

IN THE HIGH COURT OF SINDH, KARACHI

Const. Petition No.D-4326 of 2012
and Const. Petition Nos.D-3035, 4090, 4091,
4118 and 4119 of 2014

Present

Mr. Justice Aqeel Ahmed Abbasi.
Mr. Justice Muhammad Junaid Ghaffar

M/s. Pakistan Telecommunication Company Limited
and others.....Petitioners

Versus

Province of Sindh and othersRespondents

Date of hearing 14.11.2014

Date of Judgment: 11.03.2015

M/s Hyder Ali Khan and Sami-ur-Rehman, advocates for the
petitioner (C.P.No.D-4326/2012).

Mr. Ijaz Ahmed Shirazi, advocate for the petitioner (C.P.No.D-
3035/2014)

Mr. Taimur Mirza, advocate for the petitioners (C.P.Nos.D-4090,
4118 & 4119 of 2013).

M/s. Faisal Siddiqui and Muhammad Vawda, advocates for
respondent Nos.2 & 3 along with Zamir Khalid, Zain-ul-Abdin,
Deputy Commissioners and Atifuddin, Consultant, S.R.B.

Mr. Saifullah, AAG.

Mr. Dilawar Hussain, Standing Counsel.

J U D G M E N T

Aqeel Ahmed Abbasi, J: We would dispose of all the above petitions through this
common judgment as the controversy and legal points involved in the instant
petition(s) are common. In C.P.No.D-4326/2012, filed by the Pakistan
Communication Limited (PTCL), the petitioner sought the following declaration:-

- i) Declare that revenue on International Incoming Calls cannot be
taxed by the Respondents.
- ii) Declare that the Notification issued on 25.10.2012 and numbered
SRB-3-4/15/2012(ANNEX C-2) and Notification No.SRB-3-
4/16/2012 (Annex E) issued on 16.11.2012 are without lawful
authority and of no legal effect.

- iii) Quash the Notification issued on 25.10.2012 and numbered SRB-3-4/15/2012 (Annex C-2) and Notification No.SRB-3-4/16/2012 (Annex E) issued on 16.11.2012.
- iv) Prohibit the Respondents jointly and severally and directly as well as indirectly from taking any action or passing any order on the basis of Annexes C-1, C-2, E & F and from collecting any Service Tax from the Petitioner on international incoming calls.

Whereas, in C.P.Nos.D-3035, 4090, 4091, 4118 and 4119 of 2013 filed by the different Telecommunication Companies, who have been granted licence by Pakistan Telecommunication Authority (PTA) as a Long Distance International (LDI) operators, common relief in the following terms has been sought:-

- i) Declare that revenue on International Incoming Calls cannot be taxed by the Respondents.
- ii) Declare that the Notification issued on 25.10.2012 and numbered SRB-3-4/15/2012(ANNEX C-2) and Notification No.SRB-3-4/16/2012 (Annex E) issued on 16.11.2012 are without lawful authority and of no legal effect.
- iii) Restrain the Respondents jointly and severally and directly as well as indirectly from taking any action or passing any order on the basis of Notification No.SRB-3-4/15/2012 dated 25.10.2012 and Notification No.SRB-3-4/16/2012 or under any provision of the Sales Tax Act and from collecting any service tax from the Petitioner on international incoming calls in any manner whatsoever.
- iv) Grant any further relief to which the Petitioner is found entitled to in the circumstances, in the interest of justice, equity and fairness.

2. However, during the course of hearing at Katcha Peshi stage on 20.05.2014, a proposal was made on behalf of the respondent department to the petitioners that if the petitioner may approach the respondents for seeking exemption from payment of sales tax on services on the amount received on international incoming calls by the petitioners, the same will be considered in accordance with law, keeping in view the fact that earlier also exemption was

granted to the petitioner by the Federal Board of Revenue in this regard, whereas, till decision of the claim of the petitioners regarding exemption, the respondent will not proceed to recover any amount of sales tax from petitioners. Pursuant to such proposal, the learned counsel for the petitioners requested for time to seek instructions. Consequently, on 25.10.2014 when the petitions were again taken up for hearing, learned counsel for the petitioners, under instructions submitted that the proposal from the respondent as referred to hereinabove is not acceptable to the petitioners. However, learned counsel for the petitioners further submitted that petitioners will not press and agitate the validity of both the Notifications No.SRB-3-4/15/2012 dated 25.10.2012 and No.SRB-3-4/16/2012 dated 16.12.2012, nor they will challenge the withdrawal of exemption from payment of sales tax on International incoming calls, whereas, petitioner will seek declaration to the effect that revenue on international incoming calls cannot be taxed or collected from petitioners under the Sales Tax on Services Act, 2011.

3. In view of hereinabove facts and circumstances of the case and the undertaking given on behalf of the learned counsel for the petitioners during the course of hearing as referred to hereinabove, the relief sought through instant petitions has been restricted besides preliminary objection as to maintainability of petitions, only to the extent of determination as to whether the petitioner telecommunication companies and the LDI Operators are liable to pay sales tax on services in respect of revenue received on international incoming calls or not?

4. Mr. Hyder Ali Khan, learned counsel for the petitioner in C.P.No.D-4326/12, while leading arguments on behalf of the petitioners on the aforesaid controversy has contended that the petitioner PTCL is engaged in the business of telecommunication and is the largest telecommunication network and infrastructure provider in Pakistan. Per learned counsel, the business activities of the petitioner includes broadband, wireless broadband, CDMA, smart television, national international career activities amongst other activities. However, for the purposes of the subject controversy, it has been contended by the learned counsel for the petitioner that the revenue being received by the petitioner outside Pakistan in respect of international incoming calls does not involve any element of providing services, which may attract the provision of Sindh Sales Tax on Services Act, 2011, for the reasons that no services are being provided by the petitioner within the

territorial jurisdiction of the Sindh Revenue Board. Whereas, per learned counsel, the province cannot levy or charge any tax or fee on services, which are provided beyond the territorial limits of the province, in the instant case(s) Province of Sindh. Per learned counsel, the petitioner telecommunication company is registered and issued licence under Telecommunication Laws, Rules and Regulations, which regulate the functioning as well as the contractual obligation of the telecommunication companies with National, International Authorities, hence an attempt to charge or levy any tax, particularly, sales tax on the receipts of the petitioner company in respect of transactions where the petitioner cannot pass on the burden of sales tax in view of some legal and contractual obligation, would become direct tax on receipts, whereas, such authority is not vested with the Sindh Revenue Board under Sindh Sales Tax on Services Act, 2011. Learned counsel for the petitioner, while explaining the nature of the transaction, pursuant to which revenue is received by the petitioner in respect of international incoming calls has contended that international incoming calls emanate from abroad, beyond the territorial jurisdiction of the Sindh Revenue Board on which sales tax or valued added tax is already paid on the invoice charged to the customers for the complete service. The Network from which the call originate, then pays part of this charge to the petitioner for terminating the calls on its network, whereas, per learned counsel, the tax on such calls, which is already paid in foreign jurisdiction for the entire amount received by the petitioner and what the petitioner receives is a share of entire amount billed for the call to the customer outside Pakistan. Per learned counsel, any further taxation from the petitioner would therefore, result in double taxation. It is further contended by the learned counsel for the petitioner that the petitioner cannot pass on the burden on such tax on international incoming calls to foreign phone companies and it cannot also charge for any international incoming calls in violation of the rates, which are determined by PTA. It is contended by the learned counsel that the Pakistan is signatory to the International Telecommunication Regulation from the year 1992, whereas, it has been ratified subject to Pakistan's Constitutional procedure on 31.10.1997. Per learned counsel, such regulation only permits those telecommunication services to be taxed that are subject to a customer in that particular Country, whereas, it does not allow the burden of tax to be passed on to foreign phone companies or their customers.

5. While, explaining the nature of the transaction pursuant to which the petitioner received a certain amount of revenue on international incoming calls which the respondent intend to charge for the purposes of sales tax on services, learned counsel for the petitioner submits that in order to illustrate international interconnect, if a call is made by a person 'X' in New York using the AT&T Network there to person 'Y' who has a PTCL connection in Karachi, even though the entire amount for the entire duration of the call is charged and collected by AT&T, the call cannot be completed without the petitioner making available its telecommunication capabilities. Per learned counsel, the receiver of the call i.e. the petitioner customer is not charged inspite of the fact that the petitioner telecommunication services are utilized for the reason that as per PTA Regulation, the petitioner cannot charge its customers for incoming calls, whereas, PTA allows the petitioner to charge AT&T for the rendering of telecommunication services. It is further contended that PTA negotiate such rates at the international plane and the charge is regulated by PTA, hence, it is not a taxable communication services. Learned counsel further submits that the entire telecommunication sector in Pakistan would suffer if the petitioner stopped providing telecommunication services to foreign phone companies, therefore, the respondent may be restrained from charging international incoming calls paid by the foreign phone companies to the petitioner as such amount is not liable to sales tax on services. It is further contended by the learned counsel for the petitioner that in the year 2005 when the Federal Excise Act, 2005 was enacted, international incoming call was not mentioned in the first schedule of Federal Excise Act under heading 98.12, which sets out the rate of various telecommunication services which are taxable. Per learned counsel, heading 98.12 in the first schedule of Act prescribed the rates of those services to be taxed. However, neither list mentions the rates for international incoming call, therefore, the same is outside the tax net of the Act. Per learned counsel, an exemption was nevertheless provided to international incoming calls, through Notification No.SRB.Leg(I)/2011 dated 01.07.2011, however, per learned counsel, international incoming calls being outside the tax net, were not even required such exemption and the said Notification was merely an explanatory Notification. Learned counsel for the petitioner has also referred to another Notification No.SRB-3-4/15/2012 dated 25.10.2012 with an accompanying explanatory letter of the same date and submits that a representation was sent by the petitioner to the

respondent No.2 on 13.11.2012 stating therein that international incoming calls could not be taxed. Thereafter, the respondent No.2 issued another Notification No.SRB-3-4/16/2012 and through Sindh Sales Tax on Services Rules, 2011, whereas, on 04.12.2012 the respondent No.3 writing on behalf of the respondent No.2, responded to the letter of the petitioner dated 13.11.2012, refused to accept any of the grounds and stated that it would not be reviving the earlier tax exemption on international incoming calls. Per learned counsel, keeping in view hereinabove facts and circumstances and the legal embargo imposed under various laws including the PTA Act and International Telecommunication Regulations, this Court may issue a declaration to the effect that the sales tax on services in respect of revenue received on international incoming calls is not leviable. In support of his contention, learned counsel for the petitioner has relied upon the following case law:-

