JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

WRIT PETITION NO.118 OF 2022.

ICI PAKISTAN LIMITED

Vs.

APPELLATE AUTHORITY, BOARD OF TRUSTEES OF THE EMPLOYEES OLD AGE BENEFITS INSTITUTION AND OTHERS

Petitioner by	**:**	**Barrister Yousaf Khosa, Malik Omair Saleem and Abdullah Alim Qureshi, Advocates.**
Respondent No.1 & 2 by	**:**	**Mr. Khurram Mahmood Qureshi, Advocate.**
Respondents No.3 by	**:**	**Raja Rafique Janjua, Advocate.**
Date of Hearing	**:**	**09.12.2022.**

SAMAN RAFAT IMTIAZ, J.

1. Through the instant petition the Petitioner [ICI Pakistan Limited] has assailed the Order dated 24.11.2021 ("**Impugned Order**") passed by the Respondent No.1 [Appellate Authority, Board of Trustees of the Employees Old-Age Benefits Institution] whereby the appeal filed by the Petitioner against the

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Decision dated 24.10.2017 ("**Decision**") passed by the Adjudicating Authority-III, Islamabad has been dismissed.

2. The brief facts as per the Memo of Petition are that the Petitioner is a public limited company that manufactures a diversified range of products including soda ash. The Petitioner received letters dated 22.11.2013 and 12.12.2013 from the Respondent No.2 [Employees Old-Age Benefits Institution, (Jehlum Region)] requesting information and notifying that its team will visit the Petitioner's premises to check its record. Thereafter, the Respondent No.2 paid several visits to the Petitioner's establishment in order to check the relevant record for the period of July, 2010 to June, 2012 following which Demand Notice dated 23.08.2014 ("**Demand Notice No.1**") was issued alleging that no payment has been deposited by the Petitioner on behalf of the drivers and other employees of the 10-15 goods transport companies engaged by the Petitioner for the distribution of its products all over Pakistan and in view thereof an amount of Rs.3,780,000/- was demanded as payment of contribution under the Employees' Old-Age Benefits Act, 1976 ("**EOB Act, 1976**") and statutory increase in respect of 300 allegedly insured persons for the period from July, 2010 to June, 2012. The Petitioner responded vide reply dated 30.08.2014 stating that the Petitioner is not responsible for registration of truck drivers or other personnel who are in the employment of independent transport companies which are separate establishments.

3. The Respondent No.3 [Shaukat Brothers Goods Forwarding Agency] is the transport contractor of the Petitioner for transport of soda ash. It is further stated in the memo of petition that the Respondent No.3 is itself duly registered with the Respondent No.2 as an 'employer' and 'establishment' under Registration No. BCCO202 and has been making its own contributions/payments as required by law. The Respondent No. 2 nevertheless persisted in its demands vide letters dated

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19.09.2014, 23.10.2014, 23.12.2014, and 20.10.2015. The Petitioner replied vide letters dated 30.08.2014, 27.11.2014, and 16.01.2015 reiterating that there is no employer/employee relationship between the Petitioner and the persons engaged by the Respondent No.3. According to the Petitioner it advised the Respondent No. 3, in good faith, to meet with the officials of the Respondent No. 2 to clarify the matter but the inspection of the record of the Respondent No.3 could not take place as the concerned official of Respondent No.2 was unavailable on account of having been transferred.

4. Subsequently, the Respondent No. 2 allegedly acting with undue haste and without affording an opportunity of hearing to the Petitioner, erroneously and unlawfully invoked Section 12(3) of the EOB Act, 1976 and issued the Demand Notice dated 28.12.2015 ("**Demand Notice No.2**") to the Petitioner claiming an aggregate amount of Rs.4,536,000/- as employer's share of contribution under Section 9 of the EOB Act, 1976 in respect of the alleged 300 insured persons without any supporting evidence or any reference to the material on the basis of which such conclusion was reached.

5. The Petitioner, being aggrieved of the Demand Notice No.2, lodged a complaint before the learned Adjudicating Authority under Section 33 of the EOB Act, 1976. However, the Adjudicating Authority rejected the complaint of the Petitioner vide the Decision holding that the Respondent No. 2 is at liberty to proceed against the Petitioner in respect of the alleged default in payment of contribution in accordance with the EOB Act, 1976. The Petitioner preferred an appeal before the Respondent No. 1, which has been dismissed vide the Impugned Order while the Decision of the Adjudicating Authority has been upheld and the Respondent No. 2 has been directed to recover the outstanding dues from the

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Petitioner being 'principal employer' for the period from July, 2010 to June, 2012 in accordance with the law.

6. The learned counsel for the Petitioner submitted that the Petitioner is not the 'employer' as defined in Section 2(c) of the EOB Act, 1976 of the truck drivers or other personnel of the Respondent No. 3 nor are they in the 'insurable employment' of the Petitioner and as such they do not qualify as the Petitioner's 'employees' or 'insured persons' as per the meaning ascribed to such terms in the EOB Act, 1976. He argued that the Respondent No.1 was unable to appreciate that the Petitioner has not directly or through any other person employed the drivers/other employees of the Respondents No.3 as the Transportation Agreement between the Petitioner and Respondent No.3 is that of transportation services. The Respondent No. 3 has himself admitted that the Petitioner merely pays 'freight' to the Respondent No.3 which proves and establishes that the Petitioner does not pay any salaries or wages to any persons engaged by the Respondent No.3 and as such the Petitioner has no nexus or privity of contract with the persons engaged by the Respondent No.3. He stressed upon Section 2(e)(v) of the EOB Act, 1976 which includes a Road Transport Company within the definition of 'establishment'. He drew the attention of this Court to Section 2(7) and Section 3A of the Road Transport Workers Ordinance, 1961 (" **Road Transport Ordinance**") to submit that a Road Transport Company such as Respondent No.3 falls under the definition of 'employer' as per the EOB Act, 1976. He relied upon *Farid Company (Pvt.) Ltd. Vs. Vice-Commissioner, Pessi,* 2012 SCMR 1428, *Muhammad Nawaz Vs. Member Judicial Board of Revenue*, 2014 SCMR 914, *Fauji Fertilizers Company Ltd. Vs. National Industrial Relations Commission*, 2014 PLC 10, *Messrs Agri Auto Industries Ltd. Vs. Employees' Old-Age Benefit Institution, Hub Region*, 1990 PLC 21, *Farid Ahmad Vs. Pakistan Burmah-Shell Ltd*., 1987 SCMR 1463, *Mian*

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Munir Ahmad Vs. The State, 1985 SCMR 257, *M/s Overseas Marine Trading Agencies (Pvt.) Ltd. Vs. The Board of Trustees, Employees Old-Age Benefits Institution*, 2005 PLC 175, *Pakistan Burmah Shell Ltd,. Karachi Vs. Sindh Labour Court No.IV, Karachi*, PLD 1979 Karachi 109 (incorrectly cited as PLD 1978 Karachi 109), *Seagull Exports (Pvt.) Ltd. Vs. Sindh Labor Appellate Tribunal*, 2002 PLC 212 and *Dharangadhra Chemical Works Ltd. Vs. State of Saurashtra*, AIR 1957 SC 264.

