JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P No.38612 of 2015

D.G Khan Cement Company Limited

Versus

Federal Board of Revenue etc.

J U D G M E N T

Date of Hearing.	22-12-2017
PETITIONERS BY:	M/s Imtiaz Rasheed Siddiqui, Shahryar Kasuri, Mansoor Usman Awan, Shahzad Ata Elahi, Kh. Farooq Saeed, M.M. Akram, Shahbaz Butt, Usman Akram Sahi, Arslan Riaz, M. Hamza, Sajid Ijaz Hotiana, Tanzil ur Rehman, Waseem Ahmad Malik, Tahir Amin, M. Nasir Khan, Ehsan ur Rehman, Monim Sultan, Shahzeen Abdullah, Hussain Ibrahim, Hammad Khan Babur, Majid Tahangir, Abdullah Akhtar Butt and Shahid Sharif, Advocates.
RESPONDENTS BY:	M/s Sarfraz Ahmad Cheema, M. Asif Hashmi, Shahid Usman, Shagufta Ejaz, Advocates. Mr. Nasar Ahmad and Mr. Imraz Aziz Khan, D.A.G. Mr. Nadeem Mehmood Mian, Asst. Attorney General. Dr. Ishtiaq Ahmad Khan, Director Law, FBR.

Shahid Karim, J:- This petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (**"the Constitution"**), seeks the following reliefs:-

> *"In view of the facts and circumstances narrated above, it is, therefore, most graciously prayed that this honourable Court be pleased to declare that:*
>
> *A. The insertion of section 4B in the Income Tax Ordinance, 2001, by the respondent Federation, is illegal, unlawful, ab-initio void and ultra vires the Constitution of Islamic Republic of Pakistan, 1973; the same be struck down accordingly.*

> *B. Section 9(2) of the Finance Act, 2015 whereby section 4B has been inserted in the Income Tax Ordinance, 2001 is without jurisdiction, illegal, void ab-initio and of no legal effect.*
>
> *It is further prayed that during the pendency of the titled petition restrain the respondents, their officers, agents from refusing to accept the tax return of the petitioner for the tax year 2015, without the payment of super tax u/ s 4B of the Ordinance (either electronically or manually, at the option of the petition), for the tax year 2015, while further restraining the said respondents from taking any actions towards recovery of the impugned levy in any manner whatsoever."*

2. This judgment shall also decide similar petitions at Appendix-I with this judgment and which in their broad sweep raise the same question of law. In essence, the challenge in these petitions is to the constitutionality of Section 4B of the Income Tax Ordinance, 2001 (**"the Ordinance, 2001"**). Section 4B was inserted by the Finance Act, 2015 and seeks to impose a super tax for rehabilitation of temporarily displaced persons. It reads as under:-

> ***4B. Super tax for rehabilitation of temporarily displaced persons.—*** *(1) A super tax shall be imposed for rehabilitation of temporarily displaced persons, for tax years 2015 3[to 2017], at the rates specified in Division IIA of Part I of the First Schedule, on income of every person specified in the said Division.*
>
> *(2) For the purposes of this section, "income" shall be the sum of the following:—*
>
> *(i) profit on debt, dividend, capital gains, brokerage and commission;*
>
> *(ii) taxable income 4[(other than brought forward depreciation and brought forward business losses)] under section (9) of this Ordinance, if not included in clause (i);*
>
> *(iii) imputable income as defined in clause (28A) of section 2 excluding amounts specified in clause (i); and*

> *(iv) income computed under Fourth, Fifth, Seventh and Eighth Schedules.*
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> *(3) The super tax payable under sub-section (1) shall be paid, collected and deposited on the date and in the manner as specified in sub-section (1) of section 137 and all provisions of Chapter X of the Ordinance shall apply.*
>
> *(4) Where the super tax is not paid by a person liable to pay it, the Commissioner shall by an order in writing, determine the super tax payable, and shall serve upon the person, a notice of demand specifying the super tax payable and within the time specified under section 137 of the Ordinance.*
>
> *(5) Where the super tax is not paid by a person liable to pay it, the Commissioner shall recover the super tax payable under subsection (1) and the provisions of Part IV, X, XI and XII of Chapter X and Part I of Chapter XI of the Ordinance shall, so far as may be, apply to the collection of super tax as these apply to the collection of tax under the Ordinance.*
>
> *(6) The Board may, by notification in the official Gazette, make rules for carrying out the purposes of this section.*

3. Thus, a super tax has been imposed for the rehabilitation of temporarily displaced persons for the tax year 2015 (initially) which was by way of Finance Act, 2017 extended to 2017 at the rates specified in Division II-A of Part-I of the First Schedule on income of every person specified in the said Division. Therefore, the first element of the tax in issue to be flagged is that it has been imposed on a certain category of persons and has not been imposed across the board on all persons liable to pay income tax. This shall be elaborated upon in the proceeding part of this judgment.

4. The primary challenge hinges upon two separate but connected arguments raised by the learned counsel for the petitioners. It shall not be necessary to

refer to their arguments separately as the counsels appearing for the petitioners supplemented the arguments of each other and in material particulars adopted them. Those arguments will be dealt with during the course of this opinion in their various nuances.

5. It has been contended that super tax is not a tax and therefore could not have been levied through a money bill by the Parliament and consequently its imposition through the Finance Act, 2015 was *ultra vires* and unconstitutional. The learned counsel for the petitioners invite this Court to hold that since firstly a specific purpose has been mentioned in the provision of Section 4B, that by itself takes it out of the ambit of the concept of tax and, therefore, could not have been levied through a money bill. Secondly and as an alternate argument, it was argued that even if it is deemed that super tax could have been imposed through the Finance Act, 2015, the said levy is in the nature of double taxation and ought to be struck down on that account as outwith the powers of the legislature. These two arguments have their provenance in two judgments of the Supreme Court of Pakistan on which the entire reliance was placed by the learned counsel for the petitioners. Prior to that however, a reference may be made to a judgment rendered by this Court and reported as *Sufi Muhammad Farrukh Amin v. Federation of Pakistan and others* (**2017 PTD 83**). In that judgment,

the challenge was to the constitutionality of the income support levy at the rate of 0.5% on the value of net immovable assets/ wealth. Amongst others, the challenge was premised on the ground that since a purpose had been spelt out in the law itself that fact would render the levy as fee and not a tax and, therefore, the imposition through a money bill was incompetent. During the course of the opinion, certain fundamental principles of interpretation were underscored and one of them was an observation by Justice Cardozo of the U.S Supreme Court in *Panama Refining Co. v Ryan, 293 U.S. 388, 439 (1935)* and the following remarks:-

> *"When a statute is reasonably susceptible of two interpretations, by one of which it is unconstitutional and by the other valid, the court prefers the meaning that preserves to the meaning that destroys."*

