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COMMITTEE ON SUBORDINATE LEGISLATION
(2017-2018)

(SIXTEENTH LOK SABHA)

THIRTY-THIRD REPORT

[ACTION TAKEN BY THE GOVERNMENT ON THE RECOMMENDATIONS/ OBSERVATIONS CONTAINED IN THE TWENTY FOURTH REPORT OF THE COMMITTEE ON SUBORDINATE LEGISLATION (SIXTEENTH LOK SABHA) ON THE NATIONAL HIGHWAYS FEE (DETERMINATION OF RATES AND COLLECTION) SECOND AMENDMENT RULES, 2014]

LOK SABHA SECRETARIAT
NEW DELHI

August, 2018/Shravana, 1940 (Saka)

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(PRESENTED TO LOK SABHA ON 7.8.2018)

सत्यमेव जयते

LOK SABHA SECRETARIAT
NEW DELHI

August, 2018/Shravana, 1940 (Saka)

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Shri Dilipkumar Mansukhlal Gandhi **Chairperson**

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2. Shri Idris Ali
3. Shri Birendra Kumar Chaudhary
4. Shri S. P. Muddahanume Gowda
5. Shri Shyama Charan Gupta
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8. Shri Prem Das Rai
9. Shri Chandu Lal Sahu
10. Shri Alok Sanjar
11. Shri Ram Prasad Sarmah
12. Adv. Narendra Keshav Sawaikar
13. Shri V. Panneer Selvam
14. Shri Ram Kumar Sharma
15. Shri Nandi Yellaiah

SECRETARIAT

1. Smt Sudesh Luthra - Additional Secretary
2. Shri Ajay Kumar Garg - Director
3. Smt Jagriti Tewatia - Deputy Secretary

INTRODUCTION

I, the Chairperson, Committee on Subordinate Legislation having been authorised by the Committee to submit the report on their behalf, present this Thirty-third Action Taken Report.

2. This Report relates to the action taken on the recommendations of the Committee contained in the Twenty Fourth Report (2017-2018) (Sixteenth Lok Sabha) which was presented to Lok Sabha on 28.12.2017.

3. The Committee considered and adopted this Report at their sitting held on 2.8.2018.

4. Full reply of the Ministry of Road, Transport and Highways is given in Annexure-I.

5. Minutes of Nineteenth Sitting of the Committee (2017-18) held on 2.8.2018 relevant to this Report are included in Appendix-I of the Report.

6. An Analysis of the Action Taken by Government on the recommendations/ observations contained in the Twenty Fourth Report of the Committee on Subordinate Legislation (Sixteenth Lok Sabha) is given in Appendix II.

New Delhi;
2 August, 2018
11 Sravana, 1940 (Saka)

DILIPKUMAR MANSUKHLAL GANDHI
Chairperson,
Committee on Subordinate Legislation

REPORT

This Report of the Committee on Subordinate Legislation (2017-18) deals with the action taken by the Government on the recommendations contained in their Twenty-fourth Report (Sixteenth Lok Sabha) which was presented to Lok Sabha on 28.12.2017.

2. The Twenty-fourth Report contained observations/recommendations on the issue of imposition of fee equivalent to two times of the fee applicable on the vehicles entering FASTag lane without a FASTag as the same was without any statutory backing in the National Highway Fee (Determination of Rates and Collection) Second Amendment Rules, 2014.

3. The Committee in their original report on 'The National Highway Fee (Determination of Rates and Collection) Second Amendment Rules, 2014', had observed that imposition of any kind of additional charges beyond the prescribed charges on violation of some norms/criteria definitely qualifies as penalty and as such the charges imposed upon a user of a vehicle not fitted with a FASTag venturing into the FASTag lane, over and above the normal fee/charge, falls under the category of penalty. The Committee, therefore, recommended that if imposition of penalty provision is to be retained in the Rules then appropriate statutory amendment is required to be brought out in the Parent Act empowering the Central Government to impose penalties on toll lane violations. In this regard, the Committee note from the action taken reply furnished by the Ministry on the issue of treating the levy of two times the user fees on the FASTag users as penalty, the legal opinion of Additional Solicitor General, India who opined that, 'quantum of fee leviable on non-FASTag vehicles who are otherwise not entitled to use the dedicated FASTag lane and yet travel in the dedicated lane is a form of regulatory measure of fee and not a penalty as the non-FATag vehicle would be utilizing the facility of seamless movement. There is a correlation between the levy imposed and the counter payment or quid pro quo as held in State of Uttar Pradesh vs Vam Organic Chemical Ltd (2014 (1) SCC 225). Simultaneously, road users may be motivated to move

towards an electronic means of payment with the assurance that the benefit, which would accrue to them, would be in the form of seamless passage, and therefore fee leviable on non-FASTag vehicles is legally justified in accordance with the amendment Rules 2014.' Thus, keeping in view of the clarification/opinion expressed by Additional Solicitor General of India, the Committee does not desire to pursue the matter any further. A copy of the opinion of the Additonal Solicitor General is reproduced in Annexure-I.