7. On the other hand, the learned counsel for the Respondents No.1 and 2 submitted that the Petitioner has admitted its liability vide its letter dated 25.06.2018 written to Respondent No.3. He submitted that the ultimate services are given to the Petitioner who is the main beneficiary of the services rendered by the drivers/other employees and that according to all the material collected by the Respondent No.2 it is clear and apparent that the drivers/other employees are employed by the Petitioner through Respondent No.3 yet neither of them has declared them as employees. He highlighted the injustice that was done to almost 300 workers and that it is their welfare that is at stake. He also highlighted that the Petitioner has only challenged the Impugned Order passed by the Appellate Authority and not the Decision of the Adjudicating Authority and therefore he argued that no judgment can be passed by this Court in the instant petition against the Decision. He relied upon *Metropolitan Steel Corpn. Ltd. Vs. Employees' Old-Age Benefits Institution and the Board through Chairman*, 2016 PLC 499, *Messrs Bolan Mining Enterprises Vs. Board of Trustees, EOBI*, 2010 SCMR 1573, *Attock Cement Pakistan Company Vs. The Board of Trustees, Employees' Old-Age Benefits Institution*, 2004 PLC 106, *Messrs Service Sales Corporation (Pvt.) Limited Vs. Assistant Director, Field Operation Employees' Old-Age Benefits Institution*, 2001 SCMR 1599, *Ghulam Nabi Vs. Muhammad Mansha,* 1988 SCMR

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1571 and *Messrs Abdul Aziz Noor Muhammad Vs. Employees' Old-Age Benefits Institution*, 1983 PLC 198.

8. Interestingly enough the Respondent No.3 has also disowned the alleged 300 drivers, etc., as employees of Respondent No.3 and submitted that only 8% of the soda-ash produced by the Petitioner is transported by Respondent No.3 for which purpose it has five permanent employees, all whom are fully registered with Respondent No.1 and their contribution is been regularly deposited. It was further submitted on behalf of the Respondent No. 3 that the remaining 92% of soda ash produced by the Petitioner is transported by the purchasers themselves.

9. Arguments advanced by the learned counsel for the parties have been heard and the record attached with the file has been perused.

Doctrine of Merger

10. I will first address the objection raised by the learned counsel for the Respondents No.1 and 2 that adjudicating the instant matter is a futile exercise given that the Decision, whereby the Respondent No.2 has been held at liberty to proceed against the Petitioner for the default in question, has not been challenged in the instant writ petition and as such even if the petition is allowed as prayed for the Decision shall remain in the field.

11. I am afraid the contention has no merit in view of the Doctrine of Merger according to which the decision passed by a lower forum merges into the decision of the higher forum in appeal/revision irrespective of whether the higher forum affirms, modifies or reverses the order or judgment of the forum below. Reliance is placed upon *Bashir Ahmed Abdini Vs. Hon'ble chairman and Member of Administration Committee and Promotion Committee of Hon'ble High Court of Baluchistan*, 2022 SCMR 448. Consequently, if the Impugned Order passed by the

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higher forum is set aside by this Court in the instant matter, the Decision of the lower forum, having merged into the Impugned Order, will no longer be available especially since both are concurrent judgments although as observed in the cited judgment it does not make a difference whether the higher forum affirms, modifies or reverses the order or judgment of the forum below.

12. Even otherwise, the Petitioner is not just seeking setting aside of the Impugned Order but has also prayed for a declaration to the effect that the Petitioner is not the employer of the alleged 300 persons mentioned in the Impugned Order. If such prayer is allowed, it will have the same effect as setting aside the Decision.

13. Moreover, the Petitioner has also prayed for any other better and additional relief fit and appropriate in the facts and circumstances. The Petitioner has alleged that the Adjudicating Authority of Respondent No.2 failed to differentiate and provide clarification as to whether or not the employees in question were the employees of Respondent No.3 or of the Petitioner vide its Decision. In view of such contents of the Memo of petition and the arguments submitted by the legal counsel for the Petitioner in its oral submissions, I am of the view that this Court is not precluded from passing judgment in respect of the Decision as additional relief if available on merits. I am fortified in my view by the judgment passed in *Mst. Zahida Begum Vs. Ashfaq Ahmed,* PLD 2020 Lahore 684 and *Mst. Noor Elahi Vs. Muhammad Abbas*, 2022 YLR 2383 wherein it was held that any additional or adequate relief may be granted even if not specifically prayed for if borne out of the contents of the pleadings as a Court, in aid of justice, is vested with unfettered powers. That said I now proceed to examine the Impugned Order.

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Impugned Order

14. The question that arises in the facts and circumstances of the case has been correctly framed vide the Impugned Order i.e. whether the responsibility of the payment of contribution under the EOB Act, 1976 in respect of drivers and other employees in question is upon the Petitioner or the Respondent No.3. However, the Impugned Order is devoid of analysis or reasoning for the decision reached. The Impugned Order directs the Respondent No. 2 to recover the outstanding dues from the Petitioner in respect of 300 allegedly insured persons for the period from July, 2010 till June 2012 by describing the Petitioner as the 'principal employer' without discussing the legal basis or significance of the said term.

15. The Impugned Order merely reproduces the relevant provisions of the EOB Act, 1976; refers to some case law (including incorrect citations); and provides a litmus test without actually discussing how under the facts and circumstances of the case such litmus test is satisfied or the referred case law applicable. It bears no indication of any independent application of mind. For all the foregoing reasons the Impugned Order constitutes a non-speaking order and is as such in violation of Section 24-A of the General Clauses Act, 1890. Reliance is placed upon *Saudagar, EPS Industries (Pvt.) Ltd. Vs. Deputy Commissioner Inland Revenue, Audit Unit-02, Zone-III*, 2021 PTD 2024.

16. The facts and circumstances of the case law referred to by the Respondent No. 1 in the Impugned Order are distinguishable and as such not applicable to the case at hand. The petitioner in *Attock Cement Pakistan Company (Supra)* argued that the word 'employee' appearing in the EOB Act, 1976 does not include employees employed by the contractor. Similarly, the petitioners in

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Metropolitan Steel Corpn. Ltd., (Supra) entered into an agreement with contractors for providing staff to carry out certain jobs in the establishment but argued that persons hired on contract basis through a contractor do not fall under the definition of 'employee' under the EOB Act, 1976.

17. In contradistinction to such cases, the Petitioner before this Court does not dispute that a person employed *'through any other person'* may be included in the definition of 'employee' as given in the EOB Act, 1976. The dispute raised by the Petitioner however is whether the truck drivers of independent transport contractors such as the Respondent No. 3 can be considered as persons employed by the Petitioner 'through any other person' so as to fall within the definition of 'employee' as per the EOB Act, 1976 by virtue of the transportation agreements entered into by the Petitioner with such transport contractors for the provision of transportation services.