6. With regard to the question whether the specific purpose which is mentioned in the provisions of the Act itself, was a ground for holding a particular levy to be unconstitutional, the following observations are pertinent and are reproduced below:-

> *"23. The learned counsels for the petitioners were swayed by the purpose and the factors behind the imposition of the levy as stated above in the preamble of the Act, 2013. The preamble brought forth that the state was obliged to promote social and economic well being of the people and to provide basic necessities of life and whereas it was extended to provide for the financial resources for the economical distressed persons; hence a levy was being exacted by the name of income support levy. It has long been settled that the preamble of a statute does not determine the true nature and merit of a statute and is merely a window into the substantive provisions of the statute under consideration. Therefore, anything expressed in the preamble will not impact upon the construction to be put on the substantive part of the statute. It was stated in National Federation of Independent Business v.*

> *Sebelius, Secretary of Health and Human Services 132 S.Ct. 2566 (2012) (Health Care Case) by the US Supreme Court that "we thus ask whether the shared responsibility payment falls within Congress's taxing power disregarding the designation of the exaction and viewing its substance and application". Unites States v. Constantine 296 U.S. 287 (1935); QUILL Corp. v. North Dakota, 504 U.S 298 (1992); "magic words or labels should not disable an otherwise constitutional levy". Nelson v. Sears Roebuck & Co. 312 U.S. 359 (1941); "It passing on the constitutionality of a tax law, we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it". United States v. Sotelo 436 U.S. 268 (1978).*

7. As a prefatory, it may be stated that although in the case of income support levy the purpose was given in the preamble of the Act, 2013, it does not matter whether the purpose has been given in the preamble or in the main statute for the principles governing such matters would remain the same and there is no substantial difference between the mentioning of the purpose in the preamble or in the main enactment. The ratio of the judgments in the paragraph reproduced above would aptly apply in the case of a purpose as spelt out in the preamble as well as in the main provision itself, for, at the heart of any discussion regarding such matters would be whether the levy falls within the Parliament's taxing power or not and if it is so held, the designation of the exaction will be disregarded and the court will view its substance and application (as held by the U.S Supreme Court in the Healthcare case, referred to above). Also as held in '*Nelson*' magic words or labels should not disable an otherwise constitutional levy. Further, in *United States v. Sotelo,* the principle was firmly established that the courts are only concerned

with the practical operation of a tax law while passing on the constitutionality and not its definition or the precise from of descriptive words which may be applied to it. It was said by Ginsburg, J. in *Health Care Case: "our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm"*. Also Justice Scalia underscored the reluctance to intervene in economic policy: *"I have long been an advocate of the proposition that it is not for judges to write their own policy preferences into the Constitution….Economic liberty is not an exception to this rule. In a democracy, if the basic law so permits, the legislature may decide to replace the free market with control planning, however unwise it may be."* (quoted in "*Uncertain Justice"*, by Laurence Tribe and Joshua Matz). These principles will guide this Court in determining the constitutionality of super tax as well as the entire challenge of the petitioners revolves around the descriptive words and the form employed by the legislature while imposing super tax. While considering the distinction between a tax and fee, reference was made in that judgment to the holding of the Supreme Court of Pakistan in *Federation of Pakistan through Secretary M/o Petroleum and Natural Resources and another v. Durrani Ceramics and others* (**2014 SCMR 1630**) and the following observations in particular contained in paragraph 19 of that judgment:-

> *"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 they 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'."*

8. The distinction between a tax and a fee is well entrenched and need not be referred to in detail for the purpose of this opinion. Suffice to say that the power of tax is an attribute of sovereignty of the State and held to be an essential and inherent aspect of sovereignty and "*a tax is an enforced contribution to provide for the support of Government*". (Justice Scalia in Healthcare case). The subtle but important observation with regard to the tax given in *Durrani Ceramics* was that a tax is a common burden for raising revenue and upon collection becomes part of public revenue of the State. This is one of the more important elements which will be seen while analyzing the nature of a particular tax. A fee, on the other hand, 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. Therefore, in a particular case the element of a levy having a specific purpose may overlap in the case of a tax and a fee but what distinguishes a fee is its additional elements such as rendering services or providing

privileges to particular individuals or a class on which that levy has been imposed. Therefore, fee has an element of *quid pro quo* in it which distinguishes it from the concept of tax. After analyzing the precedents in this regard, it was held that:-

> *"36. Applying the standard and test laid down by the Supreme Court of Pakistan to the levy imposed under the Act, 2013 it is evident that there is no substantive provision in the Act, 2013 itself which spells out the purpose of the levy to be with regard to a certain specific project or for rendering services or providing privilege to a community or a class of community. As adumbrated, this Court will presume the constitutionality of a statute and shall also presume that a particular levy is a tax if that is the stance of the Federal Government and other respondents. Unless rebutted in material particulars, there is no reason to assume that a particular levy is fee and not a tax. I do not find upon a holistical reading of the provisions of the Act, 2013 that there is an element of quid pro quo to exist in the provisions of the Act, 2013 between the levy and the petitioners who have laid a challenge to this levy. It is not the case of the petitioners that the levy is in lieu of certain services being rendered to the petitioners and so the petitioners stand to derive benefit from the levy. The petitioners, on the other hand, contend that the levy by the preamble of the act, 2013 is being exacted for the purpose of expending on economically distressed persons and on this basis the levy is sought to be termed as a fee. This argument of the learned counsel for the petitioners is nuanced and has no legal legs to stand upon. For a levy to be a fee, the relation between the purpose and the persons on whom the levy is being exacted has to be established. There is none in this case. According to the settled precedents, same benefit to accrue will have to be asserted in case the levy is to be established as a fee and not a tax. From the entire reading of the provisions of Act, 2013, it seems that the levy is a common burden and a compulsory exaction of money for raising revenue and expending it for the purpose of public revenue of the State. The mere fact that the preamble of the Act, 2013 refers to the application of the levy in its practical operation, does not detract from the fact that the levy is a tax and not a fee.*

9. In the above case, it was found that the levy was not a fee as it did not have the necessary ingredients which would comprise a fee and, therefore, it was held to be a tax. It was also found that merely mentioning of

a specific purpose will not render a levy as beyond the concept of a tax and therefore on this ground too the challenge was repelled.

