

IN THE HIGH COURT OF SINDH, KARACHI

C.P. NO. D- 6377 OF 2014

PRESENT:**MR. JUSTICE AQEEL AHMED ABBASI**
MR. JUSTICE ARSHAD HUSSAIN KHAN*Continental Biscuits Limited*
Versus
Federation of Pakistan and others

Petitioner: Through M/s. Atif Chaudhary, Advocates
Respondent No.1: Through Mr. Mir Hussain, Standing Counsel
Respondent No.2: Through Mr. Rafiq Ahmed, Advocate
Date of Hearing: 24.01.2017

JUDGMENT

ARSHAD HUSSAIN KHAN, J. The petitioner above named through instant constitutional petition has sought following reliefs:-

- I. *Declare that respondent No.2 does not have power to impose any fee or tax on shop boards, signboards or on any advertisement.*
- II. *Declare that the Claim/Application No.56 of 2014 pending before the Cantonment Magistrate is coram non judge, unlawful, without jurisdiction and ultra vires the constitution.*
- III. *Declare that the respondent No.2 cannot delegate any powers in particular to charge, levy, collect or recover tax or fee to a private person including respondent No.3 and any such delegation is unlawful and without any lawful authority.*
- IV. *Declare that any delegation of power to respondent No.3 is unlawful and without any lawful authority.*
- V. *Restrain respondents from demanding or collecting any advertisement fee or tax and from taking any coercive action against the petitioner or its retailers in relation to the petitioner's advertisements in particular shop boards, posters, signboards, etc.*
- VI. *Grant costs of the petition; and*
- VII. *Any other additional/alternate relief as this court may deem fit and appropriate.*

2. Brief facts as averred in instant petition are that the petitioner is a company, inter alia, engaged in the business of manufacturing and selling of biscuits since 1984. Under the trade name of 'Lu Biscuits', the petitioner manufactures different famous brands of biscuits which are widely sold and distributed throughout Pakistan and as such richly contribute to the industrialization of the country besides is a major source of tax revenue for the government. It is also averred that the nature of the petitioner's business necessitates an advertisement of its different products for which purpose certain agreements and terms and conditions are made with the private vendors/retailers to place the petitioner's posters, boards at their shops across Pakistan. The spaces on which such advertisements are made are on private properties for which appropriate remuneration/service charges are paid to such private parties. It is further averred that the petitioner in the year 2012 had received a purported demand of advertisement 'fee' from one MFQ Vision claiming to be a contractor of respondent No.2 and empowered by respondent No.2 for the collection of advertisement fee. The notice required the petitioner to pay an exorbitant amount of Rs.10,72,400/= as advertisement fee and the petitioner was threatened of coercive action by removing of petitioner's advertisements or posters pasted on the private retailer's shops or displays. The petitioner through their counsel replied to the said notice whereby it was categorically informed that in the present scheme of Cantonment Act, 1924, there exists no provision which allows respondent No.2 or the said MFQ Vision to charge, collect or recover any advertisement fee from the petitioner. Upon said reply, MFQ Vision never sent any demand or letter to claim any advertisement fee. However, the petitioner now, after almost two years, received another notice from Cantonment Magistrate claiming that respondent No.3 has filed a recovery claim No.56/2014 against the petitioner for an amount of Rs.10,00,000/- in the garb of advertisement fee whereas the petitioner has never received any letter from respondent No.3 and the first notice or any such demand was received in the form of notice by Cantonment Magistrate. It is also averred that the Cantonment Magistrate cannot entertain any such claim by a private person further more the said proceedings are malafide, coram non

judice and without jurisdiction. The petitioner having no other alternate adequate and efficacious remedy, filed present proceedings.