18. The Impugned Order also relied upon the case of *Messrs Bolan Mining Enterprises (Supra)* however in the said case it was undisputed that the employees under question were performing their duties with the appellant who was paying them in cash and that such employees were in the administrative and financial control of the appellant. The Respondent No. 1 failed to discuss whether the reasons that prevailed with the Honorable Supreme Court in *Bolan Mining Enterprises Board of Trustees (Supra)* are applicable to the facts of the instant case especially considering that the Petitioner denies that it is paying wages to the truck drivers (the effect of Petitioner's denial of payment of wages is discussed in paragraphs below).

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19. Clearly, the Respondent No. 1 was unable to appreciate the fine but crucial difference between the questions before the Courts in the case law relied upon in the Impugned Order and the one raised by the Petitioner in the instant case.

Section 12 of EOB Act, 1976

20. Before we take up the substantive question arising out of the facts and circumstances of the instant case which has not been answered by the Impugned Order, it is important to consider the submission of the Respondent No. 2 (as recorded in the Decision passed by the Adjudicating Authority of the Respondent No. 2) that the demand of Rs.4,536,000/- vide Demand Notice No.2 by the Respondent No. 2 was raised by invoking sub-section (3) of Section 12 of the EOB Act, 1976. Let us therefore consider the provisions of Sections 10 and 12 of the EOB Act, 1976 in light of the relevant definitions provided therein:

> ***2. Definitions.****-In this Act, unless the context otherwise requires,-*
>
> *(i) "**insured person**" means an employee who is or was in insurable employment;*
>
> *(j) "**insurable employment**" means employment of a person under a contract of service or apprenticeship, whether written or oral, express or implied and in respect of which contributions are payable under this Act;*
>
> ***10. Records and Returns by Employers.****- Every employer shall keep such records and shall submit to the Institution such returns, at such times, in such form and containing such particulars relating to persons employed by him, as may be provided in regulations.*
>
> ***12. Officials of Institution to Check Employer's Books.****-(1) Any official of the Institution, duly authorised by a certificate in a form specified in the regulations, may,* ***for the purpose of inquiring into the correctness of any of the particulars stated in the records or returns referred to in section 10 or the purpose of ascertaining whether any of the provisions of this Act have been complied with.-***
>
> ***(a) require an employer to furnish to him such information as he may consider necessary : or***

(b) at any reasonable time, enter any establishment or other premises occupied by such employer and require any person found in-charge thereof to produce and allow him to examine such accounts books and other documents relating to the employment of persons and payment of wages, or to furnish to him such information, as he may consider necessary ; or

(c) examine, with respect to any matter relevant to the purposes aforesaid, the employer, his agent or any other person found in such establishment or other premises, or any other person whom the said official has reasonable cause to believe to be or to have been an insured persons.

3(2) The official referred to in sub-section (1) shall not demand production of account book and other documents referred to in clause (b) of sub-section (1) for a period of two years from the date of registration of the establishment or the 1st day of July, 2005, whichever is later, if the employer does not reduce the number of insured persons in respect of whom contribution are paid under section 9:

Provided that on expiry of two years' period, if the employer enhances the number of insured persons by at least ten percent, it shall be accepted without any question otherwise checking of record shall be done as provided in sub-section (1), by an officer not below the rank of Assistant Director, duly authorized in this behalf and no question shall be asked about the previous two years.; and

(3) If an employer fails to maintain records or to submit returns as required by the regulations, or otherwise fails to comply with the provisions of sub-section (1) and thereby makes it difficult to ascertain the identity of persons required to be insured or the amount of contribution payable, the contribution shall be assessed on the basis of such evidence as the Institution may find satisfactory for this purpose. *[Emphasis added].*

21. As may be seen from the above reproductions, every 'employer' is required to keep and submit such returns as may be provided in the regulations pursuant to Section 10 of the EOB Act, 1976. For the purpose of inquiring into the correctness of any of the particulars stated in the returns referred to in Section 10 *ibid* or to ascertain whether the provisions of the EOB Act, 1976 are being complied with, an authorized official of Respondent No. 2 may require an employer to furnish information in accordance with clause (a) of sub-section (1) of Section 12 of the EOB Act, 1976 or may examine account books and other documents relating to the employment of persons and payment of wages in

accordance with clause (b) of sub-section (1) of Section 12 of the EOB Act, 1976 or may examine any person as described under clause (c) of sub-section (1) of Section 12 of the EOB Act, 1976. It is only when the employer fails to maintain records or to submit returns as required by the regulations or otherwise fails to comply with the provisions of sub-section (1) of Section 12 of the EOB Act, 1976 so as to make it difficult to ascertain the identity of persons required to be insured or the amount of contribution payable that the contribution shall be assessed on the basis of such evidence as the Respondent No. 2 may find satisfactory for this purpose in the prescribed manner.

22. In the case at hand, however, neither the Impugned Order nor the Decision addresses the question as to whether or not the pre-requisites of the assessment provided for under sub-section (3) of Section 12 of the EOB Act, 1976 as detailed herein above were satisfied prior to the issuance of the Demand Notices. The Decision passed by the Adjudicating Authority of Respondent No.2 records the Respondent No.2's submission that a team was constituted to check the records of the Petitioner vide letter dated 22-11-2013 but the record was not produced on one pretext or another and list of contractors nor copies of their contracts/agreements were provided despite several visits and verbal requests and that a commission was constituted for record checking with the consent of both the parties but that such commission submitted the report stating that the Petitioner refused to produce any record for verification when the commission visited the Petitioner's establishment on 31-03-2017 and that due to such refusal of the Petitioner the Respondent No. 2 had no choice but to make their own assessment.

23. On the other hand, the letter dated 23-08-2014 written to the Petitioner by the Respondent No.2, a copy of which has been attached with the instant petition, refers to checking of record of the Petitioner's establishment on 23-07-

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2013. This by itself shows that the Petitioner's records were checked by the Respondent No. 2 on 23-07-2013. Yet there is no finding in the Decision or the Impugned Order as to which account books or other documents or information the Respondent No. 2's authorized official required to be furnished or produced for examination which the Petitioner did not furnish or produce as per Section 12(1)(a) and (b) of the EOB Act, 1976 so as to make it difficult to ascertain the identity of persons required to be insured or the amount of contribution payable. There is also nothing on the record to highlight any evidence of examination conducted of any person as described in Section 12(1)(c) of the EOB Act, 1976.

24. Even if the conditions precedent contained in Section 12(3) of the EOB Act, 1976 are satisfied, the assessment thereunder cannot be based on whim. It must be based on evidence. The learned counsel for the Respondents No. 1 and 2 submitted that it is clear and apparent from all the material collected by the Respondent No.2 that the drivers/other employees are employed by the Petitioner through Respondent No.3. However, neither has the Respondent No. 2 brought such material before this Court nor has such material been discussed in the Impugned Order or in the Decision.

25. For starters it is noted that the Respondent No. 2 asserted in the Demand Notice No.1 that the Petitioner has engaged 10-15 transport contractors for the purpose of distribution of its products. Ironically, neither the Impugned Order nor the Decision shed light on how the Respondent No.2 determined that the Petitioner has hired 10-15 transport contractors especially in light of the fact that according to the Respondent No. 2 the Petitioner did not provide list of contractors and copies of their contracts/agreements with such contractors despite repeated demands. Be that as it may, apart from the Respondent No. 3 none of the other 10-

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15 transport contractors have even been identified. Similarly, the identity of the alleged 300 insured persons remains shrouded in mystery.