10. During the course of the arguments, the learned counsel for the petitioners did not challenge the proposition that there was absolutely no element of a fee in super tax which has been called in question in these petitions. Therefore, they were all on common ground as to the fact that the primary basis of the challenge was not that super tax was a fee and not a tax. Clearly, there is no element of *quid pro quo* and the levy has not been imposed for a specific purpose and in lieu of services rendered for a class of persons on which the imposition has been made. Therefore, it is not necessary to go into the question of drawing a distinction between a tax and a fee and for holding in this particular case whether super tax is a tax or a fee. The precise submission of the learned counsel for the petitioners is that since a specific purpose has been spelt out in the provision itself, that would itself take it out of the broad term of tax and, therefore, it is not necessary for the petitioners to establish that it was a fee and not a tax. This brings us to a recent judgment rendered by the Supreme Court of Pakistan and reported as *Workers Welfare funds, M/o Human Resources Development, Islamabad through Secretary and others v. East Pakistan Chrome Tannery (Pvt.) Ltd. Through G.M. (Finance), Lahore and others* (**PLD 2017 SC 28**) (**"WWF"**). The observations of the

Supreme Court of Pakistan in WWF were extensively referred to by the learned counsel for the petitioners in support of the argument which has been explicated above. To reiterate, in the estimation of the learned counsel for the petitioners if a specific purpose has been given in the law itself, that mere fact renders the levy to be outside the jurisdiction of the Parliament to be imposed through a money bill. It will not be necessary to refer to in greater detail the concept underlying the nature of a money bill and Article 73(3) of the Constitution relating to the origin and nature of money bill as well as the construction put by the superior courts over the years on its true meaning. It is well established and need not be referred to at this stage. Moreover, that will only be relevant if the discussion is whether the levy is a tax or a fee. As adumbrated, the learned counsel for the petitioners do not dispute the fact that the levy is not a fee and therefore the only question is whether it is a tax or not so as to caught by the mischief of Article 73(3) of the Constitution. The judgment of the Supreme Court of Pakistan in WWF was at the heart of the arguments raised by the learned counsel for the petitioners and, therefore, I shall proceed to deal with the said judgment so as to conclude whether the ratio of that judgment is applicable to the facts and circumstances of the present case or not.

11. The issue involved related to the contributions to be paid under different statutes by the employers and

industrial establishments and generally related to the welfare of the workers and employees working in those industrial establishments. There was a common thread running through all of the statutes which were the subject matter of the judgment before the Supreme Court of Pakistan as regards the nature of the contributions and levies and the obligation on the employers to contribute a specific amount to a fund which was set up under each law. The question clearly before the Supreme Court of Pakistan was whether the levy/ contribution was a tax or a fee on which there were divergent views of various High Courts and which were sought to be reconciled by the Supreme Court of Pakistan in WWF. The Supreme Court of Pakistan referred to the precedents which distinguished the concept of tax or fee which is not necessary to be referred to for our purposes, for that question does not detain us any further in these petitions. However, the Supreme Court of Pakistan in conclusion thought it unnecessary to hold whether the levy was a fee and not a tax in view of its holding that the only question which ought to be determined by the courts in any challenge on the basis of a particular act being a money bill or not was the question whether a particular levy was a tax or not and once the court came to the conclusion one way or the other, it was otiose to enter the question of whether it was a fee or not. In a nub, the courts are required to merely see as to whether a levy is within the concept of the term ‘tax’ as understood in

common parlance or not. The observations of the Supreme Court of Pakistan which are sought to be used by the learned counsel for the petitioners to their advantage are as follows:-

> *"There are no two opinions about the fact that a tax is basically a compulsory exaction of monies by public authorities, to be utilized for public purposes. However its distinguishing feature is that it imposes a common burden for raising revenue for a general as opposed to a specific purpose,#; the latter being one of the key characteristics of a fee. Now let us examine each of the subject levies/contributions in light of the above touchstone."*

12. The above observations merely reiterated a principle which has been settled over the years as to the true nature of a tax and that it is a compulsory exaction of moneys by public authorities to be used for public purposes and that it imposes a common burden for raising revenue for a general as opposed to a specific purpose. The learned counsel for the petitioners laid great stress on the term 'specific purpose' as used in the paragraph above which has been used in the judgment to distinguish it from the term 'tax' and has been affirmed as an element of fee. And, therefore, according to the learned counsels wherever there is a specific purpose mentioned in a statute that statute has to be taken as levying fee and not tax. This contention of the learned counsel for the petitioners has been raised in isolation and does not take into account the holistic reading of the judgment in WWF. It may be pertinent to mention that the Supreme Court of Pakistan in WWF referred to and endorsed the view in an earlier judgment of *Durrani*

Ceramics where the true nature of a fee in juxtaposition to a tax was dilated upon in the following words:-

> *"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'."*

13. Therefore, *Durrani Ceramics* has clearly and unequivocally expounded the true nature of the term 'fee' which, according to the Supreme Court of Pakistan, is an exaction for specific purpose and for rendering services or providing privileges to particular individuals or a class or a community etc. The term 'specific purpose' cannot be read in isolation while discussing the concept of a fee and has to be read in conjunction with the other elements especially of *quid pro quo*. In the latter part of the judgment in WWF, this was endorsed by the Supreme Court of Pakistan too and the learned counsel for the petitioners have sought to use that portion as well and which is to the following effect:-

> *"23. There is another aspect of the matter which requires due attention. No doubt the feature of having a specific purpose is a characteristic of a fee, which the subject contributions/ payments possess as discussed in the preceding portion of this opinion. However, there are certain other characteristics of a fee, such as quid pro quo, which must be present for a contribution or payment to qualify as a fee. This was the main argument of the learned counsel who*

> *categorized the subject contributions in the nature of a tax, that they (the contributions) lacked the element of quid pro quo or in other words the benefit of the contribution did not go to the payers. The industrial establishments or employers etc. were liable to pay the contribution but they were not the beneficiaries of the purpose for which such contributions were being made; the beneficiaries were their employees or workers etc. Mr. Rashid Anwar attempted to argue that the benefit need not be direct and can be indirect, therefore although the employees were directly benefited by contributions made to the Employees' Old-Age Benefit Fund as they received the disbursements, the employers received an indirect benefit in that this results in happier employees which ultimately leads to greater productivity. Whilst this may be true, albeit a strained argument, the attempt of the learned counsel challenging the legality of the amendments in the Finance Acts has all along been to categorize the contributions/ payments as a fee, which would mean that they were not a tax. While a fee is obviously not a tax, there was absolutely no need to try and squeeze the contributions/payments into the definition of a fee, when all that is required is to take them out of the ambit of a tax. We may develop this point further; although Article 73(3)(a) of the Constitution states that a Bill shall not be a Money Bill if it provides for the imposition or alteration of a fee or charge for any service rendered, this does not mean that if a particular levy/ contribution does not fall within Article 73(2) it must necessarily fall within Article 73(3). Sub-Articles (2) and (3) are not mutually exclusive. There may very well be certain levies/contributions that do not fall within the purview of Article 73(3) but still do not qualify the test of Article 73(2) and therefore cannot be introduced by way of a Money Bill, and instead have to follow the regular legislative procedure. The discussion above that the subject contributions/ payments do not constitute a tax is sufficient to hold that any amendments to the provisions of the Ordinance of 1971, the Act of 1976, the Act of 1923, the Ordinance of 1968, the Act of 1968 and the Ordinance of 1969 could not have been lawfully made through a Money Bill, i.e. the Finance Acts of 2006 and 2008, as the amendments did not fall within the purview of the provisions of Article 73(2) of the Constitution."*

