws are also concerned with public finance these words have often been adjudicated upon in an effort to discover their content.

(2) **Compulsion is not a sole criteria to determine difference between “tax” and “fee”.**

(3) Tax is a common burden and fee is payment for special benefit or privilege. But it was noticed that special benefit is secondary to the primary motive of regulation in the public interest as far instance in case of registration fees for document or marriage licences.

It was further observed that there is no generic difference between a tax and a fee, though broadly a tax is a compulsory exaction as part of a common burden, without promise of any special advantages to classes of taxpayers whereas a fee is a payment for services rendered, benefit provided or privilege conferred. Further though a fee must have relation to the services rendered or advantage conferred such relation need not be direct, a mere casual relation may be enough. Moreover, neither the incidence of fee nor the services rendered need be uniform. That others besides those paying the fees are also benefited does not detract from the character of fee. In fact the special benefit or advantage to the payer of fees may even be secondary as compared to primary motive of regulation in public interest. Lastly the Court is not to assume the role of Cost Accountant. It is neither a necessary nor expedient

to weigh too meticulously the cost of the services rendered etc. against the amount of fees collected so as to evenly balance the two. **A Broad co-relationship is all that is necessary.**” (*emphasis supplied*)

17. According to “Words & Phrases under the Constitution<sup>5</sup>,” Tax and Fee is distinguished as under:-

“Fees and taxes are both revenues for the benefit of the State. The Constitution does not make it essential that a fee should be credited to a separate fund and not to a consolidated fund.”

It may be noticed that at the end of each of the three lists, I, II and III under the Seventh Schedule, there is an Entry relating to fees to the effect---“Fees in respect of any of the matters in List...” Accordingly, each Legislature has the power to levy a fee which is co-extensive with its taxing power and it can levy a fee with reference to the services that would be rendered by the State under such law. Thus ‘fee’ is an imposition in lieu of service to be tendered to the tax-payers. The imposition will be held to be a tax if quid pro quo is absent and the levy is excessive. Thus, while in the case of a tax, there is no quid pro quo between the tax-payer and the State, there is a necessary co-relation between the fee and the service intended to be rendered.”

18. According to the Advanced Law Lexicon<sup>6</sup>,-

<sup>5</sup> K.P.Chakravarti – 2<sup>nd</sup> Edition – Eastern Law House. Page 497

<sup>6</sup> P Ramanatha Aiyar 3<sup>rd</sup> Edition Reprint 2007 Book-4, (Page-4619)



“**Tax and fee.** Commissioner H.R.E. v. Lakashindra Tirtha Swamiar, AIR 1954, SC 282, 295 quoted-The distinction between a tax and a fee lies primarily in the fact that tax is levied as a part of a common burden while a fee is payment for special benefits or privilege.”

Further, according to Advanced Law Lexicon<sup>7</sup>:

“Fees are distinguished from taxes in that the chief purpose of a tax is to raise funds for the support of the Government or for a public purpose, while a fee may be charged for the privilege or benefit conferred, or service rendered or to meet the expenses connected therewith. **Thus, fees are nothing but payment for some special privilege granted or service rendered. Taxes and taxation are, therefore, distinguishable from various other contributions, charges, or burdens paid or imposed for particular purposes and under particular powers or functions of the Government.** It is now increasingly realized that merely because the collections for the services rendered or grant of a privilege or licence, are taken to the consolidated fund of the State and are not separately appropriated towards the expenditure for rendering the service is not by itself decisive.”  
*(emphasis supplied)*

19. Osmosis of case law above helps identify the core differentiating features between Tax and Fee. In case of Fee, the allocation of the moneys collected (i.e., the Fee collected) is

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<sup>7</sup> ibid-Page-1801

**W. P. No. 8763/2011.**

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

20. Looking at it through a different dimension, Section 4(7) of WWF Ordinance provides:

**W. P. No. 8763/2011.**

(7) The payment made by an industrial establishment to the Fund under sub section (1) **shall be treated as an expenditure for purposes of assessment of income tax.** (*emphasis supplied*)

Sections 21(a) and 60A of the Income Tax Ordinance, 2001 further provide:

“21. **Deductions not allowed:** Except as otherwise provided in this Ordinance, no deduction shall be allowed in computing the income of a person under the head “Income from Business” for-

(a) any cess, rate or tax paid or payable by the person in Pakistan or a foreign country that is levied on the profits or gains of the business or assessed as a percentage or otherwise on the basis of such profits or gains.”