4. As regards the recommendation made by the Committee for providing easy accessibility and availability of the Fastag to the public, the Committee note that same are being made available through Kiosks set up by tag-issuer banks and also through their online platforms. Additionally, mobile applications such as MY FASTag have also started taking requests and providing FASTag to interested road users. Further, all new vehicles of class M and N, sold after 01.12.2017 are pre-fixed with FASTag by the vehicle manufacturer/authorized dealer and also awareness about electronic fee payment through FASTag is being generated among road users via radio jingles and advertisements on print as well as electronic media. The Committee express its satisfaction and also hope and trust that the Government will continue to make all efforts for seamless implementation of the concept of FASTag. The observations/recommendations made by the Committee and action taken replies received from the Ministry have been reproduced in chapter II of the Report.

CHAPTER II

Observations/recommendations no. 10, 11 & 12

10. The Committee note that the National Highways Fee (Determination of Rates and Collection) Second Amendment Rules, 2014 amended the principal rules of 2008 to provide for imposition of *two times* the user fee on the non-FAST tag users when they enter the FAST tag lane. According to the Ministry, this has been done to prevent non FAST tag users entering into dedicated "FASTag lane" and ensuring seamless movement of vehicles in the "FASTag lane". As regards the statutory authority to impose such penalty, the Committee note that though the National Highways Act, 1986 empowers the Central Government to levy fee on the use of national highways, there is, however, no provision in the Act which authorise the Government to impose any kind of penalty or charging extra fee or giving *challan* on any kind of violations of the prescribed toll fee norms. The Ministry have, however, tried to justify the same on account of Section 7 of the National Highways Act, 1956 which empowers the Central Government to levy fees at such rates as may be laid down by rules for services or benefits rendered on national highways.

11. The Committee are of the considered view that imposition of any kind of additional charges beyond the prescribed charges on violation of some norms/criteria definitely qualifies as penalty and as such the charges imposed upon the user of a vehicle non-fitted with FASTag venturing in the FASTag lane, over and above the normal fee/charge, falls under the category of penalty and not the fee as the Ministry has tried to justify. Not only that, in terms Rule 4 of the National Highways (Determination of rates and collection) Rules, 2008, user fees are to be collected at uniform base rates as per the category of the vehicle, and as such imposing any additional fee beyond the prescribed rates on non FASTag vehicles entering the FASTag lanes is not in conformity with the Rule 4.

12. While the Committee do not tend to agree to the interpretation of the Ministry as stated in the preceding para, the Committee are in agreement with the spirit of the amendment i.e. to provide seamless movement of vehicles at toll plazas which besides saving time and fuel adds to the efforts of the Government to reduce the cash transactions in the economy. The

Committee also note that concept of dedicated fast lanes is yet to take off and as such the collection of any penalty has not yet started. In this connection, it may be relevant to point out that the Committee in their reports have been recommending for making provisions for substantive matters like imposition of fees, penalties in the parent statute instead of leaving it to the Executive under delegated legislation. The Committee, therefore, recommend that if the provision of imposition of penalty is to be retained in the Rules, the Government may bring appropriate statutory amendment in the parent Act delegating the powers on the Central Government to impose penalties on the toll lane violators. The Committee further recommend that before resorting to imposition of penalties on toll lane violators, once the statutory amendment in the parent Act as recommended by the Committee is made, the Government must ensure easy availability of FASTags to the public by exploring the feasibility of providing the same through various public channels like online applications, Banks, Post Offices, toll plazas etc besides ensuring adequate number of lanes as well as initiating awareness campaigns to educate the people as the FASTag concept being a new concept is at a nascent stage in India. The necessary action as suggested may be taken and the Committee be apprised accordingly at the action taken stage.

Reply of the Government

2.1. The Ministry had referred the issue of two times levy of user fees to the Hon'ble Additional Solicitor General, India for legal opinion. After examination of issue, the Hon'ble ASG has opined as under:

> " In my view, the quantum of fee leviable on non-FASTag vehicles who are otherwise not entitled to use the dedicated FASTag lane and yet travel in the dedicated lane is a form of regulatory measure of fee and not a penalty as the non-FATag vehicle would be utilizing the facility of seamless movement. There is a correlation between the levy imposed and the counter payment or quid pro quo as held in State of Uttar Pradesh vs Vam Organic Chemical Ltd (2014 (1) SCC 225). Simultaneously, road users may be motivated to move towards and electronic means of payment with the assurance that the benefit, which would accrue to them, would be in the form of seamless passage, and therefore fee leviable on non-FASTag vehicles is legally justified in accordance with the amendment Rules 2014"

2.2 In view of the above, it is clear that provision of collecting two times user fees from vehicles non-fitted with FASTag, entering into dedicated FASTag lane is within the ambit of the powers conferred by NH Act 1956 section 7 and 9.

3. Further, to facilitate easy availability of FASTags, it is stated that FASTag is being made available to road users through Kiosks set up by tag-issuer banks and also through their online platforms. Additonally, mobile applications such as MY FASTag have also started taking requests and providing FASTag to interested road users. Further, all new vehicles of class M and N, sold after 01.12.2017 are pre-fixed with FASTag by the vehicle manufacturer/authorized dealer. This has resulted in increased adoption of the RFID technology for payment of user fees, with 17.25 lakh active tags as on 31.03.2018 and toll collection amounting to about 24% of total daily user fees being paid electronically.