14. It can be seen from a reading of the portion of the judgment in WWF above that after discussing the elements of fee, it was held that in a particular case it would not be necessary to determine whether the levy was a fee or not and the only requirement was to conclude whether the levy was a tax or not for the

purpose of Article 73 of the Constitution. The Supreme Court of Pakistan in WWF then went on to analyse the different statutes which were the subject matter of the decision before the Supreme Court of Pakistan to come to a conclusion that none of the levies in the said statutes possessed the distinguished feature of a tax, that is, "*a common burden to generate revenue for the State for general purposes, instead they all have some specific purpose, as made apparent by their respective statutes which removes them from the ambit of the tax*". However, while doing so, the Supreme Court of Pakistan elaborately dealt with provisions of each statute and some of the other key features of a tax were also dilated upon and discussed before the above conclusion was drawn. For example, in the case of "Workers' Welfare Fund Ordinance, 1971 a governing body of the Workers' Welfare Fund was established to manage and administer the said fund, the analysis of the Supreme Court of Pakistan led to the following:-

> *"From the above it is clear that the Governing Body of the Workers' Welfare Fund, established to manage and administer the said fund, is supposed to do so in light of the exhaustive purposes enumerated in Section 6 ibid. Further, the Governing Body can only allocate funds to the Provincial Government, or any agency of the Federal Government and any Body Corporate for the purposes mentioned in Section 6(a) and (b) and for no other purpose, and any funds so allocated to any such body cannot be used for any purpose other than that for which they are allocated or as permitted by the Governing Body. This clearly establishes two things: that the Government has no control over the Workers' Welfare Fund, and that the funds can only be used for very specific purposes as stated exhaustively in the Ordinance of 1971 itself, and not for general or undefined purposes. This particular feature of the contribution(s) made in*

> *terms of the Ordinance of 1971 automatically preclude them from being classified as a tax."*

15. Therefore, the key elements which distinguished the fund were that there was a body corporate which was the governing body which could allocate funds and those funds could not be allocated by any other authority. Further, the funds so allocated could not be used for any purpose other than that for which they were allocated or as permitted by the governing body. Through this analysis the Supreme Court of Pakistan drew the ineluctable conclusion that the Government had no control over the fund and that the fund could only be used for their specific purpose as stated in the law itself and not for general or undefined purposes. On this basis, it was held that these features of the contribution automatically precluded them from being classified as a tax. Therefore, quite evidently the construction put on WWF does not take into account the judgment in its entirety and has been read in isolation. I have no doubt in my mind that the conclusion drawn by the Supreme Court of Pakistan was not merely on the ground that there was a specific purpose mentioned in the law itself but was arrived at in combination with a number of distinguishing features of the statutes through which the levies were imposed and all of these factors have to be read in conjunction with each other and not separately. Clearly, the respondents have a better reading of WWF than the petitioners. Therefore, the learned counsel for the petitioners in order to sustain their arguments will

have to show in the instant cases as well that not only is there a specific purpose mentioned while imposing super tax but also that there is a governing body which deals with the amounts collected by way of super tax as also that those amounts are allocated to a specific fund over which the Government has no control whatsoever. Merely proving that a specific purpose has been mentioned by the legislature while enacting super tax will not advance the case of the petitioners so as to succeed on the basis of the judgment in WWF. None has been demonstrated to exist by the counsels for petitioners.

16. The alternate argument of the petitioners is on the basis of the concept of double taxation and that super tax suffers from the vice of double taxation and thus ought to be struck down on that account. Firstly, the rule against double taxation is a judge-made rule and does not have a constitutional basis. This means that if the learned counsel for the petitioners invite this Court to hold that super tax ought to be declared invalid, a constitutional basis for the doctrine of double taxation ought to be proved and established, for this Court in the exercise of judicial review can only declare a statutory provision unconstitutional if it runs counter to the express mandate of any constitutional provision. *Pakistan Industrial Development Corporation v. Pakistan through the Secretary, Ministry of Finance* (**1992 SCMR 891**) (**"PIDC"**) is a judgment which has

been relied upon for the proposition of challenge on the basis of double taxation. Another feature of this precedent is that it too entailed a challenge to super tax which was levied by virtue of section 55 of the Income Tax Act, 1922. Section 55 of the Act, 1922 which imposed a charge of super tax was in the following terms:-

> *"15. Super-tax is charged under section 55 of the Income Tax Act and the relevant provisions are reproduced as follows:-----*
>
> > *"55. Charge of super-tax-- (1) In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year (or previous years, as the case may be) of any (person) an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by the Central Act.*

17. It will be proper to reproduce *in extenso* the entire arguments raised with regard to the double taxation and the manner in which it was dealt with by the Supreme Court of Pakistan in PIDC.

> *"13. Mr. A.A. Fazeel has contended that the levy may amount to double taxation which is not prohibited by law. He has referred to M/s. Jain Bros. and others v. Union of India and, others AIR 1970 SC 778. In this case an amendment made in section 23, subsection (5) of the Income Tax Act was under consideration. The effect of the amendment was that a registered firm was liable to pay income-tax independently of the tax payable by the individual partners of the firm on their share of profit. Prior to the amendment if the firm was registered it was not liable to pay tax but the partners were to pay on their individual shares. The assessee challenged that the firm and its partners do not constitute separate entity and either the firm or the partner can be taxed but the same income in the hands of both cannot be simultaneously subjected to tax. It was observed as follows;---*
>
> > *"It is not disputed that there can be double taxation if the Legislature has distinctly*

> *enacted it. It is only when there are general words of taxation and they have to be interpreted they cannot be so interpreted as to tax the subject twice over to the same tax (vide Channel, J. in Stevens v. The Durban-Rodde Poort Gold Mining Co. Ltd. (1909) 5 Tax Cas. 402.) The Constitution does not contain any prohibition against double taxation even if it be assumed that such a taxation is involved in the case of a firm and its partners after the amendment of section 23(5) by the Act of 1956. Nor is there any other enactment which interdicts such taxation---------if any double taxation is involved the legislature itself has by express words, sanctioned, it is not open to anyone therefore to involve the general .principle that the subject cannot be taxed twice over:"*

Mr. AA. Fazeel has also referred to Arvinder Singh etc. v. State of Punjab AIR 1979 SC 321, where it was observed that:--

> *"There is nothing in Article 265 of the Constitution from which one can spell out the constitutional vice called Double Taxation if on the same subject-matter the Legislature chose to levy tax twice over. There is no inherent invalidity in the physical adventure where other provisions exist:"*

It is, thus, clear that unless there is any prohibition or restriction imposed on the power of Legislature to impose a tax twice on the same subject matter double taxation though a heavy burden and seemingly oppressive and inequitable cannot be declared to be void or beyond the powers of the Legislature. It may, however, be noted that double taxation can be imposed by clear and specific language to that effect. Where the language is not clear or specific by implication such levy cannot be permitted. According to Palkhiwala and Kanga:--

> *"broadly stated the principle of Income Tax Act is to charge all income with tax, but in the hands of the same person only once."*

There could be double taxation if the Legislature distinctly enacted it, but upon general words of taxation, and when you have to interpret a taxing Act, you cannot so interpret it as to tax the subject twice over to the same tax. Reference can be made to:----.