3. Upon service of notice of the present petition, respondent No.3 filed the counter affidavit to petition, which was sworn by Revenue Superintendent, Cantonment Board Hyderabad. Respondent No.3, In the said counter affidavit, while denying the allegations leveled in the petition it has been stated that in the Cantonment Act, 1924, there exists provisions which allows respondent No.2 or the MFQ vision to charge, collect or recover any advertisement fee from the petitioner. It is also stated that the bye-laws regarding display of bills and advertisement and of the position, size shape or name boards, signboards and sign posts have been made by the Cantonment Board Hyderabad in exercise of the powers conferred by clause (23) of Section 282 of the Cantonment Act, 1924 (II of 1924) for general information in the gazette of Pakistan Islamabad dated 19.07.2006, SRO 743(1)2006 having previously published as required by sub-section (1) of Section 284 of the said Act and in view of said gazette notification the Cantonment Board is fixing the rate and charging on yearly basis and through Cantonment Board Resolution allowing contractor to charge the advertisement charges according to the rate fixed by the Cantonment Board. It is also stated that the petitioner has failed to make the payment of outstanding dues and hence the Cantonment Board has referred his case to respondent No.4 Cantonment Magistrate who is authorized to recover the outstanding dues. It is also stated that adequate remedy has been provided under the provision of Section 284 of the Cantonment Act, 1924. It is also stated that in case the contractor has charged the exorbitant rate more than the rate fixed by the Cantonment Board then such matter may be reconsidered and settled before the Cantonment Magistrate or the Executive Officer, Cantonment Board Hyderabad Sindh in case of filing any such complaint.

4. Learned counsel for the petitioner, besides oral submissions has also filed written synopsis of arguments, whereas learned counsel for the respondents as well as learned Addl. A.G. submitted oral arguments only.

5. Learned counsel for the petitioner during the course of his arguments has contended that Respondent No.2-Cantonment Board Hyderabad, [hereinafter referred to as the **Board**] does not have any authority or power to charge any advertisement fee. It is further contended that the only power existing under the Cantonment Act, 1924 is regarding imposition or charging of tax under Sections 60 to 70 of Cantonment Act, 1924. The purported advertisement 'fee' is not termed as tax and therefore unless the procedure provided under Sections 60 to 70 of Cantonment Act are not followed, no such tax can be claimed, thus any demand of advertisement fee by respondent No.2 and 3 is illegal, unjustified, and without jurisdiction. It is also contended that powers to impose tax or fee or charge under any fiscal law has to be strictly construed in favour of the person on whom the charge, fee or tax is sought to be imposed. Further contended that the respondents are neither entitled to impose payment of a 'fee' nor a 'tax' from the petitioner except what has been provided for under the Cantonments Act and in the manner laid out therein. Further contended that the power to impose tax vests solely and exclusively with the Parliament or in terms of Article 77 of the Constitution of the Islamic Republic of Pakistan, 1973, and such power cannot be delegated. To impose a levy in the nature of the impugned advertising fee/shop board charges would amount to delegation of power to respondents No.1 and 2 through the provisions of the Cantonments Act, such delegation would be bad in law and unconstitutional, therefore, the same is liable to be set aside. It is further contended that it is now a settled principle of law that a fee can only be charged or levied if the concerned authority is providing certain services in relation to the act on which such fee is being charged. It is also contended that respondent No.2 renders no service in relation to the shop boards or signboards affixed on a private person's properties that would entitle it to charge a fee. Furthermore, the posters, shop boards in the instant case are all affixed on private properties, thus, the demand or levy of advertisement fee by respondent No.2 and respondent No.3 is unlawful and without jurisdiction. It is also contended that the demand and proceedings before the Cantonment Magistrate are contrary to Articles 10A, 18, 23, 24 and 25 of the Constitution of Pakistan, 1973. It is also contended

that section 286-A of Cantonment Act 1924 does not permit respondent No.2 to delegate the public functionaries of collection of tax or fee to a private person and the delegation of authority to collect tax or fee to respondent No.3 under the garb of advertisement fee is impermissible. Further contended that the Cantonment Magistrate under Section 259 of the Cantonment Act 1924 is only empowered to adjudicate recovery of taxes or monies 'recoverable from such person'. Further contended that the purported advertisement tax or fee has no sanction of law and thus this demand of respondent No.2 and 3 is not recoverable from the petitioner and therefore the proceedings are unlawful, *coram non judice* and without jurisdiction. Furthermore, any suit or application filed before the Cantonment Board has to be filed by the Board itself and not by any third person. In the instant case respondent No.3 has itself filed the purported application, which is not maintainable and cannot be entertained by the Cantonment Magistrate as it does not have jurisdiction to entertain such purported claim. It is also contended that purported demand of Rs.1 million that too without substantiating the rate or criteria of such tax or fee is unreasonable, arbitrary and violative of Article 25 of the Constitution or to use the Cantonment Magistrate for such recoveries is based upon malafides, hence the proceedings before the Cantonment Magistrate are an abuse of process of law and malafide. The learned counsel in support of his arguments has relied upon the following case law:

(i) **2015 SCMR 1385**

(Hyderabad Cantonment Board v. Raj Kumar)

In this case the Hon'ble Supreme Court while upholding the decision of the High Court of Sindh, held that extraction of money in any form may it be tax, cess, toll fee, charge or rate or levy by whatever nomenclature it was classified, could be extracted by the government and/or public authority under a valid legislative instrument by the competent legislature. Further held that Section 200 of Cantonments Act, 1924, mentioned levy of stallages, rent and fee for providing stall, shop, standing shed, pen and for other defined commercial activities on the vendors dealing in goods and for the slaughter of animals in public market or public slaughter house respectively and that too subject to sanction by the competent authority. Since the parking fee was not referred to in S. 200 of Cantonments Act, 1924, therefore, the Cantonment Board had no authority to enlarge the scope of a charging section, and include conjectures and or read some activity which was not envisioned or was not the contemplation of the charging section i.e. S. 200 of Cantonments Act, 1924. Further held that although power to impose parking fee was available under the Cantonments Ordinance, 2002, but said Ordinance had not as yet been enforced as Federal Government had not issued any notification so far as

to make the Cantonments Ordinance, 2002, operational. Consequently the appeal was dismissed.

(ii) **2012 CLC 1124**
(Exide Pakistan Ltd. v. Cantonment Board)

In this case imposition of "Shop Board Fee" under section 200 of the Cantonment Act, 1924 was challenged. The High Court examined various provisions of the Act of 1924 and came to a conclusion that "Shop Board Fee" appears to be an entirely different genre of fee more akin to advertisement/Signboard [fee] of the shop, which did not fall within the contemplation of stallages, rent and fee within the sanction of section 200 of the Cantonment Act, 1924.

(iii) **PLD 1992 Karachi 427**
(Treet Corporation Ltd. v. Government of Pakistan)

In this case the division bench of this court held that the Power to levy any marking fee which was in the nature of a charge having not been conferred on executive by law, citizens could not be burdened with any such fee as power to levy fee must be conferred by statute. Marking fee could not be levied through rule or regulation when, law itself did not give power to Federal Government to levy same.

(iv) **PLD 2006 Karachi 648**
(Pioneer Traders v. Province of Sindh).

In this case the Division Bench of this Court held that any charge or levy which had not been sanctioned in the main statute could not be imposed under Rules making powers delegated by the Statute. Taxes under the Constitution could only be levied under an Act of Parliament or a Provincial Assembly by or in terms of Article 77, or 127 of the Constitution. It is also that Provincial Government, while levying assessment fee, vend fee and surcharge on assessment fee, had exceeded its jurisdiction and had violated provisions of Arts.77 and 127 of the Constitution. Consequently, the levy of assessment fee, vend fee and surcharge on assessment fee, was declared ultra vires the Constitution and same was struck down.

(v) **PLD 1971 Karachi 514**
(Haji Hashmatullah and Others v. Karachi Municipal Corporation and Other)

In this case the order passed by Commissioner of Karachi under Municipal Administration Ordinance 1960, whereby resolution passed by Municipal Corporation to lease out plots to petitioner's Association was quashed, was challenged. It was urged that the Commissioner as Controlling Authority under Municipal Administration Ordinance 1960 enjoys unlimited and absolute powers to rescind any resolution and withhold the assent or pass any order according to his discretion and the individual discretion so exercised was not justiciable. The court held that a public functionary does not enjoy despotic power to act in whatever manner he likes according to his whims. An authority created by the statute must act with the scope of the powers conferred by the

Statute and observe the limitations imposed by it. Deviation from law cannot be allowed to go unnoticed and unchecked. It is also held that jurisdiction depends upon the existence of certain circumstances, those circumstances, must be shown to exist to provide a justification for the exercise of jurisdiction. It is also held that the rules are framed under a statute and therefore are subordinate to it. Rules cannot override or abridge the provisions of the statute now can have wider scope. It is settled position of law that if the rules deviate from statute and confer excessive powers, they are repugnant to the statute and are void to the extent of the repugnancy. Thus it follows that the provisions of a statute must prevail against anything contained in the rules and therefore, the rules cannot be allowed a determinative effect.