26. It is also not clear as to how the amount of Rs.4,536,000/- demanded vide the Demand Notice No.2 has been assessed by the Respondent No.2 as the contribution payable by the Petitioner in respect of the alleged 300 insured persons. The contribution under Section 9 of the EOB Act, 1976 is a percentage of the wages however there is no evidence as to the quantum of the wages on the record. This Court therefore finds that both the forums below have failed to establish whether the conditions precedent for invoking Section 12(3) of the EOB Act, 1976 were satisfied nor has any evidence been highlighted to substantiate the assessment made thereunder.

27. Most importantly, the Demand Notice No.1 written to the Petitioner by the Respondent No.2 states that since the Petitioner is paying freight to the goods transport companies hired for distribution of its products, it is the principal responsibility of the Petitioner to make sure that payment of EOBI dues of its carriage contractors/contract employees is made and that in this regard, the Petitioner's representative assured that they will compel all transport contractors to make payment within a month but that this did not happen. It was also argued before the Adjudicating Authority of Respondent No.2 that if their contractors are not registered / not paying contribution the principal employer is bound to comply with the EOB Act, 1976. The said contents of the Respondent No. 2's letter and its submissions before the Adjudicating Authority indicate that there is an acknowledgment on part of Respondent No.2 that the liability is that of the contractors but is being imposed on the Petitioner due to the contractor's failure to comply with their statutory obligation by holding the Petitioner responsible to ensure that payments are made since it is the Petitioner that is paying freight to the

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transport contractors. However, there is no provision in the law casting the duty on the Petitioner to ensure that its contractors pay the contribution under the EOB Act, 1976 in respect of their employees or pursuant to which the Petitioner is liable to make such contribution in case of failure of their contractors to fulfill their statutory responsibility. Yet the Impugned Order holds the Petitioner liable as the 'principal employer' despite the fact that there is no such term used in the EOB Act, 1976.

EOB Act, 1976

28. The EOB Act, 1976 vide Section 3 provides that all 'employees' in an 'industry' and 'establishment' shall be insured in the manner prescribed by or under the EOB Act, 1976. The contribution is payable every month by the 'employer' to the Institution established under the EOB Act, 1976 in respect of every person in his 'insurable employment' at the rate of the stipulated percentage of his wages pursuant to Section 9. Before going further it will be beneficial to reproduce the relevant provisions of the EOB Act, 1976 as follows:

> ***2.*** ***Definitions.****-In this Act, unless the context otherwise requires,-*
>
> *(bb)* ***"employee"*** *means any person employed, whether directly or through any other person, for wages or otherwise, to do any skilled or unskilled, supervisory, clerical, manual or other work in, or in connection with the affairs of, an industry or establishment, under a contract of service or apprenticeship, whether written or oral, express or implied, and includes such person when laid off.*
>
> *Provided that a director of a limited company or of a corporation set up under any law shall not be treated as an employee under this Act, irrespective of his wages or emoluments.*
>
> *(c) "**employer**", in relation to an industry or establishment, mean any employee, and includes-*
>
> *(i) in the case of an individual, an heir, successor, administrator or assign;*

(ii) a person who has ultimate control over the affairs of an industry or establishment, or where the affairs of an industry or establishment are entrusted to any other person (whether called a managing agent, managing director, manager, superintendent, secretary or by any other name), such other person ;and

*(e) "**establishment**" means-*

(i) an establishment to which the West of Pakistan and Establishments Ordinance, l969 (West Pakistan Ordinance No. VIII of 1969) for the time being applies, and notwithstanding anything contained in section 5 thereof, includes clubs, hostels, organisations and messes not maintained for profit or gain and establishment, including hospitals, for the treatment or care of sick, infirm, destitute or mentally unfit persons ;

(ii) a construction industry as defined in the West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968 (West Pakistan Ordinance No. VI of 1968);

(iii) a factory as defined in the Factories Act, 1934 (XXV of 1934);

(iv) a mine as defined in the Mines Act, 1923 (IV of 1923) ;

(v) a road transport service as defined in the Road Transport Workers Ordinance, 1961 (XXVIII of 1961); and includes any class of industries or establishments which the Federal Government may, by notification in the official Gazette, declare to be establishments for the purposes of this Act.

*(g) "**industry**" means any business, trade, undertaking, manufacture or calling of employers, and includes any calling, service, employment, handicraft industrial occupation or avocation of workmen ;*

Section 3

***3. Compulsory Insurance**.- All employees in an industry or establishment shall be insured in the manner prescribed by or under this Act.*

Section 9

***9. Rates and Assessment**.- (1) On and from the first day of July, 1976, contribution shall be payable every month by the employer to the Institution in respect of every person in his insurable employment, at the rate of six per cent of his wages in the prescribed manner;*

Provided that no contribution shall be payable in respect of an insured person who is in receipt of Old-age pension under this Act or has attained the age of sixty years, or fifty-five years in the case of a woman.

(2) Where an insured person does not receive any wages from the employer for any period, the Institution shall, subject to regulations, determine the amount of wages with reference to which the contributions shall be computed.

(3) Notwithstanding any agreement to the contrary, the employer shall not deduct from the wages of an insured person or otherwise recover from him any portion of employer's share of contribution

9A. Contribution by Government *- Federal Government may make such contribution to the Institution as it may determined from time to time.*

9B. Contribution by the insured person: *- On and from Ist day of July 2001, the contribution shall be payable by an insured person at the rate of one percent of the wages in prescribed manners.*

29. There is no dispute that the Petitioner is an 'industry' and 'establishment' to which the EOB Act, 1976 applies. The substantive question that arises though is whether the drivers, etc., of the independent transport contractors are the 'employees' of the Petitioner employed 'through any other person' by virtue of the transportation agreement entered into by and between the Petitioner and the transport contractor or that of such transport contractor. If they are 'employees' of the Petitioner then the Petitioner cannot escape its liability under the EOB Act, 1976 to pay contribution in respect thereof but if they are not so the Petitioner cannot be saddled with such burden.

30. Going by the Impugned Order it would appear that any agreement entered into by an 'industry' or 'establishment' with an independent contractor for the procurement of services ancillary to the business of the 'industry' or 'establishment' will lead to the conclusion that all employees of the independent contractor are employed by such industry or establishment through another person and the industry or establishment is the 'employer' as defined in the EOB Act, 1976 of all the employees of such independent contractor.

31. This does not seem reasonable as an 'industry' or 'establishment' (as per the definitions ascribed to the said terms under the EOB Act, 1976) can potentially enter into a number of agreements with other independent legal entities for the provisions of services ranging from transportation, distribution, marketing, security, technical to legal, to name a few. Surely the intent of the Legislature could not be that the industry or establishment would become the employer of all the employees of the independent contractor by virtue of the service agreement entered into by the industry or establishment with the independent contractor. To my mind the intention of the Legislature was to ensure that 'employers' as defined in the EOB Act, 1976 do not avoid contribution under the said act for their own 'employees' by employing them through another entity. Therefore, a line needs to be drawn to differentiate between the case where employees are employed through another entity and a case of service agreements with independent contractors where under services are being procured which no doubt will be performed by employees but such employees who are employed by the independent contractor. Let us endeavor to understand the difference.