(1) Jain Bros. v. Union of India 77 ITR 107 (SC).

(2) Stevens v. Durban Roodprott Goldmining 5 TC 402 (407).

(3) Laxmipat Singhania v, CIT 72 ITR 291(294).

In Corpus Juris Secundum. Volume 84 it has been said:----

> *"Double taxation should not be permitted unless the Legislature has authority to impose it. However, since the taxing power is exclusively a legislative function, as discussed supra and since, except as it is limited or restrained by constitutional provisions it is absolute and unlimited; as considered supra 4, it is generally held that there is nothing, in the absence of any express or implied constitutional prohibition against double taxation, to prevent the imposition of more than one tax on property within the jurisdiction as the power to tax twice is as simple as the power to tax once. In such case whether or not there should be double taxation is a matter within the discretion of the ---------legislature Double taxation is not favoured by the Courts. It has frequently been held that it is against public policy, except where the legislative body has clearly declared to the contrary, and it is to be avoided whenever possible, although if there is a clear legislative intent that a double tax shall be imposed such Legislative intent will prevail.*
>
> *----------Double taxation, not only is not presumed or inferred, but there is a presumption against the intention of the Legislature to impose double taxation on the same property which prevails unless overcome by the express words of the statute. Double taxation is permitted only where it has been clearly imposed.*
>
> *Any construction of a taxing statute which results in taxation of the same property twice is to be avoided if possible, or if the statute is ambiguous, uncertain of its construction, doubtful, or if it may be reasonably interpreted so as to avert that result, or if the intent to impose double taxation is not clearly expressed and such construction should never be adopted unless necessary to effect the manifest intent of the Legislature. Doubts as to whether double taxation has been imposed should be resolved in favour of the tax-payers. However, at least in jurisdictions where double taxation is not unconstitutional, as discussed supra 40, where the language of the Statute is clear, the fact that double taxation results therefrom will not justify the Court in disregarding the language.*
>
> *A statute providing relief from double taxation should be liberally construed".*

18. An outstanding feature of the conclusion drawn by various judgments and treaties cited in the paragraph

above was that there was nothing in the Constitution from which it could be culled out that there was such a constitutional vice as double taxation if on the same subject matter the legislature chose to levy tax twice over. The Supreme Court of Pakistan agreed with the proposition and held that unless there was a clear prohibition or restriction imposed on the powers of the legislature to impose tax, that is, on the same subject matter, double taxation though a heavy burden and seemingly oppressive, cannot be declared to be void or beyond the powers of the legislature. Therefore, there could be double taxation if the legislature distinctly enacted it. The concept was brought out in *Corpus Juris Secundum* which echoed the same concept in the words reproduced above. That is, except as it is limited or restrained by constitutional provisions, the taxing power of legislature was absolute and unlimited and which included double taxation for "*the imposition of more than one tax on property within the jurisdiction as the power to tax twice is as simple as the power to tax once.*". In conclusion, the Supreme Court of Pakistan held that:-

> *"There can hardly be any dispute that the entire `free reserve' is a part of the total income assessed to income-tax. Under Para. 4 of Part II of the Fifth Schedule super-tax has been levied on that amount of the free reserve which though part of the total income, exceeds the paid-up ordinary share capital of the company. The petitioner can object that it amounts to double taxation on the same income which has been subjected to income-tax. As discussed above in the absence of any prohibition or limitation by Constitution or law the Legislature can impose tax twice over on the same amount or income. Super-tax*

> *has been levied in addition to income-tax by a clear and independent provision for whose charge, assessment and recovery procedure has been provided by section 58. The Legislature by clear unambiguous and in definite terms levied super-tax on the total income determined for purposes of income-tax. In these circumstances even if it amounts to double taxation it cannot be struck down. As we have held that the amendment made in section 2 (6C) of the Income Tax Act by Finance Act, 1967, and Explanation 5 added to section 4 of the Income Tax Act by Finance Act, 1968, are ultra vires of the Constitution of 1962, the Free Reserve on which super-tax at the rate provided by law has been charged, cannot in the subsequent years, be again treated as income and subjected to super-tax."*

19. The simple rule propounded by the Supreme Court of Pakistan was that in the absence of any prohibition or limitation by the Constitution or law, the legislature could impose tax twice over on the same amount or income. It was further held that super tax had been levied in addition to the income tax by a clear and independent provision and for whose charge assessment and recovery procedure had been provided. On the touchstone of the same principle it can be gleaned that super tax in this case as well has been imposed by a clear and independent provision bringing forth the intention of the legislature to tax twice over the same income of a certain category of taxpayers. Simply because the legislature intends to tax the same income twice over does not detract from the constitutionality of the levy as there is nothing in the Constitution which prohibits the legislature from doing so. This Court in the exercise of its constitutional powers can only place the provisions of an enactment under challenge and square it with any provisions of the Constitution in order

to hold that it is *ultra vires* or not. No provision of the Constitution has been cited or referred to in the instant case by the learned counsel for the petitioners which will compel this Court to hold that super tax was unconstitutional. Clearly, super tax has been levied in addition to the income tax which has to be paid by the assessee although the category of assesses is different and the mode of determination for the purpose of super tax is also distinct from the one prescribed in respect of income tax. To my mind, the intent of the legislature is very clear and doubtless the legislature had consciously imposed a super tax in addition to the income tax already imposed by virtue of section 4B of the Income Tax Ordinance, 2001.

20. The learned counsel for the petitioners sought to distinguish the case of PIDC from the present cases on the ground that in the PIDC case the legislature had clearly spelt out that the charge of super tax was an additional duty of income tax and was in addition to the income tax charged for any year. However, in my opinion, it does not matter whether the legislature expresses its intention by the use of the words 'in addition to the income tax charged or not". The intent of the legislature can be culled out from an entire reading of the different provisions of the Ordinance, 2001 and evidently if the legislature has enacted a separate provision for the charge of super tax, the intention and mood of the legislature is very clear and no further

expression is required to hold that the legislature intended for a separate charge in the nature of super tax to be imposed on the income of a person as an additional duty on income tax. Moreover, super tax, by its very nature, also relates to an additional duty of income tax and this charge has been recognized to exist independent of the income tax charged which is evident from the definition of super tax which finds mention in different legal dictionaries.