(vi) **2002 PTD 121**

(Kohinoor Textile v. Federation of Pakistan)

It is equally settled law that rules made under delegation of powers cannot go beyond the mandate conferred by the parent statute. Even if Section 37, hypothetically speaking had delegated to the CBR the power to introduce a charge or a levy, the said delegation would be bad since it is now pretty much settled that the power to impose or introduce a tax, levy or a fee is only legislative functions which cannot be delegated

(vii) **1999 SCMR 1402**

(Collector of Customs v. Sheikh Spinning Mills)

In this case Hon'ble Supreme Court define and distinguish the Tax and Fee. It is held that Tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered whereas Fee may be generally defined to be a charge for a special service rendered to individuals by some governmental agency. Further observed that as far as fee is concerned, it is distinguishable from tax. The distinction between "tax" and "fee" lies primarily in the fact that a tax is levied as a part of common burden while a fee is paid for a 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 licence is secondary to the primary motive or 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 a tax, the particular advantage if it exists at all, is an incidental result of State action. Unless the fee is earmarked or specified for rendering services to the payee, it would amount to a tax and not a fee.

(viii) **1992 SCMR 750**

(Government of North – West Frontier Province v. Rahimullah)

In this case also the term Tax and Fee was defined and discussed

(ix) **SBLR 2003 Sindh 1345**

(All Pakistan Textile Mills Association v. Province of Sindh)

In this case it is, inter alia, held as follows:

“It may be explained at the outset that though the Sindh Local Government Ordinance used the generic expression “tax” to cover

any tax, fee or cess the basic distinction between a tax and a fee is recognized by several pronouncement of the Honourable Supreme Court i.e. *Muhammad Ismail v/s Chief Cotton Inspector* (PLD 1966 SC 388), *Government of N.W.F.P.v/s Rahimullah* (1992 SCMR 750) and *Collector of Customs v/s Shaikh Spinning Mills* (1999 SCMR 1402) need to be kept in view. The consistent view of Honourable Supreme Court appears to be that while both tax and fee are compulsory exactions the essential difference lies in the fact that while tax is levied for the purposes of the general revenues of the state a fee is imposed for the purposes of rendering specific services and its burden falls upon to whom such services are provided. It has therefore been held that while it may not be possible to charge fee only on the basis of actual value of such service collected with mathematical precision some correlations between the value of services and the quantum of fee must exist.”

(x) **2014 MLD 957**
(Dubai Islamic Bank Pakistan Ltd. V. Federation of Pakistan)

In this case it is held that Board without providing any space or service could not demand under law any fee or tax from Bank. It was observed that providing spaces was pre-condition for imposition of tax. Furthermore, Board could not entrust duty of collecting charges, fees and taxes to a contractor. It is held that Collection of advertisement fee, if permissible under law, could not be entrusted to a contractor.

6. Conversely, learned counsel for the respondents while reiterating the contents of counter affidavit filed on behalf of the respondents has controverted the arguments of the learned counsel of the petitioner. At the outset, learned counsel, upon the query of this court, has very candidly stated that the subject levy is advertisement ‘fee’ and not ‘tax’. The learned counsel urged that Cantonment Board Hyderabad in exercise of the powers conferred by clause (23) of Section 282 of the Cantonment Act, 1924 (II of 1924) has made the bye-laws regulating display of bills and advertisement, and of the position, size, shape or name boards, signboards and signposts in the Hyderabad Cantonment. The said bye-law subsequently for general information has also been gazetted through notification bearing SRO 743(1) 2006 dated 19.07.2006 issued by ministry of defence. He further urged that after promulgation of the above bye-laws the Hyderabad Cantonment is legally entitled to levy advertisement fee and collect the same through their contractors. He further urged that in case the petitioner feels that the contractor is charging exorbitant rate more than the rate fixed by the Cantonment Board, in that case the matter may be reconsidered and settled before the Cantonment Magistrate or the