32. The definition of 'employee' (reproduced above) includes persons employed through any other person for wages or otherwise to do any work in or in connection with the affairs of an industry and establishment under a contract of service or apprenticeship whether written or oral, express or implied. The definition therefore has the following components:

(a) employed, whether directly or through any other person;

(b) for wages or otherwise;

(c) to do any skilled or un skilled, supervisory, clerical, manual or other work in or in connection with the affairs of the industry or establishment;

(d) under a contract of service or apprenticeship, whether written or oral, express or implied.

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(a) Employed, whether directly or through any other person

33. As far as the component listed under (a) above is concerned i.e. *'employed, whether directly or through any other person'* there is no dispute that the allegedly insured persons in question were not employed directly by the Petitioner. However, the definition also includes person employed 'through any other person', which is the bone of contention.

34. In this regard, I find the case of *Fauji Fertilizer Company Ltd. (Supra)* quite relevant wherein the Honourable Supreme Court considered the phrase *'directly or through a contractor'* contained in the definition of 'worker' provided in the Industrial Relations Ordinance, 1969. The Supreme Court glanced at various case law and concluded that the ratio of such case law is that the employees of the contractor shall not be the employees of the company if:

> *'(a) they are under the control and management of the contractor and not that of the company;*
>
> *(b) they are not on the pay-roll of the company and the management of the company is not even aware of the number of the workers employed by the contractor or about the terms and conditions of their appointment or service; and*
>
> *(c) the contractor has the power of hiring and firing the employees, and assigns works to them and the company has no concern with it.'*

35. The Supreme Court also discussed various Indian case law according to which in order to decide the question in hand the court is required to consider several factors which would have bearing on the result. The relevant portion is as follows:

> *"37. The control test and the organisation test, therefore, are not the only factors which can be said to be decisive. With a view to elicit the answer, the court is required to consider several factors which would have a bearing on the result:-*
>
> *(a) who is the appointing authority;*

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(b) who is the paymaster;

(c) who can dismiss;

(d) how long alternative service lasts;

(e) the extent of control and supervision;

(f) the nature of the job e.g. whether it is professional or skilled work;

(g) nature of establishment;

(h) the right to reject."

36. The Supreme Court concluded by finding that *'normally the relationship between the employer and employee does not exist between the company and the workers employed by the contractor, however, in the case where* ***an employer retains or assumes control over the means and method by which the work of a Contractor is to be done****, it may be said that the relationship of employer and employee exists between him and the employees of the contractor'.* [Emphasis added].

37. The criteria laid down in the case of *General Manager Pakistan International Airlines Vs. Matiullah,* 2017 PLC 148 is also quite helpful and the relevant paragraph is reproduced hereunder:

'(i) Whether the company has administrative control over the worker?
(ii) Whether the company based for the work done by the worker?
(iii) Whether the company has the power to reinstate and dismiss the worker?
(iv) Is the work required to be performed by workman of a permanent nature and is it related to process of manufacturing before the finished goods were sent into market?
(v) Whether payment for the worker's services was made by the company?
(vi) Whether the goods, that the worker helped to manufacture, when marketed, brought proceeds to the company itself?
(vi) The duration the worker had been performing his duties and providing labour in connection with the manufacturing process?
(vii) Whether the contractor is a genuine person and has not been set up merely to deny the worker of the benefits under the labour laws?'

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38. None of the factors/criteria laid down in the said case law for purposes of the issue at hand have been discussed in the Impugned Order or the Decision and yet it has been held that 300 unidentified persons are the employees of the Petitioner employed through a contractor.

39. Some of such factors were discussed in the case of *Seagull Exports (Pvt.) Ltd. (Supra)* by the Honourable High Court of Sindh at Karachi in order to determine whether respondent No.3 to 14 therein were employees of the petitioner employed through respondent No.2 or whether the latter was an independent contractor and respondent No.3 to 14 his employees by examining the terms of the contract between the petitioner and the respondent No.2. The Court found as follows:

> *10. A reading of the above document shows that the respondent No.2 were required to carry out manufacturing of Terry Towels according to the instructions and specifications given by the petitioner. The yarn was to be provided by the petitioner* ***but the work was to be supervised by the respondent who were required to employ their own labour of suitable skill and were responsible for payment of all their dues.*** *The respondent No.2 were also responsible to maintain the petitioner's machine on which the work was carried out and replace the damaged spare parts. The contributions which were by operation of law payable to the Social Security Institution and Employees Old-Age Benefit Institution were also recoverable from the bill of the respondent No.2. Consideration for performing such services were payable on the basis of the quantity of towels produced at agreed rates.*
>
> *11. From a consideration of the above document it appears quite plainly that the respondent No.2 was assigned the task of manufacturing towels and was required to engage any member of workers for accomplishing the same as well as to determine their terms and conditions of employment and exercise supervision and control over them in any respect.* ***The petitioner should neither direct such workers to perform any work or to instruct them to do so in any manner.*** *Indeed Mr. Farid Gul Khan appears to be right in contending, on the basis of the observations of the Honourable Supreme Court of India in Hussain Bhai Caliat v. Alat Factory Thozi Lali Uni and others (1978 LLJ 397) that the Court could lift the veil of such paper arrangement and discover the nacked truth. Therefore, in our opinion it was possible for the respondents Nos.3 to 14 to lead evidence to show that such contract was never given effect to and the petitioner exercised the powers of supervision and control over workers notwithstanding the said document.* ***Nevertheless it appears from the evidence on record that apart from baldly ascertaining that the said respondents***

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were employees of the petitioner not a single instance showing how the petitioner exercised control over workers or that the terms of this document were never adhered to was adduced. *Learned counsel argued that the mere fact that the respondents Nos.3 to 14 were working in the establishment owned by the petitioner created a presumption in their favour which the latter was unable to rebut. We regret we cannot subscribe to this view.* ***On the contrary in our opinion when the petitioner relied upon a contract, whereby supervision and control over worker was to be exercised by the respondent No.2 it was incumbent upon the respondent No.2 to rebut the same through tangible evidence****.'[Emphasis added].*