- 1) *Iqbal Hussain Vs. Federation of Pakistan and others* [2010 PTD 2338]
- 2) *Pfizer Laboratories Limited Vs. Federation of Pakistan & others* [PLD 1998 SC64]
- 3) *The FECTO Cement Limited Vs. The Collector of Custom Appraisement & others* 1994 MLD 1136
- 4) *Collector of Customs House Lahore & Others Vs. M/s. S.M. Ahmad & Company (Pvt) Limited Islamabad* [1999 SCMR 138]
- 5) *Shahnawaz (Pvt) Ltd. Vs. Pakistan & another* [2011 PTD 1558]
- 6) *Edulji Dinshaw Limited Vs. Income Tax Officer* [1990 PTD 155]
- 7) *M.Y. Khan Vs. M. M. Aslam & Others* [1974 SCMR 196]
- 8) *Commissioner of Income Tax Vs. Eli Lilly Pakistan (Pvt) Ltd.* [2009 SCMR 1279]
- 9) *Sumaeea Zareen Vs. Selection Committee Bolan Medical College Quetta & Others* [1991 SCMR 2099]
- 10) *State Cement Corporation of Pakistan Ltd. Vs. Collector of Customs Karachi & another* [1998 PTD 2999]
- 11) *Shamroz Khan & another Vs. Muhammad Amin & others* [PLD 1978 SC 89]
- 12) *Government of Pakistan Vs. Indo-Pakistan Corporation Ltd & others* [PLD 1979 SC 723]
- 13) *Muhammad Ismail Vs. The State* [PLD 1969 SC 241]
- 14) *Leather Connections (Pvt) Ltd. Vs. Government of Pakistan & others* [2000 PTD 3369]
- 15) *Matiari Sugar Mills Ltd Vs. Pakistan & others* [2003 PTD 773]

- 16) *Commissioner of Income Tax Companies-II, Karachi Vs. Fazal-ur-Rehman* [2009 PTD 862]
- 17) *Collector of Customs, Lahore & others Vs. S.M.Ahmed & Company)Pvt) Ltd.* [1999 SCMR 138]
- 18) *West Punjab Province Vs. K.B. Amir-ud-Din & others* [PLD 1953 Lahore 433]
- 19) *Collector of Sales Tax & Federal Excise Vs. Qasim International Container Terminal Pakistan Ltd.* [2007 PTD 250]
- 20) *Abdul Ghafoor Khan DAHA & another Vs. Controller of Estate Deputy Government of Pakistan* [1969 PTD 128]
- 21) *Muhammad Umer Rathore Vs. Federation of Pakistan* [PLD 2009 Lahore 268]
- 22) *Indus Jute Mills Ltd. Vs. Federation of Pakistan & others* [2009 PTD 1473]
- 23) *Chen One Stores Ltd. Vs. Federal Board of Revenue & others* [2012 PTD 1815]
- 24) *Defence Authority Club, Karachi & others Vs. Federation of Pakistan & others* [2007 PTD 398].
- 25) *Amin Textile Mills & others Vs. Federation of Pakistan & others* [2002 CLC 1714].
- 26) *Don Basco High School & others Vs. The Assistant Director, E.O.B.I. & others.*[PLD 1989 SC 128].
- 27) *Collector Customs, Central Excise & Sales Tax, Karachi (West) Vs. Novartis Pakistan Ltd.*
- 28) *Azad Friends Co. Ltd Vs. Commissioner of Income Tax* [1970 PTD 465].
- 29) *Commissioner of Income Tax Vs. Bhagwan Broker Agency* (PTCL 1996 FC 20).
- 30) *Ali Muhammad Vs Chief Settlement & Rehabilitation Commissioner & others.* [1984 SCMR 94].
- 31) *Commissioner of Income Tax Vs R.M. Meenakshisundaram.*[PTCL 1996 FC 157]
- 32) *Imran Ali Shah Vs Government of Pakistan & others* [2013 PLC 143].
- 33) *Imperial Tobacco Co.of India Ltd Vs. Commisisoner of Income Tax & another* [PLD 1958 SC 125].
- 34) *Zainab Bibi & others Vs Bilqis Bibi & others* [PLD 1981 SC 56].
- 35) *Shamas Textile Mills Ltd & others Vs. The Province of Punjab & others* [1999 SCMR 1477].
- 36) *Mondi's Refreshment Room & Bar Vs Islamic Republic of Pakistan & another.*[PLD 1983 Karachi 214].
- 37) *Hirjina & Co Vs Islamic Republic of Pakistan & another* [1993 SCMR 1342].
- 38) *Master Foam (Pvt) Ltd & others Vs Government of Pakistan & others* [2005 PTD 1537]

- 39) *Rijaz (Pvt) Ltd Vs The Wealth Tax Officer & another* [1996 PTD 489].
- 40) *Nasir Ali & others Vs Pakistan & others* [2010 PTD 1924]
- 41) *Commissioner of Income Tax Companies Zone-I Vs Simnwa Poloy Propylene Products (Pvt) Ltd.* [2005 PTD 2022].
- 42) *Commissioner of Income Tax/Wealth Ta Companies Zone-I Vs Hafeez Valqa Industries.*[2005 PTD 2403].
- 43) *Colibrative Heavy Industries (Pvt) Vs C.I.T/W.T Coys Zone-III* [2005 PTD 2525].
- 44) *Muslim Commercial Bank Ltd Vs Federation of Pakistan & others*[1997 PTD 1724].
- 45) *Colony Sarhad Textile Mills Ltd Vs Collector Central Excise & Land Customs & another* [PLD 1969 Lahore 228]
- 46) *K.G. Old Vs. Presiding Officer, Punjab Labour Court & others* [PLD 1976 Lahore 1097].

6. Mr. Taimur Mirza, Advocate, representing the petitioners in C.P.Nos.D-4090-4091, 4118 & 4119 of 2013, while adopting the arguments advanced by Mr. Hyder Ali Khan, learned counsel for the petitioner in C.P.No.D-4326/2012, has further contended that since Federal laws relating to telecommunication services do not tax the services provided to the foreign recipients, therefore, the Provinces also cannot levy such tax or fee on such revenue received from the international telecommunication agencies. Per learned counsel, petitioners are engaged in the business of telecommunication and have been granted license by the PTA as a Long Distance and International (LDI) Operator in terms of Section 21 of the Pakistan Telecommunication (Re-Organization) Act, 1996, and have been authorized to organize foreign telecommunication services terminated to the Pakistan through local telecommunication companies, which are technically called Local Loop Operators and "Cellular Mobile Operators". Per learned counsel, the payments are made to LDI Licence holders and the local telecommunication companies are paid by the foreign telecommunication companies. Per learned counsel, in terms of Section 3 of the Sales Tax Act only those services are taxable which are listed in the 2nd Schedule of the Sales Tax Act, whereas, there is no heading "International Incoming Calls" or any such synonymous phrase mentioned under heading 98.12 of Schedule 1 of the Act, which provides the list of telecommunication services, hence the international incoming call do not fall within the definition of telecommunication services chargeable to tax. Per learned counsel, petitioners were granted exemption since very inception from payment of

duty and taxes in respect of revenue received from the international incoming calls from foreign telecommunication companies, therefore, such amount cannot be made chargeable to tax as proposed in the impugned notices. It has been prayed by the learned counsel that since sales tax is only payable on a service which is listed in the 1st and 2nd Schedule of the Sales Tax Act, 1990, whereas, international incoming calls are not mentioned in the aforesaid schedule, hence no tax is leviable on an amount received by the petitioners from foreign telecommunication operator in this respect. Learned counsel for the petitioners has also referred to certain PTA laws and Regulations and contended that in view of certain restrictions imposed on the petitioners from charging any amount from the foreign telecommunication service companies, any amount received in this regard by the petitioners cannot be subjected to tax under Sindh Sales Tax on Services Act, 2011.

7. Mr. Ijaz Ahmed, learned counsel representing the petitioner in C.P.No.D-3035/2014 submits that petitioner has been granted licence by PTA as a LDI Operator under Section 21 of Pakistan Telecommunication (Re-Organization) Act, 1996, and does not provide any telecommunication services in respect of international incoming calls. Per learned counsel, the petitioner's function is to connect international incoming calls originating from the foreign telecommunication Companies, for the consumers in Pakistan through local telecommunication companies Local Loop Operators and Cellular Mobile Operators. Per learned counsel, an LDI Operator connects such call to local loop or cellular Mobile operator, whose customer is being called from a foreign country, whereas, the petitioner's infrastructure is utilized in such process. PTA allows the LDI operators to charge the foreign telecommunication companies for receiving and terminating the call at Pakistan end, for letting them use LDI operator's infrastructure. Per learned counsel, the petitioner cannot charge sales tax from the consumers nor the petitioner is required to pay tax on the entire revenue receipt. It is further contended by the learned counsel that since the law restricts the passing on the burden of this tax, hence it cannot be treated as tax on services (indirect tax). Learned counsel further submits that sales tax is only payable on services in the 1st Schedule and 2nd Schedule of the Sales Tax Act, whereas, international incoming calls do not find any mention in both the Schedules. Per learned counsel, imposition of tax on international incoming calls violates the International

Telecommunication Regulations passed by International Telecommunication Union in terms of clause 6.1.3, to which Pakistan is a signatory and said regulation is binding and to be honoured. It has been prayed that this is a fit case wherein reading down of the levy and the certain provisions of law is required by this Court. In support of his contention, learned counsel has placed reliance in the following case law:-

1. Messrs Elahi Cotton Mills Ltd and others vs. Federation of Pakistan through Secretary M/o Finance, Islamabad and 6 others PLD 1997 SC 582.
2. Messrs Telecard Ltd. through Deputy General Manager Finance, Karachi vs. Collector Sales Tax and Central Excise (Enforcement), Karachi and another 2010 PTD 967
3. Sardarzada Zafar Abbas and others vs. Syed Hassan Murtaza and others PLD 2005 SC 600
4. Messrs Be Be Jan Pakistan (Private) Limited, Faisalabad vs. The I.A.C of Income Tax of Companies Range-VI, Faisalabad and 3 others 2002 PTD 208
5. Paresh Chandra Chatterjee v. The State of Assam and another AIR 1962 SC 167

8. Conversely, learned counsel for the respondents No.2 and 3 at the very outset has raised a preliminary objection as to maintainability of instant petitions for being premature and having been filed without any cause of action, whereas, in respect of C.P.No.D-4326/2012 i.e. PTCL vs. Province of Sindh and others an additional objection has been raised on the grounds that petition has been filed by an unauthorized person, whereas, there is no Board Resolution or the Minutes of any Board of Directors meeting authorizing the deponent Aun Ali Sayani to file instant petition. Per learned counsel, inspite of specific objection in this regard by the respondents, the petitioner has not bothered to file such Board's Resolution or the minutes of the Board's meeting, which is mandatory legal requirement in the case of company, which intends to file legal proceedings before any Court of Law. Learned counsel submitted that the delegation of the authority matrix filed by the petitioner in response to objection raised by respondent, being internal document of the petitioner company, does not meet the mandatory requirement of filing Board's Resolution through which a legal authorization is made to a person to file legal proceedings on behalf of the company before the Court of Law. In support of his contention in this regard, learned counsel for the respondents has placed reliance in the following case law:-