Executive Officer, Cantonment Board Hyderabad Sindh by filing any application/complaint. He further urged that case law cited by the petitioner is not applicable to the present case. He lastly argued that the petition is not maintainable and liable to be dismissed. Learned counsel in support of his stance in the case has placed reliance on the following case law:-

2012 MLD 415 (*Khawaja Muhammad Asghar v. Government of Pakistan through Secretary, Ministry of Defence, Islamabad and 3 others*)

In this case Petitioner had challenged levy of tax contending that TIR Tax was being charged on the basis of S.R.O. issued by Ministry of Defence in exercise of powers conferred under S.61 of Cantonments Act, 1924; that since the S.R.O. was issued in 1977 and the plot of the petitioner was included in the Cantonment area from the year 1997, said S.R.O. could not be made applicable to the case of the petitioner. This court held that once a tax had been levied within the jurisdiction of a Taxing Authority, then addition of any area to the jurisdiction of such Authority would make all levies of taxes and charges and laws of the Authority applicable to such additional area. Laws could not be enacted afresh to have their effect on the additional/extended area.

1986 SCMR 1308 (*CANTONMENT EXECUTIVE OFFICER and another v. BURSHANE (PAKISTAN) LTD and others*)

In this case the respondent had challenged the levy of Octroi in respect of Empty Liquefied Petroleum Gas Cylinders brought in the area of Cantonment Board for refilling. Stance of the respondent was that Octroi duty was payable only once when they were imported for first time within limits of Cantonment Board and not repeatedly. It was held that Cylinders were brought within Cantonment area for use therein and it was immaterial whether brought for first time or repeatedly. Further held that appellant was entitled to levy of octroi duty each time because of being brought for use within said limits. The decision of High Court was found to have erred in holding that impugned notification could have no legal effect. Appeal was accepted with costs.

Beside above learned counsel also relied upon order dated 16.02.2010 passed by this court in HCA No. 242 and 243 of 2009. For the sake of ready reference relevant portion of the said order is reproduced as under:-

“Appellant, Hyderabad Cantonment Board has impugned the orders dated 25.5.2009 whereby CMA No.3265/09 under Order 39 Rule 1 and 2 CPC was granted, earlier interim order dated 8.4.2009 were modified to be applicable against the Cantonment Board and the National High Way Authority. It appears that pursuant to the judgment in the case of Rajkumar Vs. Cantonment Board (2006 MLD 549) the Court was persuaded to note that executive official of the Cantonment Board was not authorized or had jurisdiction under the law to prescribe or enforce recovery of the fees in respect of the bus

stand. Such powers are vested with the Cantonment Board. According to the learned counsel when the impugned order was passed it was not brought to the notice of the learned Single Judge that the requisite rules were already framed on 17th July 2006 as gazetted on 19th July 2006 such byelaw were framed for the administration and management of the general bus stands in Hyderabad Cantonment and further to regulate the establishment of the bus stands and the truck stands within the local limits of the Cantonment. The rules also prescribed the manner in which the fee was to be recovered and sanctioned. It is stated that such rules were framed pursuant to the judgment referred above. The respondent No.1 was served for earlier date as well for today's date, but none is in attendance.

Learned counsel for the National Highway Authority in both the appeals and the learned Additional Advocate General conceded to such legal position. It is however, stated that the recovery could only be made pursuant to subsequent issuance of the notification. Mr. Muhammad Rafiq, advocate concedes to the legal position and states that the recovery could be effected from the date of the notification.

Accordingly, we would set aside the impugned order on the referred CMA No. 3265/09 and it is further held that the Cantonment Board may recover the amount as prescribed under rules referred herein above from the date of publication of such notification. Both the appeals stand disposed of in the above terms. Learned trial Court is directed to decide all the pending applications in suit. Office is also directed to fix the suit preferably in the second week of March, 2010 on a date other than Monday.”

7. We have heard learned counsel for the petitioner and respondents as well as learned Addl. A.G. Sindh and with their assistance perused the record and the relevant laws.