“60A. **Workers’ Welfare Fund.-** A person shall be entitled to a deductible allowance for the amount of any Workers’ Welfare Fund paid by the person in tax year under Worker’s Welfare Fund Ordinance, 1971 (XXXVI of 1971).”

The above provisions show that contribution towards the Fund is to be treated as an expenditure for the purposes of assessment of income tax and also as a deductible allowance which cannot be the case if the Fund is treated as a tax under the Income Tax Ordinance, 2001. This further defeats the argument advanced by the respondents that the Fund is a tax on income.

**Money bill not to include Fee**

21. Article 73(3) of the Constitution provides that Money Bill shall not be deemed to be a Money Bill if it provides for fee or charge for any service rendered. This constitutional

exclusion fully applies in the present case. Fund being a Fee, it could not be amended, altered or modified through a money bill but required regular legislative procedure under article 70 of the Constitution.

**History and Scope of Article 73**

22. According to *Parliamentary Practice* by Erskine May:<sup>8</sup> “The practice of collecting all changes in taxation together and embodying them in a single composite finance bill made it impossible for the Lords to reject a bill without destroying the financial provision of the year. The situation created by the Lords’ rejection of the finance bill of 1909 resulted in the passing of the Parliament Act, 1911, the financial provisions of which were as follows;

Section 2 of the Act defines a money bill as a public bill which in the opinion of the Speaker of the House of Commons contains ONLY provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration or regulation of taxation;...A bill which contains any of the enumerated matters and nothing besides is indisputably a “money bill.” If it contains any other matters, then, unless these are “subordinate matters incidental to” any of the enumerated matters so contained in the bill, the bill is not a “money bill.” (*emphasis supplied*).

23. Money Bill has always had a special legislative procedure. Section 37, under the Government of India Act, 1935 provides:

**37.** (1) A Bill of amendment making provision---

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<sup>8</sup> Erskine May’s treatise on *The Law Privileges, Proceedings and Usage of Parliament* - 19<sup>th</sup> edition- Butterworths.

W. P. No. 8763/2011.

- (a) for imposing or increasing any tax; or
  - (b) for regulating the borrowing of money or the giving of any guarantee by the Federal Government, or for amending the law with respect to any financial obligations undertaken or to be undertaken by the Federal Government; or
  - (c) for declaring any expenditure to be expenditure charged on the revenues the Federation, or for increasing the amount of any such expenditure shall not be introduced or moved except on the recommendation of the Governor-General, and **a Bill making such provision shall not be introduced in the Council of State.** (*emphasis supplied*)
- (2) A Bill or amendment shall not be deemed to make provision for any of the purposes aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered.
- (3) A Bill which, if enacted and brought into operation, would involve expenditure from the revenues of the Federation shall not be passed by either Chamber unless the Governor-General has recommended to that Chamber the consideration of the Bill.

Under the Constitution of the Islamic Republic of Pakistan, 1956, article 58 provided for a “Money Bill” in the following manner:-

**58. Money Bills.**---(1) In this Part, “Money Bill” means a Bill containing **only provisions dealing with all or any of the following matters**, that is to say----

- (a) the imposition, abolition, remission, alteration or regulation of any tax ;

(b) the borrowing of money, or the giving of any guarantee, by the Federal Government, or the amendment of the law relating to the financial obligations of that Government;

(c) the custody of the Federal Consolidated Fund, the payment of moneys into or the issue or appropriation of moneys from, such Fund ;

(d) the imposition of a charge upon the Federal Consolidated Fund, or the abolition or alteration of any such charge ;

(e) the receipt of moneys on account of the Federal Consolidated Fund, or the Public Account of the Federation, or the custody or issue of such moneys, or the audit of the accounts of the Federal or a Provincial Government ; and

(f) any matter incidental to any of the matters specified in the aforesaid sub-clauses.

(2) A Bill shall not be deemed to be a Money Bill by reason only that----

(a) it provides for the imposition or alteration of any fine, or other pecuniary penalty, or for the demand or payment of a licence fee, or a fee or charge for any service rendered ; or

(b) it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) Every Money Bill, when it is presented to the President for his assent, shall bear a certificate under the hand of the Speaker that it is a Money Bill, and such certificate shall be conclusive for all purposes and shall not be questioned in any Court.