40. Similar exercise was done in the case of *Pakistan Burmah Shell Ltd., Karachi (Supra)* and the following was found:

'13. ***The agreement between contractor S. M. Saleh and petitioner No. 1, however, is the most important piece of evidence for determining the question whether respondent No. 2 is an employee of the petitioners.*** *The agreement, in brief, provides that though the petrol pump belongs to the petitioner-Company and the goods to be sold therein will be of and are to be supplied by the company, in whose account the proceeds of the sales would be credited,* ***the petrol pump would be managed by the contractor, who would engage necessary staff for the purpose, and such staff would be entirely under the control of the contractor and the company would have nothing to do with such staff.*** *Mr. Noor Muhammad, the learned counsel for the petitioners, strongly urged that this agreement clearly and unequivocally indicated that the employees at the petrol pump operated by the contractor of the petitioner-Company were not the employees of the petitioner-Company but of the contractor himself, who appointed them, controlled their work and also was entitled to terminate their services. Mr. Nasir Zahid. for respondent No. 2, on the other hand, submitted that the agreement was a mere eye-wash arid that the contractor was nothing more but a Manager of the petrol pump on behalf of the petitioner-Company and the real control over the petrol pump as well as the persons employed at the petrol pump was with the company. In support of his contention that the real employer of the second respondent was the petitioner-Company, Mr. Nasir Zahid relied upon the definition of "workman" in the I.R.O. as well as two decisions from the Indian jurisdiction reported as D. C. Works Limited v. State of Surashtra (AIR 1957 SC 264) and D.C. Dewan M. S. Sons v. Workers' Union (1965 LLC 260). The learned counsel further submitted that the relationship of employee and employer was a question of fact which was to be determined by the Labour Court and not by the High Court, and in support of this submission of his he relied upon a Division Bench decision of this Court reported as British India Engineering Works v. Akhtar Hussain Khan (PLD 1959 Kar. 403).*

14. ***As already indicated, the agreement between Contractor S.M. Saleh and the petitioner-Company unequivocally declares that the personnel at the petrol pump to be managed by the contractor would be the employees of the contractor and not of the petitioner-Company which will have no concern with such employees. If, therefore, this agreement is to be relied upon, respondent No. 2 cannot be***

> ***considered an employee of the petitioners*** *and the objection of the petitioners to the proceedings before the Labour Court would prevail.* ***It is on this account that Mr. Nasir Zabid was at pains to submit that this agreement was a mere sham. He, however, was unable to refer me to any material on the basis of which it could be inferred that the agreement was a mere eye-wash, as claimed by him.****' [Emphasis added]*.

41. It is clear from the case law discussed above that for the purpose at hand, it is imperative to consider the contract between the 'industry' or 'establishment' and the independent contractor. Such contract can only be disregarded if found to be an eye wash for which too a determination would have to be made.

42. It is not clear, however, whether the Transportation Agreements dated 13.12.2010 and 28.02.2012 entered into by the Petitioner and the Respondent No. 3 (copies of which have been attached with the memo of petition) were provided to the Respondent No. 1 or the Adjudicating Authority and whether the terms thereof were considered when passing the Impugned Order or the Decision. Furthermore no endeavor has been made to determine the identity of the remaining 10-15 contractors engaged by the Petitioner through whom such 300 employees have allegedly been engaged by the Petitioner let alone consider any agreement between the Petitioner and such contractors.

(b) Wages

43. Coming to the component listed under (b) above i.e. *'wages'* the Honourable High Court of Sindh at Karachi in *Sindh Employees' Social Security Institution, Karachi Vs. Philips Electrical Industries of Pakistan Ltd.*, PLD 1977 Karachi 451 held that to be an 'employee' as defined in the West Pakistan Employees' Social Security Ordinance, 1965 the person must be working for wages. The question before the Court in *Sindh Employees' Social Security Institution, Karachi (Supra)* was whether persons employed by the independent

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contractor to run canteens situated in the factory premises of the respondents are covered by the West Pakistan Employees' Social Security Ordinance, 1975 so as to make the respondents liable for contribution in respect of such persons. The Honourable High Court of Sindh at Karachi explained that:

> *'an independent contractor is not an agent or representative of the person for whom he has agreed to do the assigned work. He does not while engaged in his assigned work, represent the person who had employed him to do, that work. He is an independent contractor and his obligation is to, complete the assigned work without any interference from the employer. The acts of a contractor are not acts of his employer as acts of an agent are that of his principal. By holding that owners "would be deemed to be the employer of any workmen engaged by these contractors to whom they had assigned work in connection with their establishment by reason of the definition of 'employer' as the contractors would be deemed to be representative of the employer",* ***the learned Judge appears to have overlooked the requirement of law that a person to be an "employee" under the Ordinance has to be under contract of service with his employer and the work is done in consideration of wages payable by such an employer.'*** *[Emphasis added].*

44. The definition of 'employee' as given in the EOB Act, 1976 also requires a person to be employed for wages in order to qualify as an 'employee'. In the case at hand, the Petitioner has categorically denied that it pays wages to the alleged employees. The Respondent No. 2 has failed to show any evidence to the contrary. Yet there is no finding in the Impugned Order or the Decision as to whether or not the Petitioner is in fact paying wages and if not, the effect thereof.

45. An argument was raised in *Sindh Employees' Social Security Institution, Karachi (Supra)* that it is immaterial whether the wages were paid by the contactor but such argument was found fallacious by Honourable High Court of Sindh at Karachi in view of the fact that where the Legislature intended to depart from the commonly understood concept of employment i.e. when an employer was sought to be made liable not just for his own employees but also for the employer of its contractor it was expressly so provided as in the case of Section 12 of the Workman Compensation Act 1923 and Section 40 of the Employees Old

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Age Benefits Ordinance, 1975 (**"EOB Ordinance, 1975"**). The latter provision is reproduced herein below:

> *40.* ***Contracting.*** *-Where any person (hereafter in this section referred to as the principal) in the course of or for the purposes of his trade or business contracts with any other person (hereafter in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work which is ordinarily part of the trade or business of the principal, the principal shall be liable to pay in respect of an insured person employed in the execution of any work contributions under section & which he would have been liable to pay if that insured person had been immediately employed by him.*

46. The language of this provision leaves no doubt in the mind that where a person engages a contractor for the purpose of execution of the work which is ordinarily part of the trade or business of such person, the EOB contribution for the employees of the contractor is the responsibility of the principal as if the employees were employed by the principal. However, no such provision is included in the EOB Act, 1976. The conspicuous absence of any provision in the EOB Act, 1976 similar to Section 40 of the EOB Ordinance, 1975 shows that the Legislature did not intend to hold the 'industry' or 'establishment' liable for the contractor's employees regardless of whether or not the 'industry' or 'establishment' pays wages. Given the absence of such provision and the fact that payment of wages is a necessary component of the definition of employee as given in the EOB Act, 1976, it was imperative to establish whether or not wages were paid by the Petitioner when deciding the status of the 300 allegedly insured persons as 'employee' of the Petitioner.

47. Not only is such determination necessary for purposes of the definition of 'employee' but also in order to determine the amount of contribution payable as the contribution under Section 9 of the EOB Act, 1976 is a percentage of the wages.