8. It is well settled position in law that fiscal and charging statutes are to be strictly construed. No Government or Authority can compulsorily extract money from any class of person either in the form of tax, fee, charge or levy; unless specifically authorized under the law. In this regard Articles 77, 162 and 163, of the Constitution of Pakistan, 1973 may be referred. For the sake of convenience, the same are reproduced as under:

“Tax to be levied by law only

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

Prior sanction of President required to Bills affecting taxation in which Provinces are interested

162. No Bill or amendment which imposes or varies a tax or duty the whole or part of the net proceeds whereof is assigned to any Province, or which varies the meaning of the expression "agricultural income" as defined for the purposes of the enactments relating to income-tax, as defined for the purposes of the enactments relating to income-tax, or

which affects the principles on which under any of the foregoing provisions of this Chapter moneys are or may be distributable to Provinces, shall be introduced or moved in the National Assembly except with the previous sanction of the President.

Provincial taxes in respect of professions, etc.

163. A Provincial Assembly may by Act impose taxes, not exceeding such limits as may from time to time be fixed by Act of Majlis-e-Shoora (Parliament), on persons engaged in professions, trades, callings or employments, and no such Act of the Assembly shall be regarded as imposing a tax on income.”

9. The case of the petitioner precisely is that respondent No.2, under the Cantonment Act, 1924, does not have the authority or power to charge any advertisement fee. In order to ascertain such fact we have to examine the incident of taxation and manner in which tax, fee, charge or levy could be imposed under the Cantonments Act, 1924. In this regard for the sake of ready reference, the relevant provisions of the Cantonment Act, 1924 are reproduced as under:-

60. General power of taxation:-

(1) The Board may, with the previous sanction of the Central Government, impose in any cantonment any tax which, under any enactment for the time being in force, may be imposed in any municipality in the State wherein such cantonment is situated:

(2) Any tax imposed under this section shall take effect from the date of its notification in the Official Gazette.

61. Framing of preliminary proposals:-

When a resolution has been passed by the Board proposing to impose a tax under section 60, the Board shall in the manner prescribed in section 255 publish a notice specifying-

(a) the tax which it is proposed to impose;

(b) the persons or classes of persons to be made liable and the description of the property or other taxable thing circumstance in respect of which they are to be made liable; and

(c) the rate at which the tax is to be levied.

62. Objections and disposal thereof:-

(1) Any inhabitant of the cantonment may, within thirty days from the publication of the notice under section 61, submit to the Board an objection in writing to all or any of the proposals contained therein and the Board shall take any objection into consideration and pass orders thereon by special resolution.

(2) If the Board decides to modify its proposals or any of them it shall re-publish the modified proposals in the manner provided by section

61 indicating that the proposals are in modification of the proposals previously published; and the provisions of sub-section of this section shall apply to such modified proposals.

(3) When the Board has finally settled the proposals, it shall submit them along with the objections, if any, made in connection there with to the Central Government through the Officer Commanding in-Chief, the Command.

63. Imposition of tax:-

The Central Government may authorize the Board to impose the tax either in the original form or, if any objection has been submitted, in that form or any such modified form as it thinks fit]

200. Levy of Stallages, rents and fees:--- A Board may

- (a) charge for the occupation or use of any stall, shop, standing, shed or open in a public market, or public slaughter-house, or for the right to expose goods for sale in a public market, or for weighing or measuring goods sold therein, or for the right to slaughter animals in any public slaughter-house, such stallages, rents and fees as it thinks fit; or
- (b) with the sanction of the Competent Authority, farm the stallages, rents and fees leviable as aforesaid or any portion thereof for any period not exceeding one year at a time;
- (c) or put up to public auction, or with the sanction of the Competent authority, dispose of by private sale, the privilege of occupying or using any stall, shop, standing, shed or open in a public market or public slaughter-house for such term and on such conditions as it thinks fit.

255. Method of giving notice:- Every notice which, by or under this Act, is to be given or served as a public notice or as a notice which is not required to be given to any individual therein specified shall, save as otherwise expressly provided, be deemed to have been sufficiently given or served if a copy thereof is affixed in such conspicuous part of the office of the Board or in such other public place, during such period or is published in such local newspaper or in such other manner, as the Board may direct.

From the bare perusal of the above provisions, it transpires that Cantonment Board might, with previous sanction of Central Government, impose in any Cantonment, any tax which, under any enactment for the time being in force, might be imposed in any Municipality wherein such Cantonment was situated, after passing of resolution for imposition of tax, Board has to publish a notice specifying the proposals to persons or classes of persons who were to be made liable for tax along with description of property and other taxable things. Proposals have to be published for objections and after hearing objections, final proposals are to be placed before Central

Government. In the present case from the perusal of record, it transpires that respondents have failed to place on record any document substantiating that they have even complied with the requirements of sections 61 to 63 of Cantonment Act 1924.