- 1) Bashir Ahmed vs. Plastic Bag Packaging Limited and others PLD 1991 Lahore 386.
- 2) Eid Muhammad vs. Settlement Commissioner Sindh and another 1987 CLC 387
- 3) Sirajuddin Paracha and 12 others vs. Mehboob Elahi and 3 others PLD 1997 Karachi 62
- 4) Abdul Rahim and 2 others vs. Messrs United Bank Ltd. of Pakistan PLD 1997 Karachi 276
- 5) National Bank of Pakistan and others vs. Karachi Development Authority and others PLD 1999 Karachi 260
- 6) Messrs Pakistan Oil Mills (Pvt) Ltd. vs. Messrs Peter Shipping Co. Ltd and others 2005 MLD 1745

Without prejudice to hereinabove objection as to authority of petitioner in the absence of Board's resolution of PTCL, learned counsel for the respondents has also vehemently opposed the maintainability of instant petitions on the ground that no cause of action has arisen to the petitioners to file instant Constitution Petitions under Article 199 of the Constitution, as according to learned counsel, no adverse order, whatsoever, has been passed against the petitioners by the respondents, whereas, respondents having jurisdiction over the petitioners who are admittedly registered under Sindh Sales Tax on Service Act, 2011, have merely issued a letter to the Chairman of petitioner company intimating the legal position which has emerged after withdrawal of Notification, whereby, the exemption was granted to the petitioners from payment of sales tax on the amount received by the petitioners on international incoming calls. It is further contended by the learned counsel for respondent that admittedly the revenue received by the petitioners on account of international incoming calls meant for Pakistan (including Sindh) terminated through PTCL was chargeable to tax, however, the legislature was pleased to grant exemption to the petitioner/PTCL through Notification No.SRB-Leg(i)/2011 dated 01.07.2011, which exemption has now been withdrawn vide Notification No.SRB-3-4/12 dated 25.10.2012, therefore, there could be hardly any dispute with regard to chargeability or applicability of the provisions of Sindh Sales Tax on Services Act, 2011, on such revenue received by the petitioners in respect of services provided to the customers in Pakistan (in Sindh). Per learned counsel, the grant of exemption pre-supposes the chargeability and taxability of a levy, which in the instant case, was never disputed nor through instant petitions, the petitioners have as such challenged the vires of such levy, whereas, the argument has been raised regarding application of Sindh Sales Tax on Services Act, 2011, on the

revenue received by the petitioner in respect of international incoming calls, which are terminated by the use of PTCL connection, which are admittedly terminated by use of equipment and infrastructure provided by petitioners at the end of consumer of Pakistan (in Sindh). Learned Counsel has further argued that since Sindh Sales Tax on Services Act, 2011, has been promulgated after 18th amendment in the Constitution of Islamic Republic of Pakistan, 1973, whereby the sales tax on services is no more the domain of Federal legislation, hence it can be lawfully enacted by the Provinces after abolition of concurrent list. Per learned Counsel, no substantial ground has been raised by the petitioner to challenge the taxability or application of provisions of Sindh Sales Tax on Services Act, 2011, whereas, the petitioners have attempted to allege that since there are certain provisions in Pakistan Telecommunication (Re-organization) Act, 1996 or in the International Telecommunication Regulations placing embargo of collecting such tax from the foreign telecommunication agency or from the customers in Pakistan (in Sindh) on international incoming calls, therefore, such tax cannot be charged from petitioners. Per learned counsel, it has been further alleged that the inability of the petitioner to pass on the burden of such sales tax on services to consumer is another valid ground, therefore, such amount of sales tax cannot be charged on services in respect of incoming calls received from foreign country, from the petitioners. Learned counsel for the respondents has contended that such contention of the learned counsel for petitioners, besides being misconceived in law and fact, is also premature and requires a detailed scrutiny of certain facts, application of relevant laws, rules and regulations in this regard, which exercise has not yet been either undertaken or concluded by the respondent department, who is under legal obligation to enforce the provisions of Sindh Sales Tax on Services Act, 2011 and to apply the Rules and Regulations made thereunder on various types of services provided by a registered persons, per learned counsel, the petitioners by filing instant petitions have attempted to pre-empt such decision on merits and the lawfully initiated proceedings have been frustrated through instant petitions. Learned counsel for the respondents submits that the petitioners have not been able to point out any jurisdictional error or illegality committed by the respondent, who has simply written a letter to the petitioner intimating the factual and legal position, which has emerged after withdrawal of exemption which was earlier available to the petitioners from payment of sales tax on services in

respect of revenue received on international incoming calls. On the contrary, per learned counsel, an opportunity has been provided to the petitioners to explain their case, however, instead of submitting their response to such Show Cause Notice, petitioners have invoked constitutional jurisdiction of this Court under Article 199 which cannot be invoked unless a person is aggrieved by any adverse order or action of a public functionary, which may suffer from jurisdictional error or with some patent illegality, and the person, who feels aggrieved by such adverse order/decision, has no other alternate remedy to seek redressal of grievance under the law. It is further contended by the learned counsel that it is also well settled law that the matter, which involves disputed facts or requires examination of such disputed facts through evidence, such relief cannot be granted under writ jurisdiction in terms of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. Per learned counsel, the contention raised by the learned counsel for the petitioner on the subject controversy through instant petitions are otherwise seriously disputed by the respondents on facts as well as in law, whereas, unless such scrutiny of facts and the application of law i.e. Sindh Sales Tax on Services Act, 2011, is made by the forum provided under the Statute, this Court cannot be burdened to examine the legality on constitutional plane of some proposed decision by the respondent department, otherwise having valid jurisdiction over the case of petitioners under the Sindh Sales Tax on Services Act, 2011. Per learned counsel, unless the petitioners are aggrieved by some final order or decision by respondents, which may have an adverse legal and enforceable effect and may provide a valid cause of action to the petitioners, they cannot directly invoke the provision of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 as there is no cause of action yet ripe, hence the petitioners cannot be termed as aggrieved person(s). Per learned counsel, presently the petitioners have no cause of action or grievance, whose redressal can be sought through instant petition, whereas, these petitions have been filed to thwart and frustrate the legal proceedings initiated by the respondent having lawful jurisdiction over the petitioners under Sindh Sales Tax on Services Act, 2011, whereas, petitioner have filed with an aim to pre-empt the decision on subject controversy by the legal forum on merits. Per learned counsel, tendency to approach this Court without any valid cause of action, in the absence of any adverse order or decision has been deprecated by this Court as well as by the Hon'ble Supreme Court of Pakistan in

number of reported cases as it tends to pre-empt and obstruct the legal proceedings and decision on merits by the forums provided Special Statutes and also amounts to render the alternate statutory forums provided under the law for seeking redressal of grievance, as redundant and nugatory. While responding to submissions of learned counsel for petitioners on merits of subject controversy, learned counsel for the respondent submits that all the petitioners have admitted that they are receiving an amount in respect of providing services on international incoming calls, whereas, international incoming calls are integral part of telecommunication services and fall within the purview of Sindh Sales Tax on Services Act, 2011. Per learned counsel, international incoming calls have been listed under telecommunication services in the updated exemption notification, whereas, in terms of Section 2 (35) of Sindh Sales Tax on Services Act, 2011, the term service and services has been defined as activities under Table 98.12 of the Act 2011. Moreover, the definition of service or services includes, but is not limited to activities mentioned in Table 98.12. Learned counsel for the respondents further submits that since the petitioner company is admittedly charged the foreign vendor i.e. telecommunication companies in respect of providing services of connecting and terminating the international incoming calls in Pakistan by use of their infrastructure, therefore, the foreign vendors, who is being charged by the petitioner is the customer to whom services are provided by the petitioners in Pakistan for local customers. Moreover, in view of international clearing house agreement entered between the PTCL and LDI Operators, whereby service of all international incoming calls meant for Pakistan (including Sindh) to be terminated through the PTCL on agreed settlement rate (ASR) has been notified by PTA, hence the said service by the PTCL and LDI Operators constitutes the taxable telecommunication service of Tariff Heading 98.12 and the portion of such service terminating the incoming international call in Sindh is liable to Sindh Sales Tax on Services at the rate of 19.5 % on the ASR amount received for such calls. Learned counsel further submits that since the exemption earlier available under S.R.No.3(iii) of Notification No.SRB-Leg(iii)/2011 dated 01.07.2011 has been withdrawn vide Notification No.SR-3-4/15/12 dated 25.10.2012, therefore, the said amount is taxable under Sindh Sales Tax on Services Act, 2011. It has been prayed by the learned counsel for the respondents that instant petitions, besides being misconceived in law and facts, are premature and not maintainable, which

may be dismissed with heavy cost and petitioners may be directed to submit response to the notice(s) issued by the respondents and raise all such objections before the tax authorities, as have been raised through instant petition, which will be taken into consideration and decided by the respondents after providing opportunity of being heard to the petitioner. In support of his contention, learned counsel has placed reliance in the following case law:-

- 1) *Mughal-e-Azam Banquet Complex through Managing Partner vs. Federation of Pakistan through Secretary & 4 others [2011 PTD 2260]*
- 2) *Messrs Gul Industrial Concern through Managing Director vs. Collector of Customs Collectorate at Customs Customs House Lahore and others [2008 PTD 337]*
- 3) *M/s Chaudhri Wire Rope Industries Ltd vs. Sales Tax Officers, Special Circle-I, Lahore[1988 SCMR 1934]*
- 4) *Union of India & other vs. Kunisetty Saty-marayana [AIR 2007 SUPREME COURT 906]*
- 5) *Special Director & another vs. Mohammad Ghulam Ghouse and another [AIR 2004 SUPREME COURT 1467]*
- 6) *M/s Pakistan Television Corporation Ltd (P.T.V C.L.) Islamabad vs. Collector (Adjudication), Collector of Customs, Sales Tax and Central Excise & 2 others [2011 PTD (Trib) 1513].*
- 7) *M/s Maritime Agencies (Pvt) Ltd vs. The Assistant Commissioner of SRB and others [SBLR 2014 Sindh 1225].*
- 8) *Roche Pakistan Ltd vs. Deputy Commissioner of Income Tax & others [2001 PTD 3090]*
- 9) *Khalid Mehmood vs. Collector of Customs, Customs House, Lahore [1999 SCMR 1881].*
- 10) *M/s Bulk Shipping & Trading (Pvt) Ltd vs. Collector of Customs [2004 PTD 509].*
- 11) *Mir Nabi Bakhsh Khan Khoso vs. Branch Manager, National Bank of Pakistan Jhatpat (Dera Allah Yar) Branch and 3 others [2000 SCMR 1017].*
- 12) *Shagufta Begum vs. The Income Tax Officer, Circle-XI, Zone-B, Lahore [PLD 1989 Supreme Court 360].*
- 13) *Muhammad Akbar Shah vs. Federation of Pakistan through Secretary Ministry of Information and Broadcasting & 5 others [2011 MLD 1484]*
- 14) *National Fertilizer Marketing Ltd. vs. Secretary Local Government & Rural Development Department and 2 others [1992 MLD 1203].*
- 15) *Muhammad Zubair vs. Collector of Customs [2002 YLR 3118]*
- 16) *Haji Ghulam Rasool & others vs. The Chief Administrator of Auqaf, West Pakistan. [PLD 1971 Supreme Court 376].*