Article 47 of the Constitution of the Republic of Pakistan, 1962 provided;

W. P. No. 8763/2011.

47. Money Bills.----(1) Except on the recommendation of the President, no Bill or amendment shall be introduced or moved in the National Assembly if---

(a) it would, if enacted and brought into operation, involve expenditure from the revenues or other moneys of the Central Government; or

(b) **it makes provision for any of the matters, or any matter incidental to any of the matters,** specified below :---

(i) The imposition, abolition, remission, alteration or regulation of any tax;

(ii) The borrowing of money, or the giving of any guarantee, by the Central Government, or the amendment of the law relating to the financial obligations of the Central Government;

(iii) The imposition of a charge upon the Central Consolidated Fund, or the abolition or alteration of any such charge;

(iv) The custody of the Central Consolidated Fund, the payment of moneys into, or the issue of moneys from, that Fund;

(v) The custody, receipt or issue of any other moneys of the Central Government;

(vi) The audit of the accounts of the Central Government or of a Provincial Government.

(2) Clause (1) of this Article does not apply to a Bill or amendment by reason only that it provides--

(a) for the imposition or alteration of any fine or other pecuniary penalty, or for the demand or payment of a licence fee or a fee or charge for any service rendered ; or

- (b) for the imposition, abolition remission, alteration or regulation of any tax by any local authority for local purposes.

Article 86 of the Interim Constitution of Pakistan, 1972 provided for money bills in the following manner:

**86.** (1) Except on the recommendation of the President, no Bill or amendment shall be introduced or moved in the National Assembly if :---

(a) it would, if enacted and brought into operation, involve expenditure from the revenues or other moneys of the Federal Government ; or

(b) **it makes provision for any of the matters, or any matter incidental to any of the matters,** specified below :---

(i) the imposition, abolition, remission, alternation or regulation of any tax ;

(ii) the borrowing of money, or the giving of any guarantee, by the Federal Government, or the amendment of the law relating to the financial obligations of the Federal Government ;

(iii) the imposition of a charge upon the Federal Consolidated Fund, or the abolition or alteration of any such charge ;

(iv) the custody of the Federal Consolidated Fund, the payment of moneys into, or the issue of moneys from, that Fund ;

(v) the custody, receipt or issue of any other moneys of the Federal Government ;

(vi) the audit of the accounts of the Federal Government or of a Provincial Government.



**W. P. No. 8763/2011.**

(2) Clause (1) does not apply to a Bill or amendment by reason only that it provides :---

(a) for the imposition or alteration of any fine or other pecuniary penalty, or for the demand or payment of a licence fee or a fee or charge for any service rendered ; or

(b) for the imposition, abolition, remission, alteration or regulation of any tax by any local authority for local purposes.

(3) A bill to which clause (1) relates shall be referred to as a “Money Bill”.

24. The above shows that special legislative procedure has been consistently provided for promulgating Money Bills. Review of the historical evolution of the constitutional provisions dealing with money bills reveal that starting from **“ONLY provisions dealing with all or any of the following subjects”** under the Parliament Act, 1911 and the 1956 Constitution<sup>9</sup> to **“IF it contains provisions dealing with all or any of the following matters”** in the subsequent Constitutions<sup>10</sup> has no difference. It is as if the word “ONLY” got substituted by the word “IF”. ONLY and IF both carefully carve out the boundaries of a money bill and limit its scope to either all or any of the provisions mentioned in article 72(3)(a) to (g) **and allow nothing else to enter a money bill.** If matters falling outside article 72(3) (a) to (g) can be legislated by simply tagging them along in a money bill, it would amount

<sup>9</sup> Section 58

<sup>10</sup> article 72(3) of the 1973 Constitution. “ONLY provisions dealing with all or any of the following subjects.”

to playing a fraud on the Constitution and result in frustrating the normal legislative design under article 70 of the Constitution. It would also practically render the upper House (Senate) legislatively redundant and impair the constitutional balance of legislation between the two Houses of the Parliament.