21. However, the basic rule, in my opinion, remains unchanged. That rule is the constitutional prohibition or otherwise with regard to the imposition of a tax to be levied twice on the same income. If there is none then an additional tax can be levied and the legislature need not express in so many words its intent to do so in addition to the income tax charged already. It will suffice if a separate provision has been made with regard to the charge in question and the courts will uphold the constitutionality on that mere basis.

22. In the PIDC judgment the Supreme Court of Pakistan placed reliance on an extract from *Corpus Juris Secundum* Vol.84. The same statement finds mention in the 2010 Edition of *Corpus Juris Secundum* and I need not refer to it in detail as the statement has already been reproduced above. What is however required to be flagged and highlighted at this stage is the particular statement which says that "*however, at least in*

jurisdictions where double taxation is not unconstitutional as discussed supra forty where the language of the statute is clear, the fact that double taxation results therefrom will not justify the court in disregarding the language". This is the true essence of the approach to deal with all challenges on the basis of double taxation. In our constitutional scheme, double taxation has not been barred and, therefore, it is difficult to sustain a challenge on this basis.

23. The doctrine of 'double taxation' has been alluded to in *Kanga & Palkhivala's The Law and Practice of Income Tax (Tenth Edition, Vol.1)* in the following terms:-

> *"The rule of construction of a charging section is that before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section. No one can be taxed by implication. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all…"*
>
> *"Further, in interpreting a charging section, the court must avoid such construction of the provisions that leads to double taxation unless that is expressly provided by the statute or follows by necessary implication."*
>
> *"58. Double Taxation.—Broadly stated, the principle of the Income-tax Act is to charge all income with tax, but in the hands of the same person only once. 'There could be double taxation if the Legislature distinctly enacted it, but upon general words of taxation, and when you have to interpret a taxing Act, you cannot so interpret it as to tax the subject twice over to the same tax'. The courts must lean in favour of an interpretation to avoid double taxation unless there is clear and specific mandate of law in favour of multiple levies."*

24. Thus, the rule is that in case double taxation has expressly been provided by the statute, the court will

give effect to it. However, a prohibition has been placed on the courts to avoid construing a provision in such a manner that it leads to double taxation. Thus the two concepts are distinct and separate and must be borne in mind at all times. If an impost has been levied as a tax by clear language of the statute, the courts cannot hold the said imposition as *ultra vires* on the touchstone of double taxation. However, if the intent is not very clear, the courts will not put a construction on the charging section which will amount to double taxation. This is the distinction which needs to be brought home. In the case of *Federation of Hotel and Restaurant Association of India (178 ITR 97),* the Supreme Court of India observed:-

> *"A taxing statute is not, per se, a restriction of the freedom under article 19(1)(g). The policy of a tax, in its effectuation, might, of course, bring in some hardship in some individual cases. But that is inevitable…Every cause, it is said, has its martyrs. Then again, the mere excessiveness of a tax or even the circumstance that its imposition might tend towards the diminution of the earnings or profits of the persons of incidence does not, per se, and without more, constitute violation of the rights under art. 19(1)(g)."*

25. We may also refer to the definitions of super tax which have been given in different legal dictionaries to establish that super tax in itself is a unique concept and the mere use of the term conveys a distinct meaning. Some of them were referred to by Dr. Ishtiaq Ahmad Khan during the course of his arguments. For example, in Collins Dictionary, super tax has been defined as under:-

> *"A tax levied in addition to the basic tax, especially a graduated sur tax on incomes above a certain level."*

26. In *Stroud's Judicial Dictionary of Words and Phrases*, (Third Edition), super tax has been defined as follows:-

> *"SUPER-TAX. (1) "Super-tax is an additional income tax imposed on individual incomes exceeding a specific amount" (per Parker, J., in Bowles v. A.-G., [1912] 1 Ch. 123, at p. 135)."*

27. Thus super tax has been defined as an additional income tax imposed on the income of an individual and has been treated as synonymous with sur-tax. *Black's Law Dictionary (Tenth Edition)* also defines sur-tax to mean:-

> *"An additional tax imposed on something being taxed or on the primary tax itself."*

28. To the same effect is the definition given in Merriam-Webster's Dictionary of Law:-

> *"sur-tax—an additional tax over and above a normal tax."*

29. There is a very interesting observation by Krishna Iyer, J. in *Avinder Singh v. State of Punjab [1979] 1 SCR 845* on the so called vice of double tax:

> *"There is nothing in Article 265 of the Constitution from which one can spin out the Constitutional vice called double taxation. (Bad' economics may be good law and vice versa). Dealing with a somewhat similar argument, the Bombay High Court gave short shrift to it in Western India Theatres (AIR 1954 Bom. 261). Some undeserving contentions die hard, rather survive after death. The only epitaph we may inscribe is: Rest in peace and don't be re-born. If on the same subject matter the legislature chooses to levy tax twice over there is no inherent invalidity in the fiscal adventure save where other prohibitions exist."*

30. Mr. Nasar Ahmad, Deputy Attorney General appearing for the Federation of Pakistan as well as Dr. Ishtiaq Ahmad Khan, Director Law, FBR sought to justify the levy by reference to the constitutional provisions in this regard. The dictionary meanings of the term 'super tax' was referred to by Dr. Ishtiaq Ahmad Khan in order to bring home the proposition that super tax was a recognized concept and a term of art and its mere mentioning would mean that it was a tax in addition to the income tax already levied and this puts paid to the arguments of the learned counsel for the petitioners while attempting to draw a distinction between section 55 of the Income Tax Act, 1922 and section 4B of the Income Tax Ordinance, 2001.

31. The power to impose tax has been derived by the legislature from Article 77 of the Constitution, which is as follows:-

> *"**77.** No tax shall be levied for the purposes of the Federation except by or under the authority of Act of [1][Majlis-e-Shoora (Parliament)].*

32. Therefore, a tax which is a heavy burden and is a compulsory exaction can only be levied by or under the authority of Act of Parliament. We will now travel to Article 260 of the Constitution for the definition of the terms 'taxation' and 'tax on income', which are as follows:-

> *"taxation" includes the imposition of any tax or duty, whether general, local or special, and "tax" shall be construed accordingly;*
>
> *"tax on income" includes a tax in the nature of an excess profits tax or a business profits tax.*

33. Taxation which has a nexus with the powers to impose tax under Article 77 includes the imposition of any tax or duty whether **general, local or special**, and tax shall be construed accordingly. Therefore, the legislature has vast powers to impose tax or duty which can be special in nature. This clearly means that tax can be imposed for special purpose and which will include a specific purpose as sought to be canvassed by the learned counsel for the petitioners. This is a complete answer to the argument of the learned counsel for the petitioners with regard to the mention of a purpose in Section 4B of the Ordinance, 2001. It is not difficult to construe that Section 4B is a special tax and has been imposed for a special purpose and by virtue of the definition of taxation given in Article 260 the Parliament was well within its powers to impose such a tax. We will also take a glance at Entry 47 of the Fourth Schedule to the Constitution which reads as follows:-

> *"47. Taxes on income other than agricultural income".*

34. It has been settled by respectable authorities that Entries in the Legislative List of the Constitution indicate the subject on which a particular legislature is competent to enact but they do not provide any restriction as to the power of the legislature concerned. It is also well settled that a Legislative List cannot be construed narrowly but has to be given a liberal construction. It will be noticed that Entry 47 uses the

term ‘taxes on income’. This in my opinion is quite significant as it empowers the legislature to impose more than one tax on the income of a person. Once again, the term ‘tax on income’ used in Entry 47 effectively nullifies the arguments with regard to double taxation. Therefore, not only that the legislature does not impose a prohibition on double taxation but in fact permits the levy of more than one tax on income.