4. Additionally, awareness about electronic fee payment through FASTag is being generated among road users via radio jingles and advertisements on print as well as electronic media. (Full Reply enclosed as Annexure-I)

(Ministry of Road, Transport and Highways OM No. 24036/02/2016 (Toll) dated 17.4.2018)

New Delhi;
2 August, 2018
11 Shravana, 1940 (Saka)

DILIPKUMAR MANSUKHLAL GANDHI
CHAIRPERSON,
COMMITTEE ON SUBORDINATE LEGISLATION

Annexure-I

No. 24036/02/2016 (Toll)
GOVERNMENT OF INDIA
MINISTRY OF ROAD TRANSPORT AND HIGHWAYS
(Toll Zone)
Transport Bhawan, 1, Parliament Street, New Delhi- 110001.

Date: 17.04.2018

OFFICE MEMORANDUM

Subject: Implementation of recommendations contained in Twenty Fourth Report (Sixteenth Lok Sabha) of the Committee on Subordinate Legislation on the National Highways Fee (Determination of Rates and Collection) Second Amendment Rules, 2014.

Reference: Letter No. 14/7/COSL/2017 dated 02.01.2018.

The Hon'ble Committee of Subordinate legislation of Lok Sabha had taken up the National Highways Fees (Determination of Rates and Collection) Second Amendment Rules, 2014 for examination. The Twenty fourth Report of the Committee on sub-ordinate legislation was presented to Lok Sabha on 28.12.2017 containing the observations/recommendations of the Committee. Briefly, the Committee recommended/observed that the provision for collecting two times fees is a 'Penalty' and not a 'Fee'. However, the Committee has conformed to the spirit of the provision i.e. in order to ensure seamless movement of vehicles, saving time and fuel and reducing cash transactions to promote the digital mission. In addition to the above, the Committee also recommended for amending the present Act, i.e. NH Act-1956 to delegate power to the Central Government to impose penalties. The Committee had further recommended for facilitating easy availability of FASTag to the public and initiating awareness campaigns to educate the people on usage of FASTag.

2. The action taken on various recommendations/observations are submitted as under:

2.1. The Ministry had referred the issue of two times levy of user fees to the Hon'ble Additional Solicitor General, India for legal opinion. After examination of issue, the Hon'ble ASG has opined as under:

> "In my view, the quantum of fee leviable on non-FASTag vehicles who are otherwise not entitled to use the dedicated FASTag lane and yet travel in the dedicated lane is a form of regulatory measure of fee and not a penalty as the non-FASTag vehicle would be utilising the facility of seamless movement. There is a correlation between the levy imposed and the counter payment or quid pro quo as held in State of Uttar Pradesh vs Vam Organic Chemical Ltd. (2014 (1) SCC 225). Simultaneously, road users may be motivated to move towards an electronic means of payment with the assurance that the benefit, which would accrue to them, would be in the form of seamless passage, and therefore fee leviable on non-FASTag vehicles is legally justified in accordance with the amendment Rules 2014."

2.2. In view of the above, it is clear that the provision of collecting two times user fees from vehicles non-fitted with FASTag, entering into dedicated FASTag lane is within the ambit of the powers conferred by NH Act 1956 section 7 and 9.

3. Further, to facilitate easy availability of FASTags, it is stated that FASTag is being made available to road users through kiosks set up by tag-issuer banks and also through their online platforms. Additionally, mobile applications such as My FASTag have also started taking requests and providing FASTag to interested road users. Further, all new vehicles of class M and N, sold after 01.12.2017 are pre-fixed with FASTag by the vehicle manufacturer/ authorized dealer. This has resulted in increased adoption of the RFID technology for payment of user fees, with 17.25 lakh active tags as on 31.03.2018 and toll collection amounting to about 24% of total daily user fees being paid electronically.

4. Additionally, awareness about electronic fee payment through FASTag is being generated among road users via radio jingles and advertisements on print as well as electronic media.

This issues with the approval of competent authority.

17.4.18

(Umesh Chandra Joshi)
Superintending Engineer (Toll)
Tele: 011-23326670
E-Mail: uc.joshi@nic.in

To,
Sh. Ajay Kumar Garg
Director,
608, Parliament House, Annexe
New Delhi-110001.

PINKY ANAND

सत्यमेव जयते

अपर महा-सॉलिसिटर
भारत
ADDITIONAL SOLICITOR-GENERAL
INDIA

April 4th, 2018

To,

Shri Y.S. Malik, Secretary,
Ministry of Road Transport & Highways
Government of India
Room No. 509, Transport Bhawan,
1 Parliament Street, New Delhi - 110001.

Sub: Opinion on the issue – whether the provision for collection of two times fees from vehicles not fitted with a FASTag and yet entering into FASTag lane is a penalty or a fee and if it is in violation of Rule 4 of the National Highways Fee Rules 2008, requiring an amendment in the National Highways Act, 1956?

Ref: Letter dated 15/02/2018 of Secretary/MoRTH/2018 D.O. No. H-24036/02/2016 (Toll)

Querist: Ministry of Road Transport and Highways (MoRTH)

OPINION

Legal opinion has been sought by Ministry of Road Transport and Highways (MoRTH) whether the provision for collection of two times fees from vehicles not fitted with a FASTag and yet entering into FASTag lane is a penalty or a fee and if it is in violation of Rule 4 of the National Highways Fee Rules 2008, is an amendment required in the National Highways Act, 1956.