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(c) Work in or in connection with the affairs of the industry or establishment

48. In respect of the component listed under (c) above i.e. *'work in or in connection with the affairs of the industry or establishment'* I find the discussion in the case of *Dharangadhara Chemical Works Ltd. (Supra)* before the Supreme Court of India quite helpful wherein, while quoting English case law, a distinction was drawn between a person employed as part of the business where the work done by him is an integral part of the business and where although his work is done for the business it is not integrated into it but is only accessory to it. On this point, the Honorable Supreme Court of Pakistan summarized various Indian case law in *Fauji Fertilizer Company Ltd. (Supra)* as follows:

> *"In the case of Catering Cleaners of Southern Railway v. Union of India (AIR 1987 SC 777) = [(1987) 1 SCC 700], on the issue of contract labour engaged for cleaning catering establishments and pantry cars in Southern Railway,* ***the Indian Supreme Court pointed out that the work of cleaning catering establishments and pantry cars is necessary and incidental to the industry or the business of the Southern Railway; the employment was of perennial nature and that the work required employment of sufficient number of whole-time workmen.*** *It was directed that those workmen, who were previously employed by the contractor on the same wages and conditions of work as were applicable to those engaged in similar work in Western Railway, be absorbed without waiting for the decision of the Central Government. In the case of Sankar Mukherjee v. Union of India (AIR 1990 SC 532) = [(1990) (Supp) SCC 668], the Indian Supreme Court considered the notification by the Government of West Bengal prohibiting the employment of contract labour in various departments including the job of loading and unloading of bricks from the wagons and trucks in Brick Department.* ***The Court pointed out that the bricks handled by the Brick Department were used in furnaces of the company as refractory and incidental to the industry carried on by the company. Even though the petitioners therein were not doing the job of stacking the bricks, there was no denial or any averment or material to show that the job of loading and unloading of bricks was not incidental or alike to the stacking of the bricks; on the other hand, the workers performing those jobs which were of perennial nature, were to be treated alike. The workers doing the job of loading and unloading from the wagons and trucks in the Brick Department are to be treated on par with those who were doing the job of cleaning and stacking in the said Department. There was no reason as to why others doing the same job should***

be treated differently. *In the case of Indian Overseas Bank v. I.O.B. Staff Canteen Workers' Union (AIR 2000 SC 1508) = [(2000) 4 SCC 245] the Court held that* ***no single or substantive test could be confined or concretized as a fixed formula of universal application in all class or category of cases. Although some common standards could be devised, the mere presence of one or more or their absence of the same cannot, by itself, be held to be decisive of the whole issue, since every case has to be decided on the peculiar aspects of a particular case.*** *That being the position, in order to safeguard the welfare of the workmen, the veil may have to be pierced to get at the realities. In the case of Steel Authority of India Ltd. v. Union of India (AIR 2001 SC 3527) the Court held that even in case of contract labour, there can be adjudication as to the regularization of the employment by the Industrial Court/Tribunal.* ***If the contract is found to be not genuine, but a mere camouflage, the so called contract labour will have to be treated as employee of the principal employer, who shall be directed to regularize the services of the contract labour in the establishment concerned.*** *In the case of Mishra Dhatu Nigam Ltd. v. M. Venkataiah (AIR 2003 SC 3124) = [(2003) 7 SCC 488] the Indian Supreme Court held that where in discharge of a statutory obligation of maintaining a canteen in an establishment the principal employer availed the services of a contractor, the contract labour would indeed be the employees of the principal employer and that such cases do not relate to or depend upon the abolition of contract labour. In the case of Ram Singh v. Union Territory, Chandigarh (AIR 2004 SC 969) = [(2004) 1 SCC 126] the Court reiterated that* ***in determining the relationship of employer and employee, even though 'control' test is an important test, it is not the sole test.*** *It was further observed that it is necessary to take a multiple pragmatic approach weighing up all the factors for and against the employment instead of going by the sole test of control. An "integration" test is one of the relevant tests.* ***It is applied by examining whether the person was fully integrated into the employer's concern or remained apart from and independent of it. The other factors which may be relevant are, who has the power to select and dismiss, to pay remuneration, deduct insurance contributions, organise the work, supply tools and materials and what are the "mutual obligations" between them.*** *The Court further held that the mere fact of formal employment by an independent contractor will not relieve the master of liability where the servant is, in fact, in his employment. In that event, it may be held that an independent contractor is created or is operating as a subterfuge and the employee will be regarded as the servant of the principal employer. In the case of Workmen of Nilgiri Coop. Mkt. Society Ltd. v. State of T.N. (AIR 2004 SC 1639) = [(2004) 3 SCC 514] after referring to the case of Ram Singh (supra) the Court reiterated that the test of organization or of control and supervision are the only decisive test and different tests have to be applied in different facts and circumstances; ultimately all relevant facts have to be integrated in considering the said question...*

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16. The crux of the above case-law is that:--

(a) the word 'employed by the factory' are wide enough to include workmen employed by the contractors of the company;

(b) the employees of the contractor shall be the employees of the company if the contractor engaged the workers for running of the affairs of the company and not for some other independent work which has no concern with the production of the company;

(c) if the employees are working in a department of the company which constituted one of the principle organs of the company, the machines belong to the company, the raw material is supplied by the company and the said department is controlled by the supervisors of the company, the employees of the contractor shall be the employees of the company;

(d) the employees, engaged directly or through a contractor, would be deemed to be the employees of the company for whose benefit they perform functions;

(e) even though 'control' test is an important test, it is not the sole test; a multiple pragmatic approach weighing up all the factors for and against the employment has to be adopted, including an ""integration" test; and

(f) if the contract is found to be not genuine and a device to deprive the employees from their legitimate rights/benefits, the so called contract employees will have to be treated as employee of the company." [Emphasis added].

49. This to me, is the most critical factor in the instant case which has not been addressed in the Impugned Order or the Decision at all as to whether the work performed by the 300 alleged employees of the Petitioner was in or in in connection with the affairs of the Petitioner nor has the Respondent No. 2 highlighted any evidence on the record that establishes that the work was an integral part of the Petitioner's business as opposed to ancillary work.

(d) Contract of Service

50. Lastly, regarding the component listed under (d) above i.e. the *'contract of service'* the Honourable Lahore High Court in the case of *Pakistan Tobacco Co. Ltd. Vs. Punjab Employees' Social Security Institution, Lahore,* PLD 1978 Lahore 704 expounded upon the nature of contract which is also a component

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of the definition of 'employee' as given in the West Pakistan Employees' Social Security Ordinance, 1965 as follows:

> *"Such a contract is between the employee and the employer or his manager or representative. In case of a contract of service entered into by the employee on the one hand and by the employer or his manager or representative on the other, the natural consequence thereof is that some rights and obligations, as are provided in the contract or regulated by some Statute, are created between the employee and the employer. In that case the employee is bound to perform his duties assigned to him and work for the employer. On the other hand, the employer is obliged to pay the employee his wages for the work done. The natural consequence which emerges from the above discussion is that the employer has a supervisory and administrative control over his employee for the performance of his duties in the manner regulated by the contract.* ***In any case, it is the contract of service which creates the relationship between them of an employee and the employer.*** *As determined in Taj Din and others v. Punjab Labour Court No. 3, Lyallpur (P L D 1976 Lah. 1169)* ***the concept of employment involves three ingredients*** *(i) employer, (ii) employee and* ***(iii) the contract of employment.*** *The employee is one who employs i.e. one who engages the service of other persons. The employee is one who works for another for hire.* ***The employment is a contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision.*** *Employment brings in the contract of service between the employer and the employee. The control of the management which is the necessary element of the relationship of an employer and the employee is not directed towards providing or dictating the nature of the article to be produced or the work to be done, but refers to the other incidents having a bearing on the process of work the person carries out in the execution of the work. All what can be gathered from the principle enunciated above is that* ***the essential of the contract of services is not only to direct the employee to do work assigned to him, but also to determine the manner in which he she will do his work. Where the workers employed by the contractor are not under the contract of service of the employer and the contractor is at liberty to select any set of workers for the compliance of his own contract, the necessary consequence is that the workers are the appointees of the contractor and it is his responsibility to take work out of them, to pay them their wages accordingly, to keep a control on them, to remove them or to deal with them in any manner. Such workers, are thus answerable to the contractor alone and not to the employer for whom the contractor is carrying on work. Such workers, having no contract of service with the employer, therefore, cannot be deemed to be "employees" as defined in the Statute, and the employer is in no way liable to pay contribution in respect of them*** *".[Emphasis added].*