- 17) *Mst. Sharif Bibi & another vs. Syed Muhammad Nawaz Shah & others* [2008 SCMR 1702]
- 18) *M/s Home Comforts vs. Mirza Rashid Baig & others* [1992 SCMR 1290]
- 19) *Ghulam Farid and 2 others vs. Mst.Hamida Bibi* [2011 YLR 2188]
- 20) *Hariram Serowgee vs. Madan Gopal Bagla & another* [AIR 1929 Privy Council 77]
- 21) *M/s State Engineering Corporation & others vs. National Development Finance Corporation & others* [2006 SCMR 619].
- 22) *I.C.I. Pakistan Ltd. vs. Federation of Pakistan* [2006 PTD 778]
- 24) *Collector of Customs, Lahore and others vs. Universal Gateway Trading Corporation and another* [PTCL 2005 CL 270]
- 25) *Messrs Arshad & Company vs. Capital Development Authority, Islamabad* [2000 SCMR 1557]
- 26) *The Province of East Pakistan vs. Kshiti Dhar Roy and others* [PLD 1964 Supreme Court 636]
- 27) *Mehar Ali Memon vs. Federation of Pakistan* [PLD 2012 Sindh 425]
- 28) *Muhammad Zulfiqar vs. Government of Sindh and others* [2003 CLC 1933]
- 29) *Jehan Khan vs. Province of Sindh and others* [PLD 2003 Karachi 691]
- 30) *Mst. Bushra Sadiq vs. Karachi Development Authority* [2001 MLD 1257]
- 31) *Messrs Dewan Sons and another vs. Federation of Pakistan* [2006 PTD 1012]
- 32) *Collector of Customs and others vs. Ravi Spinning Ltd. and others* [1999 SCMR 412]
- 33) *Messrs M. Afzal & Sons and 2 others vs. Federal Government of Pakistan, Islamabad* [PLD 1978 Lahore 468].
- 34) *P.M. International vs. Federation of Pakistan* [2013 PTD 794]
- 35) *A.P. Moller vs. Taxation Officer of Income Tax and another* [2011 PTD 1460]

9. We have heard the learned counsel for the parties, perused the record and have also examined the Notifications granting exemption and its withdrawal, as well the impugned Notices issued by the respondent to the petitioners relating to subject levy. As it has already been noted in para-2 of the judgment hereinabove that the petitioners have neither challenged the vires of the subject levy nor have

disputed the legality of withdrawal of exemption available to the petitioners from payment of sales tax on services in respect of revenue received on international incoming calls, therefore, we will not dilate upon such aspects of the matter and would only examine the contention of the petitioners relating to taxability or otherwise of the revenue received on international incoming calls by the petitioners. However, before we embark upon examining the contention of the learned counsel for the parties regarding taxability of revenue received by the petitioners in respect of international incoming calls, we may observe that admittedly such revenue on international incoming calls was earlier exempted from levy of sales tax by the Government from time to time, however, such exemption from payment of Sindh sales tax on services in terms of S.R.No.3(iii) of Notification No.SRB.Leg(iii) dated 01.07.2011 has been withdrawn vide Notification No.SRB-3-4/15/12 dated 05.10.2012, and pursuant to such withdrawal of exemption, the respondents have confronted the petitioners through impugned show cause notices requiring the petitioners to explain as to why the revenue received on international incoming calls meant for Pakistan (including Sindh) terminated through petitioners may not be subjected to sales tax at the rate of 19.5% on agreed settlement rate (ASR) on the amount received for such calls. It is settled legal position that grant of exemption from payment of any tax or levy by the government in terms of the relevant provision of Statute pre-supposes the chargeability and taxability of such levy. Reliance in this regard can be placed in the case of **Collector of Customs v. Ravi Spinning Ltd. and others 1992 SCMR 412**, wherein, it has been held that issuance of exemption presupposes that goods exempted are already subject to charge of tax and duty. The chargeability of tax or taxability of certain revenues under various taxation laws can be agitated before such authority and the forum provided under law by establishing that certain income or revenue etc. is not chargeable to tax. This exercise may involve scrutiny and examination of certain facts, including disputed facts as well as, the interpretation of certain facts, agreements, Notifications and SROs issued by the Government, Rules and Regulations and the provisions of that particular taxing Statute with particular reference to charging provisions, which infact defines the scope and application of such levy or tax upon different class of persons and the different kinds of income or revenue as may be defined under a tax Statute. Petitioners before us do not claim total exemption from levy of sales tax in terms of

Sindh Sales Tax on Services Act, 2011, as the petitioners are admittedly registered under the Sindh Sales Tax on Services Act, 2011, and making payments of sales tax on the telecommunication services provided by the petitioners in Sindh. However, through instant petitions, the petitioners have sought declaration to the effect that the revenue received by the petitioner from foreign telecommunication companies in respect of international incoming calls is not chargeable to tax under Sindh Sales Tax on Services Act, 2011, mainly on the grounds that the petitioners do not provide any telecommunication services as defined under Section 2 (35) of Sindh Sales Tax on Services Act, 2011, to its local customers, nor such services are defined in the 1st and 2nd Schedule or in the Table 98.12. It has been further claimed that since the sales tax is an indirect tax, whereas, the petitioners in terms of certain restrictions under Pakistan Telecommunication Act, Pakistan Telecommunication (Re-Organization) Act, 1996 and in terms of International Telecommunication Regulations are not permitted to either charge such amount of tax from its customers nor they can pass on such burden to its customers, therefore, such levy of sales tax from petitioner is illegal. It has been urged that since, sales tax is an indirect tax, therefore, it shall not be borne by provider of service (petitioners).

10. The dispute raised by the petitioners through instant petitions regarding taxability of the revenue received by the petitioners in respect of international incoming call has arisen pursuant to issuance of two impugned Notifications i.e. SRB-3-4/15/12 dated 25.10.2012 and SRB-3-4/16/12 dated 16.11.2012, whereby, while exercising powers as conferred by Sections 10 and 72 read with Sections 9, 13 and 75 of the Sindh Sales Tax on Services Act, 2011, the Sindh Revenue Board has made certain amendments in Notification No.SRB-Leg(i)/2011 dated 01.07.2011 by omitting entries in the Table against Srl. No.3 in Column of the Clause (iii) in Column (2) and entries relating thereto and also by making further amendments in Sindh Sales Tax on Services Act, 2011, particularly Rule 35 and by inserting new clause (bb), whereby, in case of incoming international call, sales tax is required to be paid by the 21st day of the month following the month in which international incoming call is terminated. It will be advantageous to reproduce the aforesaid Notifications, which read as follows:-

GOVERNMENT OF SINDH
SINDH REVENUE BOARD
 Shaheen Complex, (9th Floor),
 M. R. Kayani Road,
 Karachi, the 25th October, 2012

NOTIFICATION
 (Sindh Sales Tax on Services)

No. SRB-3-4/15/2012.----- In exercise of the powers conferred by section 10 of the Sindh Sales Tax on Services Act, 2011 (Sindh Act No. XII of 2011), the Sindh Revenue Board, with the approval of the Sindh Government, is pleased to direct that the following further amendment shall be made in its notification No.SRB.Leg(1)/2011 the 1st July, 2011, namely:

In the aforesaid notification, in the Table, against SI. No. 3 in column (1), the clause (iii) in Column (2) and the entries relating thereto shall be omitted.

Sd/-
(S. Mushtaque Kazimi)
 Member (Tax Policy)

GOVERNMENT OF SINDH
SINDH REVENUE BOARD
 Karachi, dated November 16, 2012

NOTIFICATION
 (Sindh Sales Tax on Services)

No. SRB-3-4/16/2012.----- In exercise of the powers conferred by section 72 of the Sindh Sales Tax on Services Act, 2011 (Sindh Act No. XII of 2011), read with sections 9, 13 and 75 thereof, the Sindh Revenue Board is pleased to direct that the following further amendment shall be made in the Sindh Sales Tax on Services Rules, 2011, namely:-

In the said Rules, in rule 35, ---

- (1) in sub-rule (2), in clause (b), the word “and” at the end shall be omitted and, thereafter, the following new clause shall be inserted, namely:-
 “(bb) In case of incoming international calls, sales tax shall be paid by the 21st day of the month following the month in which the incoming international call is terminated; and”;
- (2) in sub-rule (4), in the Form “Monthly Statement for Telecom Services”,---
 - (i) After serial number 13 in the first column and the entries relating thereto in second column, the following new entry shall be added, namely:-

13A	Charges received by the Long Distance International calls license holders including Pakistan Telecommunication Company Limited on international incoming calls		
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; and

- (ii) against Serial No. 16 in the first column, the entry at (d) in second column shall be omitted.

Sd/-
(S. Mushtaque Kazimi)
 Member (Tax Policy)

11. Pursuant to aforesaid Notification, having the effect of withdrawing the exemption earlier granted from payment of sales tax on revenue received by the petitioners on incoming international call terminated in Pakistan (in Sindh), the respondent department (SRB) issued Notices to the petitioners by confronting them with the legal position which according to SRB, emerged from withdrawal of such exemption. It will be advantageous to reproduce the impugned Show Cause Notice dated 25.10.2012 addressed to the petitioners (Chairman, PTCL), in this regard as under:-

GOVERNMENT OF SINDH
SINDH REVENUE BOARD
 Shaheen Complex, (9th Floor),
 M. R. Kayani Road,
 Karachi, the 25th October, 2012

The Chairman,
 Pakistan Telecommunication Company Ltd.,
 PTCL Headquarters,
 G-8/4,
 Islamabad.

SUBJECT: SINDH SALES TAX ON AMOUNTS RECEIVED ON TELECOMMUNICATION SERVICES THROUGH ICH

Dear Sir,

Telecommunication Services are liable to Sindh sales tax at 19.5% under tariff heading 98.12 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011.

2. Sindh Revenue Board (SRB) has come to know that under the directives of Pakistan Telecommunication Authority (PTA), in pursuance of the Ministry of Information Technology (I.T. & Telecom Division), Islamabad's letter No. 9-1/2002-DT dated 13th August, 2012, the LDI Operators and PTCL have entered into an agreement, known as the International Clearing House Agreement (effective from 01.10.2012) whereby the services of all international incoming calls meant for Pakistan (including Sindh) will be terminated through PTCL on Agreed Settlement Rate (ASR) notified by PTA. The said service by PTCL constitutes the taxable telecommunication service on tariff heading 98.12 and the portion of the service terminating the incoming international calls in Sindh has to pay Sindh sales tax at 19.5% on the ASR amounts received for such calls. The exemption from Sindh sales tax, hitherto available under SR.No.3(iii) of notification No.SRB.Leg(I)/2011 dated 01.07.2011, has been withdrawn vide notification No.SRB-3-4/15/2012 dated 25.10.2012 (copy enclosed). The amounts received in pursuance of the services in respect of the international clearing house agreement between telecom operators including without limitation LDI Operators, in so far as, it relates to the incoming international calls terminated in Sindh, shall be liable to Sindh sales tax at 19.5%.