FACTS: AS IN QUERY

Under reference is the letter D.O. No. H-24036/02/2016 dated 15.02.2018 of Ministry of Road Transport and Highways (MoRTH) regarding "the provision for collection of two times fees from vehicles not fitted with a FASTag and yet entering into FASTag lane is a penalty or a fee and if it is in violation of Rule 4 of the National Highways Fee Rules 2008, requiring an amendment in the National Highways Act, 1956"

Chambers : 3 & 4, ILI Building, 2nd Floor, Bhagwan Dass Road,
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Office : A-126 2nd Floor, Neeti Bagh, New Delhi - 110049
Phone : 011 4164 0960, 4174 0655 Fax : 011 4174 0656

The Ministry of Road Transport and Highways, through its implementing agencies, is levying user fees payable by the road users on stretches of National Highways. The enabling powers for the purpose are derived from Section 7 and 9 of the National Highways Act, 1956.

2. Section 7 and 9 of the National Highways Act, 1956 empower the Central Government to levy fees as laid down in the Rules made in this behalf which are to be notified in the official gazette. Accordingly, the Ministry has notified the Rules for levy of user fees.

3. This Ministry decided to introduce the system of electronic payment of user fees in 2014, thereby permitting an additional facility to road user. Briefly, users purchase a Radio Frequency Identification Device (RFID) card i.e. FASTag, to ensure a seamless passage by an auto deduct of the amount payable by them through digital means. Accordingly, it was also considered at that time that a dedicated passage should be given to those who opt for FASTag so as to optimise the payments through electronic tool charging (ETC) and thereby improve the user experience. The concept was laid down in Rule 2 (hb) of NH Fee Rules, 2008 through an amendment in 2014 so as to define a FASTag lane that is "a FASTag Lane of the fee plaza is an exclusive lane in the fee plaza for movement of vehicles fitted with 'FASTag' or any such device". Additionally, it was felt that once such a lane and its passage is earmarked, there would be certain non-FASTag optees who may enter it, thereby vitiating the entire intent of this facility. As such, with a view to enforcing the discipline, it was included in the rules that if a non-FASTag road user navigates his passage through a dedicated FASTag lane, such vehicles will be required to pay a fee equivalent to two times of the fee applicable for that category of vehicle [Rule 6(3)]. This particular notification, issued by MoRTH, was selected for examination by the Hon'ble Committee of subordinate legislation of the Lok Sabha.

4. The Hon'ble Committee observed during its deliberations that charging of the fee equivalent to two times of the fee applicable to that category of vehicles, in fact amounted to a penalty, and sought clarifications in this behalf. The Hon'ble Committee felt that the Act empowered the Central Government to collect Fees on the National Highway and there is no

provision that empowers it to collect Penalty, extra fee or challan for any kind of violation of the prescribed fee norms. The Hon'ble Committee further observed that a double levy is actually a penalty and not a fee and was in violation of Rule 4 of NH Fee Rules, 2008. As such, the Hon'ble Committee has concluded, as conveyed vide letter dated 02.01.2018, that the provision for collecting two times fees is a 'penalty' and not a 'fee'. The committee has nevertheless confirmed the spirit of the provision i.e. to ensure seamless movement of vehicles, save time and fuel and reduce cash transactions to promote the digital mission. In addition to the above, the Committee also recommended for amending the present Act, i.e. NH Act, 1956 to delegate Powers to the Central Government to impose penalties along with making FASTag easily available to vehicle/ road users and to spread awareness regarding the same.

5. As already stated earlier the intention to set up a dedicated FASTag lane was to earmark a passage for the optees of FASTag. This was to motivate Road users to move towards an electronic means of payment with the assurance that the benefit, which would accrue to them, would be in terms of a seamless passage. Therefore, it is the considered view of the Ministry that the facility of a dedicated lane for the FASTag optees is a specific facility, and it is for this reason that sub-rule (3) was introduced under Rule 6 in this behalf.

6. To conclude, this Ministry is of the view that the levy of two-times charge from the road users who are not entitled to use the dedicated FASTag lane and yet attempt to travel in the dedicated FASTag lane is permissible under Section 7 of NH Act, 1956 which reads: "*The Central Government may, by notification in the Official Gazette, levy fees at such rates as may be laid down by rules made in this behalf for services or benefits rendered*". Hence, in our view, this provision in the Rules is fully covered within the ambit of Section 7 of the Act and does not call for any amendment to the NH Act, 1956.

Subsequently, conference was held on 16.03.18 with Ms. Dakshita Das, Joint Secretary, MORTH. Based on the discussions, an email dated 20.03.18 has been received as follow:

Costs incurred in implementation of Electronic Toll Collection (ETC) system.

1. The customer activates a FASTag by paying Rs 200 to any nominated bank. He also maintains a certain sum in his account at all times for near-non-stop movement across fee plazas. For this he expects certain service in the form of seamless movement.