51. Similarly, the Honourable Lahore High Court in *Taj Din Vs. Punjab Labour Court No.3*, PLD 1976 Lahore 1169 held as follows:

3. From what has been written above, it will be evident that the sole question for determination in this case is one of fact, namely, as to whether the petitioners are employees of the Company or of the Contractor Lal Muhammad…. A perusal of the aforesaid case-law on the subject indicates that a concept of employment involves three ingredients, (i) employer; (ii) employee and (iii) the contract of employment. The employer is one who employs i.e., one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision. Employment brings in the contract of service between the employer and the employee. The control of the Management, which is a necessary element of the relationship of master and servant, is not directed towards providing or dictating the nature of the article to be produced or the work to be done, but refers to the other incidents having a bearing on the process of work the person carries out in the execution of the work. The manner of work is to be distinguished from the type of work to be performed. A contractor is a person who in the pursuit of an independent business undertakes to do specific jobs of work for other persons without submitting himself to their control in respect to the details of the work. There is, therefore, a clear-cut distinction between a contractor and a workman. The identifying mark of the latter is that he should be under the control and supervision of the employer in respect of the details of the work. ***The prima facie test for the determination of the relationship between the employer and the employee is the existence of the right in the employer to supervise and control the work done by the employee not only in the matter of directing what work the employee is to do but also the manner in which he shall do his work. The words "either directly or through a contractor" in section 2 (xviii) of the Act indicate that the employment is by the Management directly or through some kind of employment agency and in either case there is a contract of employment between the Management and the persons employed. There should be a privity of contract between them and the Management. Where for example coolies are not employed by the Management directly nor they are employed by the Management through the agency of an independent contractor it follows that coolies employed by the said contractor are not workers within the meaning of the definition in the Act. The various provisions contained in different sections of the Act give a clear indication that a worker under the definition of the Act is a person who enters into a contract of service under the Management and does not include an independent contractor or his coolies or servants who are not under the control and supervision of the employer.*** *No exception to this enunciation of law has been taken by the learned counsel for the parties and as even otherwise it appears to be quite in order, no case in the course of writ jurisdiction has been made out for interference with the concurrent finding of fact recorded by the two Courts below on the relevant evidence before them. [Emphasis added].*

52. The Respondent No. 1 appears to be cognizant of this requirement as the Impugned Order observes that the litmus test would be the contract of service whether executed directly or through any other person. Notwithstanding the

foregoing observation, the Impugned Order does not discuss whether there is any privity of contract between the Petitioner and the alleged 300 truck drivers despite which the Petitioner has been held liable to pay contribution under the EOB Act, 1976 for them. The Respondent No. 2 has not disclosed the existence of any such contracts of service before this Court either.

Definition of Establishment

53. Notwithstanding the generality of the above discussion it is pertinent to note that the definition of 'establishment' given in sub-section (e) of Section 2 of the EOB Act, 1976 includes in sub-clause (v) a road transport service as defined in the Road Transport Ordinance. Whereas the definition of 'road transport service' as given in section 2(7) of the Ordinance is a service carrying passengers or goods or both by road in vehicles for hire or reward. According to the Petitioner, the Respondent No.3 is a road transport service by virtue of the fact that it is engaged in carrying goods by road in vehicle for hire or reward. In case it is established that Respondent No.3 is indeed a road transport service as per the definition under Section 2(e)(vii) of the EOB Act, 1976 read with the Road Transport Ordinance, it would mean that a road transport service is an 'establishment' in which case it would be the 'employer' in relation to the 'employees' employed by it directly or through any other person by virtue of the definitions of such terms. But if we were to hold the clients / customers of such road transport service as the 'employer' *vis a vis* the employees of the road transport service then the definition of 'establishment' to the extent of Section 2(e)(v) of the EOB Act, 1976 would become redundant as a road transport service would never be the 'employer' itself. However, the Respondent No. 1 failed to consider whether Respondent No.3 is a road transport service or not and the effect thereof.

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Alleged Admission

54. Last but not least, the learned counsel for the Respondents No.1 and 2 argued that the Petitioner's letter dated 25-06-2018 written to Respondent No.3 contains an admission. According to this letter the Petitioner invokes clause 5(ii) of the Transportation Agreement dated 29.02.2016 and informed Respondent No.3 that they have started deducting a minimum payment of certain amount from their bills to recover the penalties imposed by Respondent No.1 on account of non-payment of EOB contribution of carriage contractor hired for the distribution of its soda ash business products.

55. The Transportation Agreement dated 29.02.2016 is not before me. But according to clause 5(ii) of the Transportation Agreements dated 28.02.2012 and 13-12-2010 it is Respondent No.3 who shall be exclusively responsible for the payment of remuneration and other legal benefits to the drivers, etc. in accordance with relevant laws and that if any time the Petitioner is forced to pay any amount on account of a decision or decree of a competent court the amount so paid shall be reimbursed to the Petitioner and or the Petitioner shall be entitled to deduct the same from any amounts due to the Respondent No.3. If clause 5(ii) of the Transportation Agreements dated 29.02.2016 is the same, the contents of the letter dated 25-06-2018 hardly constitute an admission of liability rather it shows that the Petitioner is asserting that it has to pay what was liability of the Respondent No.3 and as such withheld the said amount from its future payments to the Respondent No.3.

Conclusion

56. To sum up, as indicated in *Fauji Fertilizer Company Ltd. (Supra)* no hard and fast rule can be laid out for the purpose of determining whether a person

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has been employed by an 'industry' or 'establishment' through any other person or whether such person is the employee of an independent contractor that the 'industry' or 'establishment' has contracted with for provision of services. Each case has to be decided on the basis of its own peculiar facts and circumstances. However, no decision can be reached without analysis of the relevant factors as discussed in case law on the subject some of which has been discussed herein above. On the other hand, the Impugned Order and the Decision have neither taken into consideration the relevant factors nor weighed in on them as required.

57. For all the foregoing reasons, the instant petition is allowed with the result that the Impugned Order and Decision are set-aside and the matter is **remanded** to the Adjudicating Authority-III, Islamabad of the Employees Old-Age Benefits Institution to decide the Petitioner's Complaint afresh in accordance with the law in light of the above observations and till then no adverse action shall be taken against the Petitioner.

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in open Court on this 8th day of March, 2023.

JUDGE

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Approved for Reporting
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