3. SRB expects that not less than 24% of the incoming international calls are terminated in Sindh.

4. You are requested kindly to ensure that you pay Sindh sales tax at 19.5% of the amounts of ASR received by PTCL on account of incoming international calls terminated in Sindh. The tax should be paid under the Sindh Government head of account "B-02384" against SRB-prescribed PSID/Challan (Form SST-04) in one of the SRB-authorized branches of National Bank of Pakistan in the prescribed manner by the prescribed due date(s).

5. In case you have any query to make or any clarification to seek, you may call SRB helpline (021) 111-778-000 or visit SRB Helpdesk at 9th floor of Shaheen Complex at M.R. Kayani Road, Karachi; or contact the undersigned at ac2@srb.gos.pk. At your convenience.

(Uzma Ghory)
Assistant Commissioner

Encl: (1) as above

Copy, alongwith a copy of the enclosure, to:

- 1) The Chairman, PTA, F-5, Islamabad
- 2) The Chairman, FBR, Islamabad
- 3) The Chairman, PRA, Finance Deptt., Government of the Punjab, Lahore.

12. The aforesaid Notice was duly responded by the petitioner (PTCL) vide their letter dated 13.11.2012 and it will be advantageous to reproduce the aforesaid letter, which may disclose the entire case of the petitioners and the objection as raised on withdrawal of exemption by the respondents on the revenue received by the petitioners on incoming international calls:

“ Pakistan Telecommunication Company Ltd.,
PTCL Headquarters,
Sector G-8/4, Islamabad
www.ptcl.com.pk.

SM/ST/SRB/Exempt/01/2012
November 13, 2012

The Assistant Commissioner,
Sindh Revenue Board (SRB),
Karachi.

Dear Sir,

SUB: TAX ON REVENUE FROM INTERNATION INCOMING CALLS

Please refer to letter No.SRB-COM-I/AC-I, TEL/3924/2011 dated October 25, 2012 asking us to pay Sindh Sales Tax on Services (SST) on revenue from international incoming calls terminated in Sindh by our company on the platform of the International Clearing House (ICH) at Pakistan Telecommunication Authority's Agreed Settlement Rate (ASR) in view of the fact that exemption upon such calls have been withdrawn by SRB vide notification No.SRB-3-4/15/2012 dated October 25, 2012.

We would like to draw your kind attention towards the fact that the operation of the ICH agreement between our company and various Long Distance International operators has been suspended by the honourable Lahore High Court on petition from Brain Telecommunications Ltd and the matter is subjudice.

Our company is continuing to bill foreign network operators (FNOs) at prevailing rates for international incoming call termination. In this respect, we are

disappointed that SRB has withdrawn exemption on revenue from international incoming call termination. We submit that this exemption was obtained from the Federal Government on extremely plausible reasons on the initiative of our company. Exemption initially granted under the Central Excise Act, 1944 which was carried in the Federal Excise Act, 2005 which in turn was adopted verbatim by SRB.

In the year 2003, our company convinced the Ministry of Information Technology and Telecommunication (MoITT) that indirect tax on international incoming calls would have to be borne by our company since the incidence of such a tax cannot be passed on to FNOs under the binding provisions of the International Telecommunications Regulations. Such a levy would have been against the very nature of Value Added Taxation which is a tax on revenue and not on income. MoITT then successfully convinced the Ministry of Finance to issue necessary instructions to the then Central Board of Revenue to notify the requested exemption. Relevant extract from our company's letter of February 25, 2005 to MoITT, which formed the basis for grant of exemption, is reproduced below:

“CED on telecommunication services under the law is not a tax on income but is an indirect Value Added Tax (VAT) that is collected by PTCL from telephone subscribers. PTCL's revenue settlement arrangements with FNOs are within the framework laid down in International Telecommunication Regulations (ITRs)(copy attached) to which Government of Pakistan was one of the signatory.

Clause 1.6 of Appendix 1 of the ITRs at its page number 16 reads as under:

“1.6 Where an administration has a duty or fiscal tax levied on its accounting rate shares or other remunerations, it shall not in turn impose any such duty or fiscal tax on other administrations.”

In view of the restrictions imposed in the above provision in ITRs, PTCL is prevented from imposing/passing on the CED to FNOs in respect of its share of revenue. Passing on the burden of CED to FNOs will tantamount to breaching understanding reached by the Government of Pakistan with 78 other countries which are members of International Telecommunications Union and signatories to the above ITRs.

If PTCL is required to bear this tax from its own share of revenue, it will result in a serious erosion of its profitability and will also be against the very nature of the VAT regime. The erosion will have serious consequences on the growth of telecommunication sector in Pakistan as well as the Government's plan to privatize its.”

Thus the main rationale for granting the above exemption was that indirect tax should not be borne by the provider of services as it is against the nature of VAT and unjustifiably erodes the profitability of the service provider. This rationale has acquired even more relevance than it did at the time of original exemption in the year 2003. This is so because international call rates have plummeted by 309% since the year 2003. Thus the current withdrawal of exemption may be unjustified.

The above referred exemption was granted by SRB through a SRO No.SRB.Leg(I)/2011 dated 1st July 2011 which has been withdrawn through subsequent SRO No.SRB-3-4/15/2012 dated October 25, 2012. The power to grant exemption and to withdraw it has been conferred on SRB by Section 10 of the Sindh Sales Tax on Services Act, 2011 (SSTS Act, 2011), read with Section 21 of the General Clauses Act, 1897, which is to be exercised with the approval of the Government of Sindh (GOS). Section 10 of SSTS Act, 2011 does not specify any conditions or regulations which would govern the decision of exemption or its withdrawal. This Section, thus, confers discretionary powers upon SRB and GOS.

It has been held by the honourable Supreme Court of Pakistan in case of Chairman, Regional Transport Authority, Rawalpindi v. Pakistan Mutual Insurance Company Ltd, Rawalpindi reported as PLD 1991 Supreme Court 14 that executive discretionary powers must be exercised judiciously, reasonably, in good faith, using reasonable skill, attention, prudence and caution.

The apex Court also held that discretionary powers conferred upon the executive cannot be exercised arbitrarily. Rather it should be exercised in a structured manner under rules, regulations and policies framed by the executive itself which it should consistently follow. Furthermore, the apex Court emphasized that such rules, regulations and policies should be open so that transparency is achieved in the executive's exercise of discretionary powers. These are the touchstones of judicious exercise of discretionary powers that are binding upon all executive authorities of the country under Article 189 of the Constitution of Pakistan as they have been framed by the honourable Supreme Court of Pakistan. The action of SRB to withdraw exemption on revenue from international incoming calls must therefore be examined on the aforesaid touchstone.

SRB has not made public any rules, regulations and policies that it was required to frame for exercise of discretionary powers conferred under Section 10 of SSTS Act, 2011. Therefore, SRB has not followed the principles of openness as enunciated by the apex Court in the above referred judgment. Secondly, SRB has apparently not framed any such rules for exercise of discretion under Section 10 of SSTS Act, 2011. Accordingly, it is in violation of the principle enunciated by the apex Court that rules structuring discretionary powers must be framed by the executive as soon as possible upon grant of discretionary powers.

In the above referred case law, Supreme Court of Pakistan has also held that discretionary powers should be exercised by the executive in a reasonable manner and in good faith. It is only reasonable to state withdrawal of an exemption must be justified by a change in the ground realities, facts and reasons on the basis of which exemption was earlier granted. As mentioned above, the reason for earlier grant of exemption in the year 2003 was not to burden the telecom company providing international incoming call service with indirect taxation since it would turn such an indirect tax into a direct tax which is against the basis nature of VAT. Now that the international call rates have dropped by a whopping 309%, the withdrawal of exemption is not merited and is therefore unreasonable. If the only reason for withdrawing exemption is to generate more revenue, then we are constrained to state that such a decision is not in good faith as it crushes the fair rationale of granting exemption only for revenue generation. Therefore, the act of withdrawal of exemption also badly fails on the touchstone of reasonability and good faith as laid down by the honourable Supreme Court of Pakistan.

We may also state here that changes in law through sub-ordinate legislation through exercise of discretionary powers, such as grant and withdrawal of exemptions, are reasonable if they are in accordance with law prevailing on the same subject in other countries around the world. In other words, the reasonability of change in law through discretionary powers may be judged by comparing it with laws of other countries. We must, therefore, examine what is the treatment of international incoming calls/telecommunication exports by majority of countries around the world.

In the following table, we have summarized the treatment of international incoming calls/telecommunication exports in various countries/regions:

S.No.	Country	Treatment	Applicable law
1	Singapore	Zero-rated	Section 21(3)(q) read with 5 th Schedule of the Goods and Services Tax Act, 1993.
2	Australia	GST Free/Zero-rated	A New Tax System (Goods and Services Tax), Act, 1999.
5	Fiji Island	Zero-rated	Value Added Tax Decree, 1991.
3	India	Zero-rated	Finance Act, 1994; Export of Service Rules, 2005; Place of Provision of Services Rules, 2012.
4	Bangladesh	Zero-rated	Section 12(9) of Value Added Tax Act, 2011
5	European Union	Zero-rated	European Communities (Value-Added Tax) Regulations.

It is clear from the above detail that many countries and regions around the world, including developing nations, have zero-rated telecommunications exports. Accordingly, the rescinded exemption under the SSTS Act, 2011 was already a harsher measure than international practice as it does not allow credit for related input tax which is adjustable when exports are zero-rated. Therefore, the withdrawal of exemption by SRB is in reality a step away from international benchmarks of VAT for telecommunication exports.

The above countries have zero rated telecommunication exports based upon sound reasons. Apart from encouraging exports, the main reason is that VAT is a tax on consumption inside the taxing country and since the benefit of international incoming calls is consumed outside the country, the same cannot be made subject of local consumption tax. It must also be noted that the very purpose of the SSTS Act, 2011 is to tax consumption of services in Sindh. Since in the case of international incoming call service, the service is consumed by FNOs outside Pakistan in the shape of connectivity for their consumers, the withdrawal of exemption on revenue from international incoming calls effectively taxes FNOs outside Pakistan which is illegal being against the purpose of SSTS Act, 2011 as mentioned above.

We must also point out here that the levy of Sindh Sales Tax on revenue from international incoming calls is not only unreasonable but is also unconstitutional. This is so because exports of goods have been zero-rated by the Federal Legislature under the Sales Tax Act, 1990. Both the export of goods and services brings in vital foreign exchange for Pakistan. Therefore, the act of zero-rating of export of goods while taxing of telecommunication exports at rates higher than even other services (19.5% against 16% for other services) is open and clear discrimination against exporters of telecommunication services. There can be no intelligible rationale for such blatant discrimination which is violative of the fundamental rights enshrined in our Constitution against discriminatory treatment. We may also point out here that the Federal and Provincial legislatures as well as executives have the collective responsibility to ensure that citizens are not discriminated against and are dealt with in accordance with the Constitution.