Following Financial implications are additionally at the Government end:

2.1. Cost of infrastructure:

In order to augment ETC infrastructure, all lanes at fee plazas are being upgraded to Hybrid lanes (with option of payment of user fees through cash and card/FASTag) with one dedicated FASTag lane on either side to ensure seamless transportation. The cost incurred towards this initiative, assuming a 12 lane fee plaza sums up to be:

Cost incurred in installing ETC infrastructure:		
Item	Rs. in Lakh/ lane	Total cost in Rs lakhs
Dedicated lane	19.8	39.2
Hybrid lane (With option of payment of user fees through both cash and card/tag.)	1.3	113
Total (Assuming 2 dedicated and 10 hybrid lanes)		152.2

Therefore, expenditure towards augmenting all the fee plazas (Total 470 no.s) across NHs is about Rs 700 cr.

2.2. Incentive for adopting FASTag:

In order to incentivize users for adoption of ETC through FASTag, a cashback scheme is being offered to road users. A cashback of 10% user fee was provided to FASTag optees in FY 2016-17 and 7.5% cashback is being offered in FY 2017-18.

2.3. Revenue foregone for backend accounting and operations:

4% of the user fees collected through ETC is disbursed to the service providers (Issuer bank 1.5%, Acquirer bank 1.25%, NPCI 0.25% and IHMCL 1%) towards operating ETC and backend accounting.

3. It is pertinent to mention here that one FASTag lane is equivalent to five manual lanes in terms of capacity and performance. In case a non-FASTag user arrives on the dedicated FASTag lane, the performance of the dedicated lane goes down to 20%. This jeopardises the whole facility making all the additional investment made for implementation of ETC infructuous. Therefore, collection of two times user fees was incorporated in order to dissuade non-FASTag users from navigating into the dedicated FASTag lane.

4. However, collection of two times user fees does not qualify as a penalty as it has been incorporated to trigger a behavioural change among non-FASTag optees. It was envisaged that non-FASTag users may get encouraged by the performance and near-non-stop movement of the FASTag lane and opt for ETC to save on fuel and commute time thus improving the efficiency and performance of the current regime of transportation of freight and passengers across the nation

RELEVANT SECTIONS AND RULES:

THE NATIONAL HIGHWAYS ACT, 1956:

Section 7 Fees for services or benefits rendered on National Highways. –

(1) The Central Government may, by notification in the Official Gazette, levy fees at such rates as may be laid down by rules made in this behalf for services or benefits rendered in relation to the use of ferries, [permanent bridges the cost of construction of each of which is more than rupees twenty five lakhs and which are opened to traffic on or after the 1st day of April, 1976] temporary bridges and tunnels on national highways [and the use of sections of national highways].

Section 9 Power to make rules. –

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2)(b) The rates at which fees for services rendered in relation to the use of ferries, permanent bridges, temporary bridges and tunnels on any national highway [and the use of sections of any national highway] may be levied, and the manner in which such fees shall be collected, under Section 7;]

NATIONAL HIGHWAYS FEE (DETERMINATION OF RATES AND COLLECTION) RULES 2008:

Rule 2 (hb) – "Fastag lane of fee plaza" is an exclusive lane in the fee plaza for movement of vehicles fitted with "FASTag" or any such device."

Rule 4 Base Rate of Fee: (2) The fee for use of a section of national highway of four or more lanes, for the base year 2007-08, be the product of the length of such section multiplied by the following rates namely:

Type of Vehicle	Base rate of fee per km (in Rupees)
Car, Jeep, Van or Light Motor Vehicle	0.65
Light Commercial Vehicle, Light Goods Vehicle or Mini Bus	1.05
Bus or Truck (Two Axles)	2.20
Three Axle Commercial Vehicles	2.40
Heavy Construction Machinery (HCM) or Earth Moving Equipment (EME) or Multi Axle Vehicle (MAV) (Four to six axles)	3.45
Oversized Vehicles (seven or more axles)	4.20

Clause (6)(b): Provided also that no user fee shall be levied for the delayed period between the date of completion as per the agreement entered into with the concessionaire and the date of actual completion of the project.

Rule 6: Collection of Fee:

Proviso to sub-clause (3) Provided that no additional charges shall be realized for making the payment of fee by use of a smart card or on board unit (transponder) or any other such device. Provided further that user of the vehicle not fitted with "FASTag" entering into "FASTag lane" of the Fee plazas shall pay a fee equivalent to two times of the fee applicable to that category of vehicles as per sub-rule (2) of rule 4.

This Ministry decided to introduce the system of electronic payment of user fees in 2014, thereby permitting an additional facility to road users. Briefly, users purchase a Radio Frequency Identification Device (RFID) card i.e., FASTag, to ensure a seamless passage by an auto deduct of the amount payable by them through digital means. Accordingly, it was also considered at that time that a dedicated passage should be given to those who opt for FASTag so as to optimize the payments through Electronic Toll Charging (ETC) and thereby improve the user experience. The concept was laid down in Rule 2 (hb) of NH Fee Rules, 2008 through an amendment in 2014 so as to define a FASTag lane "a FASTag lane of the fee plaza is an exclusive lane in the fee plaza for movement of vehicles fitted with 'FASTag' or any such device". Additionally, it was felt that once such a lane and its passage is earmarked, there would be certain non-FASTag optees who may enter it, thereby vitiating the entire intent of this facility. As such, with a view to enforcing the discipline, it was included in the rules that if a non-FASTag road user navigates his passage through a dedicated FASTag lane, such vehicles will be required to pay a fee equivalent to two times of the fee applicable for that category of vehicle [Rule 6(3)]. This particular notification, issued by MoRTH, was selected for examination by the Hon'ble Committee of Subordinate Legislation of the Lok Sabha.