10. This court in the case of Rajkumar v. Hyderabad Cantonment Board (2006 MLD 549) had examined the vires of parking fee; levied by the Cantonment Board Hyderabad on commercial vehicles, and it was held that Tax toll or fee could not be imposed and/or levied by any government agency without appropriate legislative authority and since there were no provisions in the Cantonments Act, 1924, empowering Cantonment Board to charge parking fee, such levy was without lawful authority. This Court while dealing with section 200 of Cantonments Act, 1924, also held that exclusive powers conferred upon Cantonment Board to charge fee for the purposes prescribed therein, could not be exercised by anyone else including the Executive Officer of the Board and the parking fee by the Board was declared by High Court as illegal, null and void. Such view was also reiterated in the case of Munawar Yunus and others v. Karachi Cantonment Board (2011 MLD 1006). The judgment passed in the case of Raj Kumar was subsequently upheld by the Hon'ble Supreme Court in the case of Hyderabad Cantonment Board v. Raj Kumar and others (2015 SCMR 1385).

11. This Court in another case viz. Exide Pakistan Limited v. Cantonment Board Clifton and others (2012 CLC 1124) while examining section 200 of Cantonment Act has observed as under:

“it is quite clear that a Board indeed has authority to levy "Stallages, rents and fees" in respect of (i) "occupation or use of any stall, shop, standing, shed or open or (ii) for the right to expose goods or (iii) for weighing or measuring goods in "public market". Such power to impose stallage, rent and fee is not unqualified, but could only be used with the prior approval and sanction of the Competent Authority [i.e. the Chief of Army Staff or any other officer appointed by the Federal Government per section 2 (viii)]. Nothing has been placed on record to show that even such levy has approval of the competent authority. The provision relied upon clearly speaks that the Board could exercise its authority to levy "Stallages, rents and fees" in respect of shops, stall etc. situated in the "Public Market" which is defined in section 2(xxx) of the Cantonments Act, which means "a market maintained by a Board". Admittedly shop of the Petitioner is not situated in public market but in private commercial premises. Even other wise "Shop Board Fee" appears to be entirely different genre of fee more relatable or akin to advertisement/signboard of the shop, which does not fall within the contemplation of "Stallages,

rents and fees" within the contemplation of at least section 200 of the Cantonments Act, 1924. No other provision of Cantonments Act, 1924 was pointed out by Mr. Jamal Ansari, learned counsel for the Board, which may justify or sanction or imposition of impugned "Shop Board Fee".

12. In view of the foregoing we are of the humble opinion that the Board has no authority to grant or approve "shop Board Fee", even approval of charge is itself colourable authority not vested in the Board, accordingly the impugned demand is struck down. Board has no authority to collect "shop board fee" from a private commercial premises unless of course law is amended to vest Board with such authority."

[underlining is to add emphasis]

12. Learned counsel for the respondents while arguing his case has urged that the case of *Raj Kumar (2015 SCMR 1385)* is not applicable to the present case as at relevant time when the Cantonment Board Hyderabad imposed parking fee, there was no bye-law in existence in favour of Cantonment, Hyderabad, which could empower the said Cantonment to collect parking fee from the bus owners who parked their buses at the cantonment bus stand. Whereas, in the present case, per learned counsel, bye-laws regarding display of bills and advertisement and of the position, size shape or name boards, signboards and sign posts have been framed by the Cantonment Board Hyderabad in exercise of the powers conferred by clause (23) of Section 282 of the Cantonment Act, 1924 (II of 1924) and it has also been published in gazette of Pakistan Islamabad dated 19.07.2006 SRO 743(1)2006 as required by sub-section (1) of Section 284 of the said Act and in view of said gazette notification the Cantonment Board is fixing the rate and charging advertisement fee on yearly basis and in this regard, the Respondent Cantonment through a Board Resolution has out source the collection of above Fee by appointing contractor. Per learned counsel since the gazette notification in respect of display of bills and advertisement does empower the Respondent cantonment to levy advertisement fee and collect the same, therefore, the demand of advertisement fees is not adversely affected by the above-referred judgments.