In view of the discussion, it can be concluded that the withdrawal of exemption by SRB on international incoming calls is arbitrary, unreasonable and unconstitutional rendering it void in the eyes of the law and Constitution.

The only plausible and legal course of action available to SRB is to recommend to GOS that all kinds of telecommunication exports including international incoming calls may be zero-rated to encourage inflow of badly needed foreign exchange and to bring the SSTS Act, 2011 in line with international benchmark practices. We may add here that the telecommunication industry has made a representation to the honourable Secretary of the Federal Ministry of Information Technology and Telecommunication for zero-rating of telecommunication exports which has been forwarded (vide letter No.7/2010-DT of May 21, 2012) with strong endorsement to the Secretary of the Federal Finance Ministry.

Yours truly,

Sd/-

Mohammad Jafar Shah
Senior Manager (Sales Tax)''

13. From perusal of hereinabove two Notifications issued by the Sindh Revenue Board, Government of Sindh and the correspondence ensued between petitioners and SRB, it appears that the Government of Sindh, in exercise of powers as conferred by Section 10 of Sindh Sales Tax on Services Act, 2011, and Section 72 of Sindh Sales Tax on Services Act, 2011 read with Sections 9, 13 and 75 thereof has withdrawn the exemption earlier granted by the Government of

Sindh to the petitioners on the revenue received on incoming international calls, and consequently such services have been brought again within the domain of chargeability under Sindh Sales Tax on Services Act, 2011. However, through instant petitions, the petitioners have alleged that withdrawal of exemption by the Sindh Revenue Board on international incoming call is arbitrary, unreasonable and unconstitutional. In the reply furnished by the petitioners in response to show cause Notice, it has been urged that the Sindh Revenue Board shall recommend to Government of Sindh that all amounts of telecommunication exports, including international incoming calls may be zero rated to encourage inflow of foreign exchange and to bring the Sindh Sales Tax on Services Act, 2011, in line with the international bench mark practices. To sum up the contention of the learned counsel for the petitioners as advanced before this Court in all these cases, and by keeping in view their stance as expressed in writing pursuant to Notices issued by the Sindh Revenue Board in this regard, it has been observed that petitioners, though admitted that certain revenue is being received by the petitioner against services provided in respect of international incoming calls, which are admittedly terminated in Pakistan (Sindh), whereas, such service is provided by them through use of infrastructure provided by them. However, petitioners have expressed their inability to pay sales tax on such services on the pretext that since there are some restrictions with regard to charging any tax from foreign telecommunication agencies and from passing on such incident of sales tax to its customers, therefore, such levy of sales tax and its collection from the petitioner by the Sindh Revenue Board will be unreasonable and in conflict with Telecommunication Laws of the country as well as International Telecommunication Regulations etc. Prima facie, there seems no error or illegality on the part of respondents while issuing the impugned Notifications issued by the respondent in lawful exercise of jurisdiction as vested under Section 10 of Sindh Sales Tax on Services Act, 2011, whereas, there is no allegation of bias or malafide in exercise of discretion by the Government while issuing the aforesaid Notifications, whereby, exemption earlier granted on the revenue received on international incoming calls has been withdrawn.

14. Since learned counsel for the petitioners under instructions of their clients, have already stated that they will not press the constitutionality of the charge of sales tax on services on revenue received on international incoming calls, or

legality of two Notifications, whereby, exemption earlier granted to petitioner has been withdrawn, therefore, we would not dilate upon either on the constitutionality or the chargeability of Sindh Sales Tax on Services Act, 2011, in respect of revenue received by the petitioners on international incoming calls terminated in Pakistan (Sindh) nor we would record any finding regarding exercise of discretion vested in the Sindh Revenue Board in terms of Section 10 of the Sindh Sales Tax on Services Act, 2011, which, otherwise, authorizes the Sindh Revenue Board, with the approval of Government, to exempt any taxable services from the whole or any part of the tax chargeable under this Act subject to such conditions and restrictions as it may impose. As regards claim of petitioner seeking declaration to the effect that the revenue received on international incoming calls by petitioners i.e. PTCL and LDI operators, we are not inclined to issue any declaration to such effect or to record any finding with regard to the merits of such claim of the petitioners at this entirely pre-mature stage as in our opinion, it is the domain of the Revenue Authorities to examine and decide as to what revenue received by a registered person fall within the definition of taxable service in terms of Section 3, and as to whether, such amount is chargeable to tax in terms of Section 8 of Sindh Sales Tax on Services Act, 2011. Such exercise, in the instant cases, has not so far been undertaken by the Sindh Revenue Board as no assessment of tax or determination of or determination of any tax liability, whatsoever, has been made, either in terms of Section 23 or by invoking any other provision of Sindh Sales Tax on Services Act, 2011. Since there has been no finding by the competent authority with regard to taxability or otherwise in respect of the revenue admittedly received by the petitioners in respect of international incoming calls, therefore, we do not intend to pre-empt such decision by the appropriate Tax Authority, as it may involve scrutiny of certain disputed facts and documents including agreements, and may also require interpretation of various provisions of Sindh Sales Tax on Services Act, 2011, Sindh Sales on Services Rules 2012, PTA Regulation or any other telecommunication laws as well as the terms of treaties as argued hereinabove by the learned counsel for the petitioners. We may further observe that the learned counsel for petitioners have not been able to point out any constitutional or jurisdictional error, or some patent illegality committed by the respondents while issuing the impugned Notices, whereby, petitioners have given an opportunity to show cause and submit their response in respect of possible

effect and the consequence of withdrawal of exemption, which was earlier granted to the petitioners by the respondents. We have also noted that learned counsel for petitioners have not been able to demonstrate that as to how the proposed treatment to be meted out by Sindh Revenue Board to the revenue received by the petitioners on international incoming calls is contrary to the mandate of law i.e. Sindh Sales Tax on Services Act, 2011, with particular reference to Sections 3, 8 and 9 of the Sindh Sales Tax on Services Act, 2011. It will not be out of place to observe that Sindh Sales Tax on Services Act, 2011 is an enactment by the Province of Sindh, after 18th amendment in the Constitution of Islamic Republic of Pakistan, 1973, whereby, imposition, administration, collection and enforcement of taxes on services has been made prerogative of the provinces. It provides complete mechanism and hierarchy for determination of tax liability, assessment and recovery of tax and also the forums of appeal for redressal of grievance in case of an adverse order under the Sindh Sales Tax on Services Act, 2011. Admittedly, in the case of petitioners, no such determination with regard to taxability through assessment process in terms of Section 23 read with Section 3 and 8 of the Sindh Sales Tax on Services Act, 2011 has been made, whereas, the amount received by petitioners on international incoming calls was earlier exempted from levy of sales tax on services pursuant to Notifications as referred to hereinabove, therefore, it will be appropriate if the petitioners may explain their cases before the assessing officer having jurisdiction over the cases of petitioners regarding taxability or otherwise under Sindh Sales Tax on Services Act, 2011, or may seek exemption from payment of tax on revenue received on international incoming calls, in terms of Section 10 of Sindh Sales Tax on Services Act, 2011, in terms of exemptions earlier granted to the petitioners in this regard.

We are of the considered opinion that in view of the facts and circumstances of these petitions, no ground for interference by this Court under Article 199 of the Constitution is made out at this stage of proceedings, when the petitioners have been merely confronted through Show Cause Notice(s)/letter(s) by Sindh Revenue Board regarding effect of withdrawal of exemption Notifications in respect of sales tax on services received by petitioners on incoming international calls, terminating in Pakistan (Sindh), whereas, neither any adverse order has been passed by the respondents nor any demand has been created towards sales tax on services under Sindh Sales Tax on Services Act, 2011.

There seems no cause of action or grievance yet ripe to be made subject matter of these petitions.

15. Under somewhat similar circumstances, M/s Maritime Agencies (Private) Ltd. filed Constitution Petition i.e.D-769/2014 before this Court, whereby, the petitioners impugned the show cause notice issued by respondent S.R.B. seeking declaration to the effect that the sales tax under the Sindh Sales Tax on Services Act, 2011, cannot be levied on the entire commission income and agency fee of the petitioner. However, a Division Bench of this Court, under similar circumstances, vide order dated 24.04.2014, in the case of **M/s Maritime Agencies (Private) Ltd, v. Assistant Commissioner of S.R.B. and others reported as SBLR 2014 Sindh 1425**, dismissed the aforesaid petition on the point of maintainability by placing reliance in the earlier judgments of this Court in the following terms:-

“6. The tendency to impugn the Show Cause Notices issued by the Public Functionaries under taxing statutes, before this Court under Article 199 of the Constitution, and to casually bye-pass the remedy as may be provided under a Special Statute is to be discouraged as it tends to render the statutory forums as nugatory. Moreover, if the proceedings initiated under Special Taxing Statutes do not suffer from jurisdictional error or gross illegality the same are required to be responded and resolved before the authority and the forums, provided under the Statute for such purpose, whereas, any departure from such legal procedure will amount to frustrate the proceedings which may be initiated by the public functionaries under the law and will further preempt the decision on merits by the authorities and the forums which may be provided under the statute for such purpose. In the instant case a Show Cause Notice has been issued by the respondent who admittedly has the jurisdiction over the case of the petitioner, wherein, certain queries have been made and the petitioner has been provided an opportunity to respond to such Show Cause. Petitioner is at liberty to file detailed reply and to raise all such legal objection, as raised through instant petition, which shall be decided by the respondent strictly in accordance with law, after providing complete opportunity of being heard to the petitioner with particular reference to the provisions of Section 3 of Sindh Sales Tax on Services Act, 2011, read with Rule 32 of the Sindh Sales Tax on Services Rules, 2011 as argued by the learned counsel for the petitioner before us. If the petitioner is aggrieved by any adverse decision by the respondent in this regard, a remedy as provided under the law in terms of Section 57 of Sindh Sales Tax on Services Act, 2011 can be availed by filling an appeal before the Commissioner (Appeals) Sindh Revenue Board. Similarly an appeal is also provided against the order of CIT (Appeals) in terms of Section 61 before the Appellate Tribunal, whereas, after the order of Appellate Tribunal, a Reference can also be filed before this Court in terms of Section 63 of the Sindh Sales Tax on Services Act, 2011 in respect of questions of law which

may arise from the order of the Tribunal. Since in the instant case, no final adjudication on the proposed Show Cause Notice has been made so far by the respondent and merely a Show Cause Notice has been issued, therefore, we are of the view that instant petition is pre-mature, whereas no cause of action has accrued to the petitioner which may justify the filing of instant petition.