25. The special legislative procedure is, therefore, an exception and must operate in its restricted scope. Being a special procedure it also has to be construed strictly as it is a deviation from the normal legislative process under the Constitution. Integrity of a money bill must be jealously guarded and matters falling outside the purview of article 72(3) (a) to (g) of the Constitution should not be permitted to stealthily crawl into a money bill (at times due to political sophistry of the Government in power) and adulterate its sanctity. It is useful to paraphrase what A. K. Brohi wrote in the preamble to the Fundamental Law of Pakistan<sup>11</sup> in 1958: “It is equally necessary that all the wielders of “constituted authority”, like the legislators, the administrators and the judicial officers, be made fully aware of the *limits* of their power, so that they may, in the exercise of their authority act, not only within the letter of the law of the constitution but also in accordance with the spirit thereof. For there is such a thing, says Mr. Walter Lippman, that famous Publicist, Philosopher and

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<sup>11</sup> A.K.Brohi- *Fundamental Law of Pakistan*- Din Muhammed Press-1958 (Preface - page iv)

Sage of America, as “lawless legality” and this is often, according to him, “to be found where men deny that in making or interpreting law they are bound by the spirit of the law.’

26. The above legal position is further supported by the recent view espoused by the Supreme Court of Pakistan in Mir Muhammed Idris and others v. Federation of Pakistan (PLD 2011 SC 213) Hon’ble Chief Justice Iftikhar Mohammed Chaudhry speaking for the Court held:

“Article 73(2) of the Constitution, ... reflects that a Bill or amendment shall be deemed to be a Money Bill if it contains provisions dealing with all or any of the matters enumerated in clauses (a) to (g) of paragraph 2 of this Article. In our opinion, reappointment of Chairman, the President and other members of the Board of NBP does not fall within ambit of clauses (a) to (g) *ibid*. Thus it is crystal clear that the amendment in question could not have been introduced in clause (d) of subsection (3) of section 11 of the Act of 1974<sup>12</sup> by way of Finance Act, 2007, as it lacked constitutional requirement envisaged by article 70 of the constitution i.e., approval by two houses of Parliament...therefore, the amendment on that score, in the light of the law laid down in Sindh High Court Bar Association case, was unconstitutional and could not be upheld.<sup>13</sup>”

<sup>12</sup> Bank (Nationalization) Act, 1974 (Act XIX of 1974)

<sup>13</sup> Para 11 Page 220 of the report.

Finance Act, 2007<sup>14</sup> in the above cited case carried many other taxing provisions like the Sales Tax Act, 1990, Income Tax Ordinance, 2001 and Federal Excise Act, 2005 and while maintaining the integrity of the money bill, the amendment introduced through Amendment of Bank (Nationalization) Act, 1974 (Act XIX of 1974) was declared unconstitutional. Hence, every constituent of a money bill must pass the text laid down in Article 73(2) of the Constitution or else it cannot be deemed to be a money bill and has to be excised and severed from the money bill so that it can be passed through the regular legislative procedure provided under article 70 of the Constitution.

27. Similarly in Sindh High Court Bar Association v. Federation of Pakistan (PLD 2009 SC 879) once again Hon'ble Chief Justice Iftikhar Muhammad Chaudhry speaking for the full court held:

“Under article 176 of the Constitution, the number of the Judges of the Supreme Court is to be determined by an Act of the Majlis-e-Shoora (Parliament). Until the number of Judges is so determined, it may be such as may be fixed by the President. By the Supreme Court (Number of Judges) Act, 1997 (Act XXXIII of 1997), it was provided that the number of Judges of the Supreme Court of Pakistan other than the Chief Justice shall be sixteen. ...”<sup>15</sup>

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<sup>14</sup> PTCL 2007 BS 274

<sup>15</sup> Para 125 Page 1112 of the report.

Once again Finance Act, 2008<sup>16</sup> remained intact but the Amendment of Act XXXIII of 1997 was declared *ultra vires*.

28. Respondents, with vehemence, placed reliance on Messrs. Mutual Funds Association of Pakistan (MUFAP) v Federation of Pakistan (2010 PLC 306). The learned Division Bench of the Sindh High Court in this case has held:

“ (i) ...imposition under the Workers’ Welfare Fund Ordinance, 1971 is in the nature of a tax and not in the nature of fee because it is not a charge for service rendered or to be rendered and is certainly a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered....

(ii) ....

(iii).....

(iv) it cannot be held that the legislature can impose a tax on income only and only through the Income Tax Ordinance. If the legislature through any other piece of law authorizes as compulsory exaction for public purpose without making rendering of his service a condition for a levy, such a levy by whatever name called, would be a tax on income....

Therefore in our opinion the amendment incorporated in the Workers’ Welfare Fund Ordinance, 1971 by the Finance Act, 2008 is also a financial amendment as it imposes a **sort of tax** on income of establishments including the petitioner.<sup>17</sup>”  
(*emphasis supplied*)

I with respect disagree with reasoning of the above cited judgment of the Sind High Court. The cited judgment does not discuss the special beneficial purpose of the Fund given under

<sup>16</sup> PTCL 2008 BS 273

<sup>17</sup> paras 26 and 27. Pages 321 and 322 of the report.