The Committee observed during its deliberation that charging of fee equivalent to two times of the fee applicable to that category of vehicles, in fact amounted to a penalty, and

sought clarifications in this behalf. The Committee felt that the Act empowered the Central Government to collect fees on the National Highways and there is no provision that empowers it to collect penalty, extra fee or challan for any kind of violation of the prescribed fee norms. The Committee observed that a double levy is actually a penalty and not a fee in violation of Rule 4 of NH Fee Rules, 2008. As such, the Committee concluded, as conveyed vide letter dated 02.01.2018 that the provision for collecting two times fee is a 'Penalty' and not a 'Fee'. The Committee has nevertheless confirmed the spirit of the provision i.e. to ensure seamless movement of vehicles, save time and fuel and reduce cash transactions to promote the digital mission. In addition to the above, the Committee also recommended for amending the NH Act, 1956 to delegate powers to the Central Government to impose penalties along with making FASTags easily available to vehicle/road users and to spread awareness regarding the same.

OPINION:

Sections 7 & 9 of the NHAI Act, 1957 empower the Central Government to levy fees as laid down in the Rules made in this behalf which were notified in the Official Gazette. Under the 2008 Rules notified under Section 7 of the Act, there is a bar on collection of additional charges in such a situation.

The said Rules were amended by the National Highways Fees (Determination of Rates and Collection) 2nd Amendment Rules 2014 notified on 21st November, 2014.

The following amendments were made in the Rules :-

"2. In the National Highways Fee (Determination of Rates and Collection) Rules, 2008 (hereinafter referred to as the principal rules) in rule 2, after clause (h), the following clause shall be inserted, namely:-

"(ha) "FASTag" means an onboard unit (transponder) or any such devide fitted on the front wind screen of the vehicles" and

(hb)"FASTag lane of toll plaza" is an exclusive lane in the toll plaza for movement of vehicles fitted with "FASTag" or any such device".

3. In the Principal Rules, in Rule 6, sub-rule (3)----

(a) after "or thorugh smart card' the words and letters "or through FASTag" shall be inserved;

(b) after the existing proviso device the following proviso shall be inserted, namely:-

"Provided further that user of the vehicle not fitted with "FASTag" entering into "FASTag lane" of the Toll Plazas shall pay a fee equivalent to two times of the fee applicable to that category of vehicles as per sub-rule (2) of rule 4".

Whether the provision for collection of two times fees from vehicles not fitted with a FASTag and yet entering into FASTag lane is a penalty or a fee and if it is in violation of Rule 4 of the National Highways Fee Rules 2008, requiring an amendment in the National Highways Act, 1956?

Under the Rules of 2014, it is open to the Government to levy different types of fee on different types of vehicles depending upon the purpose and object of this exercise. There are two categories of vehicles :-

(i) Vehicles with Fastag

(ii) Vehicles not fitted with Fastag.

The facility of a dedicated lane for Fastag optees is specifically a facility provided by the Government with a view to earmarking facility. A different quantum of fees is made applicable to non-Fastag optees.

Discussion on fee.

I. In "Calcutta Municipal Corporation and Ors. vs. Shrey Mercantile Pvt. Ltd. and Ors. (2005) 4 SCC 245", Hon'ble Supreme court held:

"16.....the main difference between "a fee" and "a tax" is on account of the source of power. Although "police power" is not mentioned in the Constitution, we may rely upon it as a concept to bring out the difference between "a fee" and "a tax". The power to tax must be distinguished from an exercise of the police power. The "police power" is different from the "taxing power" in its essential principles. The power to regulate, control and prohibit with the main object of giving some special benefit to a specific class or group of persons is in the exercise of police power and the charge levied on that class to defray the costs of providing benefit to such a class is "a fee". Therefore, in the aforestated judgment in Kesoram's case, it has been held that where regulation is the primary purpose, its power is referable to the "police power". If the primary purpose in imposing the charge is to regulate, the charge is not a tax even if it produces revenue for the government. But where the government intends to raise revenue as the primary object, the imposition is a tax. In the case of Synthetics & Chemicals Ltd. v. State of U.P. , it has been held that regulation is a necessary concomitant of the police power of the State and that though the doctrine of police power is an American doctrine, the power to regulate is a part of the sovereign power of the State, exercisable by the competent legislature. However, as held in Kesoram's case (supra), in the garb of regulation, any fee or levy which has no connection with the cost or expense of administering the regulation cannot be imposed and only such levy can be justified which can be treated as a part of regulatory measure. To that extent, the State's power to regulate as an expression of the sovereign power has its limitations. It is not plenary as in the case of the power of taxation...."