7. In the case of M/S ROCHE PAKISTAN LTD. VS. DEPUTY COMMISSIONER OF INCOME TAX AND OTHERS, reported in 2001 PTD 3090 AND M/S SITARA CHEMICAL INDUSTRIES LTD. AND ANOTHER VS. DEPUTY COMMISSIONER OF INCOME-TAX reported in 2003 PTD 1285, the Division Benches of this Court after having examined the case law of the superior Courts on the issue of maintainability of Constitution petition, were pleased to dismiss the Constitution Petitions, which were filed on mere issuance of show cause notices. It will be advantageous to reproduce the relevant findings of the Court in both the cases are hereunder:

(i) **Roche Pakistan Ltd. v. Deputy Commissioner of Income-Tax and others 2001 P.T.D 3090.**

“18. In view of the above discussion, we are of the opinion that the Impugned notice under section 62 of the Ordinance issued by respondent No.1 to Roche is strictly in accordance with law and was not without jurisdiction and/or mala fide. Consequently, it could not be assailed by filing a Constitutional petition under Article 199 of the Constitution. Moreover, as adequate alternate remedy by way of appeal before the Commissioner of Income-tax, a second appeal before the Income-tax Appellate Tribunal and thereafter a reference to the High Court under section 136 of the Ordinance are available to the petitioner, this petition is not maintainable.

19. It would not be out of place to mention here that after filing of this petition, the petitioner submitted his further reply in relation to the question of applicability of section 79 which was withheld by it in the earlier reply to the notice. The conduct of the petitioner in withholding its response to the applicability of section 79 in its reply to the Notice under section 62, filing the present Constitutional petition and thereafter submitting its reply on the question in issue in order to justify the maintainability of the Constitutional petition cannot validate the proceedings which may otherwise be not maintainable. Respondent No.1 would now consider the reply filed by Roche, apply his mind and make the assessment in accordance with law. If Roche is aggrieved by the order passed by respondent No.1 it would be open to it to resort to the statutory remedies available under the law.”

(ii) **Sitara Chemical Industries Ltd. v. Deputy Commissioner of Income-tax 2003 P.T.D 1285.**

“The purpose of citing the above cases is to show that the Assessing Officer have been exercising jurisdiction to consider the tax related issues arising out of amalgamation of the companies and consequently, the impugned show-cause notice issued by the Deputy Commissioner of Income-tax is within his competent and jurisdiction to which no exception can be taken. The petition is pre-mature and without any substance which stands dismissed accordingly.”

8. In view of hereinabove facts and by applying the ratio of aforesaid decisions to the facts of this case, we are of the opinion that the instant petition is misconceived in law and facts, which is hereby dismissed in limine alongwith listed applications.”

16. The tendency to abandon or bypass the forum provided under Statute for resolution of a dispute regarding taxability or otherwise has already been deprecated by the Hon'ble Supreme Court in number of cases including the case of **Khalid Mehmood vs. Collector of Customs, Customs House, Lahore (1999 SCMR 1881)**, wherein, the Hon'ble Supreme Court, after having examined different taxation laws with particular reference to availability of alternate statutory remedy and the forums provided for resolution of disputes, while dismissing the Constitution Petition filed by taxpayer, was pleased to hold as under:-

“ As to bar of jurisdiction, it is to be noted that Article 199 of the Constitution opens with word to the effect that the High Court may exercise its powers under such Articles only “if it is satisfied that no other adequate remedy is provided by law”. Adequacy of the alternative remedy, therefore, if there is another remedy available, should always attract the attention of the High Court.

Of such alternative remedies also there are some, which would still leave the jurisdiction of the High Court virtually unaffected, if the order, complained of, is so patently illegal, void or wanting in jurisdiction that any further recourse to or prolongation of the alternative remedy may only be counter-productive and, by invocation of Article 199 the mischief can forthwith be nipped in the bud. In such matters, of course, neither the alternative remedy would be adequate nor bar of jurisdiction in the Sub-Constitutional Legislation may come in the way of the High Court in exercising its Constitutional jurisdiction.

There are other matters, however, where the Constitutional jurisdiction under Article 199 cannot be so readily resorted to. One such, falling in this category, would be matters amenable to the jurisdiction of any exclusive Tribunal, mandated by the Constitution itself. Another, which readily comes to the mind, would be disputes under a stature, postulating the appellant or revisional jurisdiction to reside either in the High Court itself or directly in the Supreme Court. an example, essentially relevant to the first, would be the Service Tribunal where the Tribunal is mandated by the Constitution of Pakistan namely, Article 212, thereof and where an appeal lies directly from the Tribunal's decision to the Supreme Court. Obviously, the High Court should be very slow in entertaining disputes covered by the jurisdiction of such a Tribunal even in matters where the High Court's jurisdiction cannot be taken away e.g. acts which are void, without jurisdiction or coram non iudice. In such cases of ouster, the High Court would consider it a better exercise of its discretion not to interfere. More or less a similar principle applies where an exclusive Tribunal or a regular Court has jurisdiction in a matter but the legislation, creating such Court or forum or conferring jurisdiction on the same, also ends up by providing appellant or revisional jurisdiction to the High Court itself. Obvious examples could be civil and criminal proceedings, emanating under the Code of Civil and Criminal Procedure, Income Tax References, Customs Appeals etc. In such matters, where the High Court itself is the repository of the ultimate appellate, revisional or referral powers, conferred by the relevant stature, it is in the rarest of cases that the High Court may be persuaded to entertain a Constitutional petition and to enforce the Constitutional

remedy in preference to its own appellate, revisional or referral dispensation arising in course of time.”

17. Similarly, in the case of **Chaudhri Wire Rope Industries Ltd. vs. Sales Tax Officer, Special Circle-I, Lahore (1988 SCMR 1934)**, the Full Bench of the Hon'ble Supreme Court while examining the effect and application of Notification i.e. SRO No.125(i)/70 dated 29.06.1970 issued under Section 7 of the Sales Tax Act, 1951, whereby, Federal Government granted exemption to machinery or article for the use in the machinery or component or spare parts thereof from payment of sales tax on the case of petitioner, was pleased to hold as under:-

“4. The notices have been issued to the appellant under section 28, Sales Tax Act, subsection (1) of which reads as follows: --

“(1) If for any reason in any year tax escaped assessment or has been under assessed or assessed at a rate lower than that provided under this Act, or excessive relief or refund has been allowed, the Sales Tax Officer may –

(a) where a return for the relevant quarter, quarters or year has not been filed, serve a notice at any time on the assessee, and after making such enquiry as he considers necessary make the assessment at any time within two years from the end of the year in which such notice was served; and

(b) in other cases, serve a notice at any time within three years from the end of the year in which the assessment was first made or excessive relief was allowed or the order for return was first passed, and after making such enquiry as he considers necessary re-assess, at any time within two years from the end of the year in which such notice is served, the tax payable, or relief or refund allowed,

A perusal of this subsection leaves no room for doubt that if in a case the Sales Tax Officer is satisfied that the product sold by a person is not covered by the exemption notification and yet the benefit of the same has been given to it, he can lawfully reopen the case and initiate proceedings for assessment.

5. it is contended on behalf of the appellant that it has already been allowed exemption in the assessment years beginning from 1969-70 and that the notices have been issued to it merely because the Sales Tax Officer had changed his mind and that the change of mind on the part of the Sales Tax Officer cannot be regarded as a sufficient ground for initiating proceedings under section 28, Sales Tax Act.

6. We have seen the previous assessment orders beginning from 1969-70. Prima facie we are not satisfied that this is a case of mere change of mind or opinion' on the part of the Sales Tax Officer. However, we would not like to offer any firm opinion on the question lest it should prejudice the case of the appellant before the Sales Tax Officer, for, we are in agreement with the High Court that the appellant should take this objection in the first place before the said officer.

7. As already mentioned, apart from issuing notices to the appellant no further proceedings had been taken by the Sales-tax Officer before the appellant moved the constitutional jurisdiction of the High Court. in the circumstances of this case the petition before the High Court was clearly

premature and the learned Single Judge dismiss this appeal without costs. We may hardly need to add that it will be open to the appellant to take up all the defences which it wishes to urge in support of this appeal before the Sales Tax Officer who will no doubt consider them on merits before making any order.”

18. In the case of **Mir Nabi Bux Khoso vs. Branch Manager, National Bank of Pakistan (2000 SCMR 1017)** while examining the maintainability of the Constitution Petition under Article 199 and 185 (3) on mere issuance of Show Cause Notice was pleased to dismiss the petition for being pre-mature, in the following terms:-

“ We have heard the learned counsel at length and in our view it was rightly held by the learned Judges of the Balochistan High Court that the writ of prohibition could not be issued because no adverse action had been taken by the bank against the petitioner except issuance of notices. The learned Judges in this behalf also relief upon a judgment of this Court reported as **Muhammad Tufail v. Abdul Ghafoor** and another (PLD 1998 SC 201). We have also noticed that the petitioner has taken different stands in his reply as well as the representation, which he had sent in reply to the notices and therefore, it was rightly concluded by the learned Judges of the Balochistan High Court that all these questions are to be decided by the bank officials and therefore, the issuance of writ was premature because no adverse action had been taken against the petitioner.

19. Another Divisional Bench of this Court in the case of **Union Cosmic Communications (Pvt) Ltd. and 5 others vs. Central Board of Revenue and another reported as 2006 PTD 1678**, while examining the maintainability of a Constitution Petition on the touchstone of controverted facts and availability of the alternate remedy, was pleased to dismiss such petition in the following terms:-

“9. This bring us to another important aspect of the case as regards maintainability of this petition that, in case of disagreement about the exact nature of working of the petitioners business of PCOs as highlighted above, these petitions would involve factual controversies, which cannot be resolved by this Court without holding investigation into such disputed questions of fact, which exercise is normally not called for/restored to under Article 199 of the Constitution.

10. The arguments of Mr. Aqeel Ahmed Abbasi challenging the maintainability of these petitions on the ground of availability of alternate adequate remedy to the petitioners under the hierarchy of Income Tax Ordinance, 2001 have also much force. In a recent judgment of this Court in the case of **ICI Pakistan Limited v. Federation of Pakistan 2006 PTD 778**, examining the similar issue of challenging the show-cause notice issued by the Income Tax Authorities through constitutional petition, relying upon the two earlier judgments, in the cases of **Roche Pakistan Limited v. DCIT and others 2001 PTD 3090** and **Sitara Chemicals Industries Limited v. DCIT 2003 PTD 1285**, the Division Bench of this Court of which one of us i.e. **Anwar Zaheer Jamali, J.** was a member, observed as under:---

“21. Indeed availability of alternate remedy has not been considered as an absolute bar for this Court for exercising its constitutional jurisdiction under Article 199 of the Constitution in appropriate cases, despite non-availing such alternate remedy. Further, in fiscal matters the superior Courts have been more

liberal in exercising their constitutional jurisdiction, keeping in mind financial constraints, which may be the compelling reason for the aggrieved party to bypass the alternate remedy, as due to such financial constraints the departmental remedy might lose its efficacy. However, in the present petition even the question of availability of alternate remedy by way of appeal and its efficacy or adequacy seems to be premature, as at this stage neither there is any adverse order against the petitioner nor the impugned notice has created any financial liability on the petitioner, but only some explanations have been sought and opportunity of hearing has been provided to them, which is in conformity to the spirit of proviso to subsection (1) of section 62 (ibid). In such circumstances, when instead of submitting their reply the petitioners have taken the course of filing this constitutional petition. Such practice cannot be approved.