35. The incidence of tax in the present cases is income. The criteria in Section 4B is a certain threshold of income and, therefore, by all means is a special tax. It can clearly be distinguished from the case of WWF, in that, the entire amount collected by way of super tax is part of the Federal Consolidated Fund and the Government has complete control over the amount and can expend it for the special purpose mentioned in Section 4B. There is no similarity between the case of WWF and the present cases as the entire gemut of ingredients of a valid tax are present in the case of super tax under challenge where in the case of WWF, the Supreme Court of Pakistan was constrained to hold that the levies and contributions were not part of the general concept of tax and, therefore, could not be imposed through a money bill.

36. Dr. Ishtiaq Ahmad Khan has produced the budget documents where the super tax has been classified as part of the Federal Consolidated Fund under the head of

direct taxes and has been deemed to be a tax revenue. These documents should also be sufficient to clear the ambiguity if any with regard to the super tax being not part of the Federal Consolidated Fund and not under the direct control of the Federal Government and FBR.

37. On the issue of specific purpose of super tax and its levy, a reference may be made to the budget speech of the Finance Minister in respect of the Budget 2015-16. The *raison d'etre* for the levy of super tax was expressed in the following words:-

> ***"K. Revenue for Rehabilitation of Temporarily Displaced Persons:***
>
> *The terrorism and counter-terrorism efforts have resulted in displacement of hundreds of thousands of people of FATA and Khyber Pakhtunkhwa from their homes. The vulnerable sections of the population, women, children, elderly and sick have suffered the most. The host communities have also taken a toll. The cost of rehabilitation of these displaced persons has been estimated at 80 billion rupees. These direct affectees of the war on terror deserve the full support and facilitation of the Nation. To meet enhanced revenue needs for the rehabilitation of Temporarily Displaced Persons in a dignified and befitting manner, it is proposed to levy a one-time tax on the affluent and rich individuals, association of persons and companies earning income above Rs. 500 million in tax year 2015 at a rate of 4% of income for banking companies and 3% of income for all others. It is expected that the provinces will also contribute their due share in this national cause and the entire receipts from this source shall be utilized for rehabilitation of TDPs."*

38. Therefore, the Government was very clear that the impost was a tax and on a certain category of persons and was meant to rehabilitate the temporarily displaced persons affected by terrorism and counter-terrorism efforts in the region of FATA and Khyber Pakhtunkhwa. The mere fact that the Government mentioned the purpose for which the revenue was being

generated and the charge was being levied does not detract from the fact that the impost was a tax and was to be expended for the general purpose of rehabilitation of temporarily displaced persons. Quite evidently, the burden of displacement of a large population and their rehabilitation was an event which was not within the contemplation of the Federal Government and there was no budgetary allocation in the normal course which could be used for the said purpose unless certain cuts were to be made from ordinary budget allocations in respect of other development schemes for which resources had already been earmarked. It was specifically mentioned in the statement that the tax was being imposed on the affluent and rich individuals, association of persons and companies within a certain income bracket as also that the Provinces shall also contribute their due share. The entire enterprise was mentioned as one of national cause and for the rehabilitation of TDPs. The same purpose has also found its way in Section 4B and will be deemed to be mere allocation in the Federal Consolidated Fund for a specific project, that is, rehabilitation of temporarily displaced persons. It can be seen from the entire reading of the budget speech 2015-16 that it spelt out the budget strategy and the development plan as well as the national development program relating to various sectors of the economy. The rehabilitation of the temporarily displaced persons should validly be taken as a project

and a specific sector for which an additional amount of revenue was required and which was sought to be generated by the imposition of super tax. There was nothing in the act to render it unconstitutional as the rehabilitation of temporarily displaced persons can very well be viewed as a distinct project of the Federal Government similar in nature to any other project yet with its own unique characteristics.

39. In a taxing statute, legislature enjoys much greater latitude for selection of subjects of taxation as also for classification and the legislative will is based on diverse, economic, social and policy considerations. The economic wisdom of a tax is within the exclusive province of the legislature and questioning the legislative policy is beyond the domain of the courts.

40. *"Proper respect for a co-ordinate branch of the government requires that we strike down an Act of Congress only if the lack of constitutional authority to pass the act in question is clearly demonstrated." United States v. Harris, 106 U.S 629, 635 (1883)*. It was also observed by Chief Justice John Roberts (of the U.S Supreme Court) in *National Federation of Independent Business v. Sebelius, Secretary of Health and Human Services 132 S.Ct. 2566 (2012)* that:-

> *"Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the*

> *people from the consequences of their political choices."*

41. A reference to the budget speech has been made hereinabove. It is the obligation of the Federal Government in terms of Article 80 of the Constitution to lay before the National Assembly a statement of the estimated receipt and expenditure of the Federal Government for that year referred to as the Annual Budget Statement. The Annual Budget Statement, reproduced above, therefore, gave the purpose of the impost called the super tax. According to Article 80, the Annual Budget Statement shall show separately the sums required to meet other expenditure proposed to be made from the Federal Consolidated Fund. Clearly, what the Annual Budget Statement prescribes as super tax is the sum required to meet other expenditure which the Federal Government proposes to make from the Federal Consolidated Fund. Therefore, if the purpose has been given in the Annual Budget Statement, it does not render it unconstitutional merely because if the same purpose has been reflected in the law itself as it is in accordance with the terms of Article 80 of the Constitution. Simply put, if the purpose can be delineated in the Annual Budget Statement, it can also be stated in the law itself and that will not render the taxation measure as unconstitutional. At best, by mentioning the purpose in section 4B, the legislature had adopted a novel method, yet "*legislative novelty is not unnecessarily fatal; there is a first time for everything*."