II. In "State of Rajasthan and Ors. vs. Basant Agrotech (India) Ltd. (2013) 15 SCC 1", Hon'ble Supreme Court held:

"6. Elaborating on the said principles, the Constitution Bench adverted to the concept of Regulation and, in that context, culled out the principle to the effect that the primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences for determining the character of the levy. A levy essentially in the nature of a tax and within the power of the State Legislature cannot be annulled as unconstitutional merely because it may have an effect on the price of the commodity. A State legislation, which makes provisions for levying a cess, whether by way of tax to augment the revenue resources of the State or by way of fee to render services as quid pro quo but without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of "Regulation and control" belonging to the Central Government by reason of the incidence of levy being permissible to be passed on to the buyer or consumer, and thereby affecting the price of the commodity or goods. Thereafter, it observed as follows:

A tax or fee levied by the State with the object or augmenting its finances and in reasonable limits does not ipso facto trench upon Regulation, development or control of the subject. It is different if the tax or fee sought to be levied by the State can itself be called regulatory, *the* primary purpose whereof is to regulate or control and augmentation of revenue or rendering service is only secondary or incidental.."

III. In "Kandivali Cooperative Industrial Estate and Ors. vs. Municipal Corporation of Greater Mumbai and Ors.(2015) 11 SCC 161", Hon'ble Supreme Court held:

" 24. However, it would be appropriate to refer the principles laid down by this Court in the case of The Commissioner, Hindu Religious Endowment, Madras v. Sri Lakshmindra Tirtha Swamiar of Shirur Mutt AIR 1954 SC 282, which according to us will be the complete answer to the points raised by Mr. Divan and Mr. Singh, learned senior Counsel appearing for the Appellants. In para 44, this Court observed: 44. Coming now to fees, a 'fee' is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the

Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay (Vide Lutz on "Public Finance" p. 215.). These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases.

25. A fee undoubtedly, is a payment primarily in public interest, but for some special services, rendered or some special work done for the benefit of those from whom payments are demanded. In other words, fees must be levied in consideration of certain services which the individual accept willingly or unwillingly. It is also necessary that fees or charges so demanded must be appropriated for that purpose and must not be used for other general public purposes. Further, indisputably, the legislature can delegate its power to statutory authority, to levy taxes or fees and fix the rate in regard thereto.

26. Elaborating the distinction between the tax and a fee, this Court in number of decisions held that the element of compulsion or coercion is present in all impositions, though in different degrees and that it is not totally absent in fees. The compulsion lies in the fact that payment is enforceable by law against a man in spite of his unwillingness or want of consent and this element is present in taxes as well as in fees..."

IV. In "State of Tamil Nadu and Ors. vs. TVL. South Indian Sugar Mills Assn. and Ors. (2015) 13 SCC 748, Hon'ble Supreme Court held:

"...7. Over the years, the inflexibility with which the principle of quid pro quo was to be applied, which may have been sired from a pedantic perusal of Synthetics and Chemicals Ltd., has been clarified and crystallized by this Court. We shall reproduce these paragraphs from B.S.E. Brokers' Forum, Bombay and Ors. v. Securities and Exchange Board of India and Ors. (2001) 3 SCC 482 to enable their fruitful consideration:

30. This Court in the case of Sreenivasa General Traders v. State of A.P. (1983) 4 SCC 353 has taken the view that the distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary motive of Regulation in public interest. This Court said that in determining whether a levy is a fee or not emphasis must be on whether its primary and essential purpose is to render specific services to a specified area or class. In that process if it is found that the State ultimately stood to benefit indirectly from such levy, the same is of no consequence. It also held that there is no generic difference between a tax and a fee and both are compulsory exactions of money by public authorities. This was on the basis of the fact that the compulsion lies in the fact that the payment is enforceable by law against a person in spite of his unwillingness or want of consent. It also held that a levy does not cease to be a fee merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have a direct relation to the actual service rendered by the authority to each individual who obtains the benefit of the service. It also held that the element of quid pro quo in the strict sense is not always a sine qua non for a fee, and all that is necessary is that there should be a reasonable relationship between the levy of fee and the services rendered. That judgment also held that the earlier judgment of this Court in Kewal Krishan Puri v. State of Punjab (1980) 1 SCC 416 is only an obiter.....

.....

38. As noticed in the City Corporation of Calicut (1983) 2 SCC 112 the traditional concept of quid pro quo in a fee has undergone considerable transformation. From a conspectus of the ratio of the above judgments, we find that so far as the regulatory fee is concerned, the service to be rendered is not a condition precedent and the same does not lose the character of a fee provided the fee so charged is not excessive. It is also not necessary that the services to be rendered by the collecting authority should be confined to the contributories alone. As held in Sirsilk Ltd. 1989 Supp. (1) SCC 168 if the levy is for the benefit of the entire industry, there is sufficient quid pro quo between the levy recovered and services rendered to the industry as a whole. If we apply the test as laid down by this Court in the

abovesaid judgments to the facts of the case in hand, it can be seen that the statute Under Section 11 of the Act requires the Board to undertake various activities to regulate the business of the securities market which requires constant and continuing supervision including investigation and instituting legal proceedings against the offending traders, wherever necessary. Such activities are clearly regulatory activities and the Board is empowered Under Section 11(2)(k) to charge the required fee for the said purpose, and once it is held that the fee levied is also regulatory in nature then the requirement of quid pro quo recedes to the background and the same need not be confined to the contributories alone.