13. From perusal of the provision [section 60 to 63] of the Cantonment Act 1924, reproduced in the preceding paras, it appears that respondent No.2 {Cantonment} may levy tax but such a power has

a precondition, however in the said provisions the word ‘fee’ is not appearing. It is a well settled rule that when a parent statute [the Governing Law] does not empower the levy of fee, then levy of such a fee through a delegated legislation in the shape of Bye-laws is not permissible. Moreover, Section 282(23) of the Cantonment Act, 1924 only empowers the Board to frame bye-laws to regulate the items mentioned in the relevant statutory provision/enabling enactment and does not empower them to levy a fee. For the sake of ready reference Section 282(23) of the Cantonment Act 1924 is reproduced as under:

“282. Power to make bye-laws. Subject to the provisions of this Act and of the rules made thereunder, a ⁵[Board] may, in addition to any bye-laws which it is empowered to make by any other provision of this Act, make bye-laws to provide for all or any of the following matters in the cantonment, namely :-

(1).....
 (2).....
 (3).....

 (23) the regulation of the posting of bills and advertisements, and of the position, size, shape or style of name-boards, sign-boards and sign-posts”

Furthermore, the terms 'fee' and 'tax' are two distinct terms. Tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered whereas fee may be generally defined to be a charge for a special service rendered to individuals by some governmental agency or a Local Council under the principle of *quid pro quo*. In this regard, reliance may be placed on the case of Collector of Customs and others v. Sheikh Spinning Mills (1999 SCMR 1402), Judgment of the House of Lords titled ‘McCarthy and Stone (Developments) Ltd. v. London Borough of Richmond upon Thames’ reported in (1994 SCMR 1393) and the case of Lucky Cement Factory v. Government of N.W.F.P (2013 SCMR 1511).

14. In the present case, the Cantonment Board Hyderabad is not providing any service to the petitioner for displaying and advertising its products on the bill boards/sign boards of shops on its private vendors/retailers shops. This, in fact, is a private arrangement between the petitioner and the shopkeepers. The petitioner uses bill board/sign

boards of shop to advertise its products, at the expense of the petitioner. In the circumstances, the money demanded by the respondents under the name of 'advertisement fee' without providing any services in respect thereof is declared illegal on the above principle of quid pro quo.

15. As regards the issue of collection of levy (advertisement fee) through a private contractor (respondent No.3), learned counsel for the respondents has urged that the Cantonment Board under the law is empowered to delegate its power to collect the subject levy. In this regard, he has relied upon Section 286-B of the Cantonment Act 1924. Here, it would be advantageous to reproduce the above referred section:

“286B. Delegation of powers.-(1) The Federal Government may, by notification in the official Gazette, delegate any of its powers under this Act or the rules made thereunder to any officer subordinate to it subject to such conditions or limitations as may be specified in the notification.

(2) The Board may, with the prior approval of the Federal Government, by resolution, delegate all or any of its powers under this Act or the rules made there under to any of its officers subject to such conditions or limitations as may be specified, in the resolution.

[Underlining is to add emphasis]

From the bare perusal of the above said section, it is apparent that Respondent Cantonment Board cannot delegate any power to a private person and can only delegate the same to its own officers. Moreover, the delegation of sovereign right to levy or collect any tax by the State to private person is otherwise contrary to the constitutional mandate. Thus, the delegation of power to respondent No.3 to collect the subject levy is also unlawful.

16. In the present case, though respondent No.2 (Cantonment Board Hyderabad) has framed bye-laws but the same are of no help to them as even then the Cantonment Board City could not demand advertisement fee from the petitioner for the reason that no services are being provided by the Cantonment Board to the petitioner as the boards in question have been installed on private vendors/retailer's shops in consequence of some mutual arrangement between the petitioner and the shops owners.

17. For the reasons discussed above, the imposition of advertisement fee by the respondents without satisfying the preconditions and without providing any corresponding service or facility and issuance of the recovery notices by the contractors are declared illegal and without jurisdiction. Consequently, proceeding pending before the learned Cantonment Magistrate is quashed.

This petition is accepted.

JUDGE

JUDGE

Karachi;

Dated: _____