**W. P. No. 8763/2011.**

WWF Ordinance. Second, both fee and tax can be collected under compulsion, therefore, nothing turns on this aspect. Third, WWF Ordinance is not a tax on income for the elaborate reasons given above in this judgment. Fourth, the term “financial amendment” is a generic term and requires qualification when applied to a money bill, as matters relating to fees, charges and penalties can also pass as “financial amendments” but do not constitute Tax for the purposes of Article 72(3) of the Constitution.

**Ouster Clause under Article 73(5)**

29. As to the ouster clause in Article 73 (5) of the Constitution which provides that every Money Bill shall bear a certificate under the hand of the Speaker of the National Assembly and the said certificate shall be conclusive for all purposes and shall not be called in question. The said ouster clause does not give protection to an unconstitutional act or an act that is without jurisdiction, *corum non-judice* and based on *malafide*. This question stands well settled in Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others (PLD 2010 S.C. 61), The State v. Zia-ur-Rahman and others, (PLD 1973 S.C. 49), Miss Asma Jilani v. The Government of the Punjab and another, (PLD 1972 S.C. 139), The Federation of Pakistan through the Secretary, Establishment Division, Government of Pakistan Rawalpindi v. Saeed Ahmad Khan and others, (PLD 1974 S.C.

**W. P. No. 8763/2011.**

151), *Pir Sabir Shah v. Federation of Pakistan and others*, (PLD 1994 S.C. 738) and *Mian Jamal Shah v. The Member Election Commission, Government of Pakistan, Lahore and others* (PLD 1966 S.C.1). Hence the ouster clause is not attracted in the present case and this court has the power to judicially review the legislative amendments brought about through Finance Act, 2006 & 2008 in the WWF Ordinance.

30. For the above reasons, the impugned amendments introduced in WWF Ordinance through Finance Acts, 2006 and 2008 are declared unconstitutional and therefore struck down. As a consequence, impugned Notice dated 14.6.2011 is set aside, being unlawful and unconstitutional. The petitioner is, however, liable to pay Workers' Welfare Fund under WWF Ordinance as it stood prior to the impugned amendments.

31. This writ petition is allowed in the above terms with no order as to costs.

(Syed Mansoor Ali Shah)  
Judge

\*A.W.\*/M.Tahir\*

Announced in open court on \_\_\_\_\_.

**JUDGE**

**APPROVED FOR REPORTING.**

**SCHEDULE "A"**

In section 12 of the Finance Act, 2006 (Act III of 2006) the following amendments were brought about in the Ordinance:-

.... For clause (i) the following shall be substituted, namely:-

“total income” means:

- (i) where Return of Income is required to be filed under this Ordinance, the profit (before taxation or provision for taxation) as per accounts or the declared income as per the return of income, whichever is higher; and
- (ii) where return of Income is not required to be filed, the profit (before taxation or provision for taxation) as per accounts or four per cent of the receipt as per the statement filed under section 115 of the Ordinance, whichever is higher:”

In section 8 of the Finance Act, 2008 (Act I of 2008) which is reproduced hereunder:-

“8. Amendments of Ordinance No.XXXVI of 1971.----In the Workers Welfare Fund Ordinance, 1971 (XXXVI of 1971), the following further amendments shall be made, namely:-

- (1) In section 2, in clause (f) after sub-clause (iv), the following new sub-clause shall be inserted, namely---
  - “(iva) any establishment, to which the West Pakistan Shops and Establishment Ordinance, 1969 (W.P. Ordinance No.VIII of 1969), for the time being applies;”
- (2) In section 4—
  - (a) In subsection(1), the words “of so much” and “as is assessable under the Ordinance” shall be omitted;
  - (b) In subsection (4) the words and comma “At the time of making an assessment under the Ordinance, or



as soon thereafter as may be the” and “on the basis of the income so assessed” shall be omitted; and

(c) In subsection (5) for the word “assessed” the word “total” shall be substituted and the words “subsequent to the assessment made under the Ordinance” shall be omitted; and

(3) In section 11B, in subsection (3) after the word “sanction” at the end the words “with the previous approval of the Governing Body” shall be added.”

**(Syed Mansoor Ali Shah)**  
Judge