6. Subsequently, in State of U.P, v. Vam Organic Chemicals Ltd. (2004) 1 SC 225 (commonly referred to as "Vam Organic II") this important aspect of the law has been further crystallised thus-

34. The word "service" in the context of a fee could, therefore, include, a levy for a compulsory measure undertaken vis-a-vis the payer in the interest of the public. This "coercive" measure has been subsequently judicially clarified to mean a "regulatory measure". But in the case of both kinds of services, whether compulsorily imposed or voluntarily accepted, there would have to be a correlation between the levy imposed and the "counterpayment or quid pro quo". However, correlationship between the levy and the services rendered is one of general character and not of mathematical exactitude. All that is necessary is that there should be a reasonable "relationship" between levy of the fee and the service rendered. Contrariwise when there is no such correlation, the levy, despite its nomenclature is in fact a tax. In Corporation of Calcutta v. Liberty Cinema AIR 1965 SC 1107 the licence fee charged Under Section 548 of the Calcutta Municipal Act, 1951 had been challenged on the ground that no service was rendered commensurate with the tax..."

In my view, the quantum of fee leviable on non-Fastag vehicles who are otherwise not entitled to use the dedicated FASTag lane and yet travel in the dedicated FASTag lane is a form of regulatory measures of fee and not a penalty as the non FASTag vehicles would be utilising the facility of seamless passage. There is a corelation between the levy imposed and the counter payment or quid pro quo as held in State of Uttar Pradesh vs Vam Organic

Chemicals Ltd. [2004 (1) SCC 225]. Simultaneously, road users may be motivated to move towards an electronic means of payment with the assurance that the benefit, which would accrue to them, would be in terms of a seamless passage, and therefore fee leviable on non-Fastag vehicles is legally justified in accordance with the amended Rules of 2014.

(Pinky Anand)
Additional Solicitor General

APPENDIX I

(Vide para 5 of the Introduction)

MINUTES OF THE NINETEENTH SITTING OF THE COMMITTEE ON SUBORDINATE LEGISLATION (2017-2018)

The Nineteenth sitting of the Committee (2017-18) was held on Thursday, the 02nd August, 2018 from 1500 hours to 1600 hours in Room No. 148, Third Floor, Parliament House, New Delhi.

PRESENT

Shri Dilipkumar Mansukhlal Gandhi — Chairperson

MEMBERS

2. Shri Birendra Kumar Choudhary
3. Shri Shyama Charan Gupta
4. Shri Jhina Hikaka
5. Shri Janardan Mishra
6. Shri Prem Das Rai
7. Shri Chandul Lal Sahu
8. Shri Alok Sanjar
9. Adv. Narendra Keshav Sawaikar
10. Shri Ram Kumar Sharma
11. Shri Nandi Yellaiah

SECRETARIAT

1. Smt Sudesh Luthra - Additional Secretary
2. Shri Ajay Kumar Garg - Director
3. Shri Nabin Kumar Jha - Additional Director
4. Smt Jagriti Tewatia - Deputy Secretary

2. At the outset, the Chairperson welcomed the Members to the sitting of the Committee. The Committee then considered the following draft Reports:-

(i) Draft Thirty-first Report on the Rules/regulations governing the functioning of Delhi Police.

(ii) Draft Thirty-second Report on the Action taken by the Government on the observations/recommendations contained in the 26th Report of the Committee (16th Lok Sabha) regarding Rules/Regulations framed under AIIMS Act, 1956.

(iii) Draft Thirty-third Report on the Action taken by the Government on the observations/recommendations contained in the 24th Report of the Committee (16th Lok Sabha) regarding National Highway Fee (Determination of Rates and Collection) 2nd Amendment Rules, 2014.

(iv) Draft Thirty-fourth Action Taken Report on the observations/ recommendations contained in the 11th Report of the Committee (16th Lok Sabha) on Cigarettes and other Tobacco Products (Packaging and Labelling) Amendment Rules, 2014.

(v) Draft Thirty-fifth Action Taken Report on the recommendations/ observations contained in 5th Report (16th Lok Sabha) of the Committee.

(vi) Draft Thirty-sixth Action Taken Report on the recommendations/ observations contained in 9th Report (16th Lok Sabha) of the Committee.

3. After deliberations, the Committee adopted the same with slight modifications in the draft 34th Report on Cigarettes and other Tobacco Products (Packaging and Labelling) Amendment Rules, 2014. The Committee also authorized the Chairperson to present the same to the House.

The Committee then adjourned.

APPENDIX II

(Vide para 6 of the Introduction)

Analysis of the Action Taken by Government on the recommendations/ observations contained in the Twenty-fourth Report of the Committee on Subordinate Legislation (Sixteenth Lok Sabha).

I	Total number of recommendations	2
II	Recommendations that have been accepted by the Government [vide recommendation No. 12 (Part-II)]	1
	Percentage of total	50%
III	Recommendation which the Committee do not desire to pursue in view of Government's replies [vide recommendation No. 12 (Part-I)]	1
	Percentage of total	50%
IV	Recommendations in respect of which replies of the Government have not been accepted by the Committee.	Nil
V	Recommendations in respect of which final replies of Government are still awaited	Nil