(Roberts C.J in National Federation of Independent Business). In *National Federation of Independent Business,* common known as the *Medicare Case,* the U.S Supreme Court by majority upheld the levy of penalty by the Congress as a taxation measure and while doing so observed that:-

> *"The joint dissenters argue that we cannot uphold § 5000A as a tax because Congress did not "frame" it as such. Post, at 17. In effect, they contend that even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels. An example may help illustrate why labels should not control here. Suppose Congress enacted a statute providing that every taxpayer who owns a house without energy efficient windows must pay $50 to the IRS. The amount due is adjusted based on factors such as taxable income and joint filing status, and is paid along with the taxpayer's income tax return. Those whose income is below the filing threshold need not pay. The required payment is not called a "tax," a "penalty," or anything else. No one would doubt that this law imposed a tax, and was within Congress's power to tax. That conclusion should not change simply because Congress used the word "penalty" to describe the payment. Interpreting such a law to be a tax would hardly "[i]mpos[e] a tax through judicial legislation." Post, at 25. Rather, it would give practical effect to the Legislature's enactment.*

42. Thus, in holding of the U.S Supreme Court, the conclusion should not change simply because the Congress used the word 'penalty' to describe the payment as such a law could legitimately be interpreted to be a tax. It was not argued by any of the petitioners that the exaction had become so punitive that the taxing power does not authorize it. It remains true, however, that the *"power to tax is not the power to destroy while this Court sits". (Oklahoma Tax Comm'n v. Texas Co., 336 U. S. 342, 364 (1949) (quoting Panhandle Oil Co. v.*

Mississippi ex rel. Knox, 277 U. S. 218, 223 (1928) (Holmes, J., dissenting))."

43. The learned counsel for the respondents placed heavy reliance on *Sohail Jute Mills Ltd. And others v. Federation of Pakistan through Secretary, Ministry of Finance and others* (**PLD 1991 SC 329**). In the said precedent, Iqra Surcharge on imported goods was levied by the Finance Act, 1985 which was described as an additional customs duty. Various questions arose before the Supreme Court of Pakistan. It was held that Iqra Surcharge was an additional customs duty and merely because it had been described by the label of Iqra Surcharge will not detract from the fact that it was customs duty in essence. While interpreting the term 'Surcharge' it was concluded that by its very nature the term connoted an additional levy of a duty or tax and an exaction beyond what had already been imposed. On this basis, it was observed that:-

> *"Read as a whole, it is clear that what was being imposed was an additional duty and this additional duty was in the nature of customs duty and was to be distinguished as Surcharge. It was levied only on import and only on the goods specified in the First Schedule to the Customs Act, 1969. These words made it clear that it was a customs duty. It was in addition to the customs duties already imposed. It was to be known as a 'Surcharge' and it was leviable at the rate of five per cent.*
>
> *16. In the Finance Act of 1985, the expression used was "an additional customs duty as Iqra Surcharge on the importation of the goods specified in the First Schedule to the Customs Act, 1969." Here also, it was clear from the reading of the taxing provision that an additional tax was being imposed. It was in the nature of Customs duty. It was to be distinguished as 'Iqra Surcharge'. It was leviable on*

> *import of goods only such as were mentioned in the First Schedule to the Customs Act, 1969."*

44. The importance of *Sohail Jute Mills* from the perspective of the present petitions is that in *Sohail Jute Mills*, too, by the method of construction of the statute the Supreme Court of Pakistan came to the conclusion that by the levy of Iqra Surcharge, an additional customs duty was being imposed by the legislature and, therefore, it was a valid piece of legislation and within the powers of the legislature. This provides an answer to the argument of the learned counsel for the petitioners that since the legislature does not mention by so many words in section 4B that this was in addition to the charge imposed by section 4B and, therefore, it was caught by the mischief of double taxation. On the contrary, the intention of the legislature is very clearly expressed starting from the Annual Budget Statement and by the use of the term 'super tax' to prescribe the species of the tax levied through section 4B.

45. In the end it may be stated that this Court is vested with the authority to interpret the law and in the words of Roberts C.J in *Health Care* case *"but the court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution that judgment is reserved to the people."*

46. For what has been discussed above, the provisions of section 4B of the Income Tax Ordinance, 2001 are held to be constitutional and valid. The instant

petition as well as petitions mentioned in Appendix 'A' are hereby ***dismissed***.

(SHAHID KARIM)
JUDGE

Announced in open Court on 29.12.2017

Approved for reporting.

JUDGE

⋆

Rafaqat Ali

Appendix-1

Sr. No.	***W.P Nos.***	***Title***
1.	***124089 of 2017***	***Pak Electron Ltd. V. FOP***
2.	***124109 of 2017***	***Albayrak Turizm v. F.O.P***
3.	***32910 of 2017***	***M/s EKO-KRC v. F.O.P***
4.	***18518 of 2016***	***Pak Electron Ltd. F.O.P***
5.	***32876 of 2017***	***M/s EKO-KRC v. F.O.P***
6.	***31419 of 2016***	***M/s Qarshi Industry v. F.O.P***
7.	***109280 of 2017***	***Sh. Mukhtar Ahmad v. F.O.P***
8.	***87881 of 2017***	***Rafhan Maize Products v. CIR***
9.	***32994 of 2017***	***Tayyab Manzoor Tarar v. F.O.P***
10.	***10790 of 2017***	***Maple Leaf Cement v. F.O.P***
11.	***1608 of 2017***	***M. Naeem Mukhtar v. F.O.P***
12.	***106217 of 2017***	***Coca Cola Beverages Pak. V. F.O.P***
13.	***1607 of 2017***	***Sh. Mukhtar Ahmad v. F.O.P***
14.	***1610 of 2017***	***M/s Ibrahim Fibers Ltd. F.O.P***
15.	***19294 of 2016***	***Sh. Mukhtar Ahmad v. F.O.P***
16.	***25011 of 2017***	***M/s Gharibwal Cement v. F.O.P***
17.	***39962 of 2015***	***Reliance Commodities v. F.O.P***
18.	***14591 of 2017***	***M/s Habib Rafiq Pvt. Ltd. V. F.O.P***
19.	***109268 of 2017***	***M. Naeem Mukhtar v. F.O.P***
20.	***108268 of 2017***	***Ghani Glass Ltd. V. F.O.P***
21.	***35743 of 2016***	***M/s Habib Rafiq Pvt. Ltd. V. F.O.P***
22.	***30720 of 2017***	***Z.K.B Reliable J.V v. F.O.P***
23.	***19293 of 2016***	***Muhammad Wasim Mukhtar v. F.O.P***
24.	***19292 of 2016***	***Muhammad Naeem Mukhtar v. F.O.P***
25.	***1609 of 2017***	***M. Waseem Mukhtar v. F.O.P etc***
26.	***40508 of 2015***	***M/s Ibrahim Fibers Ltd. V. F.O.P.***
27.	***109260 of 2017***	***M. Wasim Mukhtar v. F.O.P***

(SHAHID KARIM)
JUDGE

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Rafaqat Ali`