22. Moreover, there is no denial of the fact that the Officer who has issued the impugned notice under section 62 of the Income Tax Ordinance, 1979 is seized of the assessment case of the petitioner for the year 2002-03 and thus in that context has jurisdiction to call upon the petitioner company to give reply to the queries made in the impugned notice. We are, therefore, in full agreement to the submission of departmental representative Dr. Masood Tariq that there is no valid justification for us to proceed readily with the presumption of mala fide against the respondent No.4, merely for the reason that he has issued the impugned notice dated 26-5-2005, calling upon the petitioner for their explanation/reply and affording them an opportunity of hearing in the matter.

23. It is also pertinent to mention here that queries made in the notice not only involve the question of law, mainly agitated in the present petition, but also number of other factual queries, which could be answered only after examination of the relevant record and submission of explanation by the petitioner before respondent No.4. In such circumstances, bypassing the stage of submission of reply to the impugned notice by the petitioner seems to be a device to avoid facing proceedings before the respondent No.4, who has jurisdiction for this purpose in terms of section 62 of the Income Tax Ordinance, 1979. After careful examination of the whole material placed on record by the petitioner, we feel that exercise of writ jurisdiction in the instant petition at this stage, will amount to usurpation of powers of the departmental authorities to adjudicate the assessment case of the petitioner at their level in accordance with law, in a more comprehensive manner after investigation of all factual and legal aspects of the case. The rule of propriety also demands that if question of jurisdiction is involved in a matter, in the first instance, such objection should be raised before the authority whose jurisdiction has been challenged and thereafter, if need be, further course available under the relevant provisions of law should be followed by the aggrieved party, instead of approaching this Court directly in its Constitutional jurisdiction on the pretext that the concerned authority/respondent No.4 has no jurisdiction to issue impugned notice or that available remedy is not adequate, efficacious or effective.”

20. From perusal of hereinabove facts and circumstances of the case and the decision of the Hon'ble Supreme Court of Pakistan as well as of this Court in aforesaid cases it can be safely concluded that the petitioners have not been able to make out a case for invoking the constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan 1973, as neither vires of any

provision of law has been challenged through instant petition nor any jurisdictional defect or patent illegality has been pointed out by the petitioner in the notices issued by the respondent, whereby the petitioners have been confronted with the effect of withdrawal of exemption from payment of sales tax on services in respect of amounts received by the petitioners towards incoming international calls, whereas, even such withdrawal of exemption notification has not been challenged on the constitutional touchstone. The proper course available to the petitioners under the facts and circumstances of the case would be that the petitioners may either apply to the Sindh Revenue Board in terms of Section 10 of Sindh Sales Tax on Services Act, 2011, seeking exemption from payment of sales tax on the amount received on international incoming calls, who may grant such exemption to the petitioners with the approval of the government, subject to such condition and restriction as it may impose by Notification in the official Gazette, as it was earlier granted to the petitioners through aforesaid Notification(s), OR they may submit response to the Notices issued by the respondent by raising all such grounds and objections, which have been raised before this Court through instant petitions, whereafter, the relevant officer of Sindh Revenue Board, having jurisdiction over the case of the petitioners, would have made assessment of tax in terms of Section 23 of the Sindh Sales Tax on Services Act, 2011, in accordance with law, after providing complete opportunity of being heard to the petitioners. It will be advantageous to reproduce Section 23 of Sindh Sales Tax on Services Act, 2011, which provides comprehensive mechanism for the purposes of making assessment of tax in respect of registered person under Sindh Sales Tax on Services Act, 2011.

“23. Assessment of Tax.—(1) Where on the basis of any information acquired during an audit, inquiry, inspection or otherwise, an officer of the SRB, not below the rank of Assistant Commissioner SRB is of the opinion that a registered person has not paid the tax due on taxable services provided by him or has made short payment, the officer shall make an assessment of sales tax actually payable by that person and shall impose a penalty and charge default surcharge in accordance with sections 43 and 44.

(2) No order under sub-section (1) shall be made by an officer of the SRB unless a notice to show cause is given to the person in default within five years from the end of the tax period to which the order relates specifying the grounds on which it is intended to proceed against him and the said officer shall take into consideration the representation made by such person and provide him with an opportunity of being heard if the person so desires.

(3) Any order under sub-section (1) shall be made within one hundred and twenty days of issuance of the show cause notice or within such extended period as the officer of the SRB may, for reasons to be recorded in writing, fix provided that such extended period shall in no case exceed sixty days.

(4) In computing the period specified in sub-section (3), any period during which the proceedings are adjourned on account of a stay order or proceedings under section 65 or the time taken through adjournment by the person not exceeding thirty days shall be excluded.

(5) An order passed by an officer of the SRB under sub-section (1) may be further amended as may be necessary when on the basis of information acquired during an audit, inquiry, inspection or otherwise, the officer of the SRB is satisfied that:--

- (i) any sales tax has been under-assessed or assessed at too low a rate; or
- (ii) any taxable service provided by the person has escaped assessment.

(6) The Commissioner SRB may amend, or further amend, any order passed under sub-sections (1) or (5), if he considers that the order is erroneous or prejudicial to the interest of sales tax.

(7) Sub-sections (2), (3) and (4) shall be applicable to any order passed under sub-sections (5) or (6).

(8) Notwithstanding anything contained in this Act Board may prescribe thresholds, parameters, standards and basis for assessment of supply value and the assessment of tax.”

It will not be out of place to observe that if tax payer feels aggrieved by any order of assessment under Section 23 of Sindh Sales Tax on Services Act, 2011, can file an appeal under Section 57 against such order or any decision or order passed under Sections 22, 24-B, 43, 44, 47, 68 and 76 of the Sindh Sales Tax on Services Act, 2011, before the Commissioner (Appeals), Sindh Revenue Board, within 30 days of the receipt of such decision or order. Similarly, against an order passed by the Commissioner (Appeals), S.R.B. in terms of Section 57 of the Sindh Sales Tax on Services Act, 2011, the tax payers or the officer of the S.R.B. aggrieved by such order can prefer an appeal before the Appellate Tribunal under Section 61 of the Sindh Sales Tax on Services Act, 2011, within 60 days, whereas, order passed by the Appellate Tribunal can be assailed by an aggrieved person or any officer of the S.R.B. not below the rank of Deputy Commissioner within 60 days of the communication of the order of the Appellate Tribunal by filing a reference before this Court under Section 63 of the Sindh Sales Tax on Services Act, 2011 and against an order passed by this Court in its reference jurisdiction can further assail

such order before the Hon'ble Supreme Court seeking leave to appeal under Article 185 of the Constitution. All questions relating to application of any provision of law, Rules and Regulations or Notification in the case of a tax payer are to be decided by the Tax Authorities and the Forums provided under the Statute for such purpose, whereas, any aggrieved person cannot be allowed to directly approach this Court under Article 199 of the Constitution to examine the chargeability or for determination of its taxability, without even allowing the Tax Authorities to exercise their lawful authority and to make assessment of tax liability of a taxpayer. Particularly without being aggrieved in terms of Article 199, at a pre-mature stage, when there is even no adverse order or final decision against the petitioner, which could be assailed by a taxpayer on the touchstone of the constitutionality. The petitioners in the instant case are admittedly not even aggrieved persons in terms of Article 199 of the Constitution as no adverse order whatsoever, has been passed against them nor any adverse action has been taken by the public functionaries, on the contrary, respondents have merely provided an opportunity to the petitioners through Show Cause Notice to explain their position with regard to taxability of the revenue received by them on international incoming calls, which was admittedly granted exemption in terms of Notification as referred to hereinabove by the competent authority, and the same has been subsequently withdrawn by the same competent authority, whereas, such withdrawal of Notification has not been challenged by the petitioners through instant petitions. Instant petitions have been filed without any cause of action, whereas, the petitioners have attempted to pre-empt the assessment of tax by the Tax Authorities in the case of petitioners under the Statutory provision of Sindh Sales Tax on Services Act, 2011.

21. From perusal of the pleadings and the reply filed by the respondents as well as the arguments made before this Court by the learned counsel for the parties, it has emerged that seriously disputed facts have been agitated by the parties, whose scrutiny cannot be undertaken by this Court while exercising constitutional jurisdiction under Article 199, whereas, such facts can be agitated and decided by the Statutory Forums provided under Sindh Sales Tax on Services Act, 2011, whereas, a party cannot be allowed to either abandon or bypass such Forums and the Authorities which have been assigned the function of assessment of sales tax under the Statute and to determine the tax liability of a person. No

constitutional or any legal question has been raised by the petitioners which may require this Court to exercise its extra ordinary constitutional jurisdiction and to issue any declaration to the effect that the revenue received by petitioners in respect of international incoming calls is not liable to tax under Sindh Sales Tax on Services Act, 2011, as it is the domain of tax authorities as provided under Sindh Sales Tax on Services Act, 2011, for such purpose. We have been observing with concern that tendency to approach this Court directly by invoking constitutional jurisdiction in tax matters within an aim to either thwart the proceeding initiated by the Tax Authorities, otherwise, having lawful jurisdiction over the case of a taxpayer, even at an initial stage, whereby, they are confronted through Show Cause Notices to explain their position with regard to their tax liability, has alarmingly increased, whereas, in view of huge pendency of cases, large number of petitions are pending since long before this Court in which stay is operating in respect of public revenue. Filing of such misconceived and premature petitions has, on the one hand, unnecessarily burdened this Court with frivolous litigation, whereas, it also amounts to showing no confidence on the Forums provided under special taxing Statute.

22. Accordingly, we do not find any substance in the instant petitions, which besides being premature and having been filed without any cause of action, in the absence of any adverse order against the petitioners, are not maintainable and the same are hereby dismissed along with listed applications. However, before parting with this judgment, we may observe that the observations made hereinabove with regard to charge of sales tax on the revenue received on international incoming calls or the claim of exemption in terms of Section 8 of the Sindh Sales Tax on Services Act, 2011, are tentative in nature and would have no adverse bearing on merits of the case of the petitioners, who are at liberty to raise all such grounds and pleas before the concerned authority as raised through instant petitions, who shall decide the same strictly in accordance with law and on the basis of material which may be produced during assessment proceedings, if any, by the petitioners. Petitioners are also at liberty to approach the Sindh Revenue Board and may seek exemption in terms of Section 10 of the Sindh Sales Tax on Services Act, 2011, as it was earlier granted to the petitioners, whereas, such claim of exemption of the petitioners shall be decided by the Sindh Revenue Board with the approval of the Government, strictly in accordance with law, after providing complete opportunity

of being heard to the petitioners, without being influenced by any such observations, whereas, no adverse inference may be drawn from dismissal of these petitions by this Court, as we have not dilated upon the merits of the claims of petitioners in this judgment.

Above petitions are dismissed in the aforesaid terms alongwith all pending applications, however, with no order as to costs.

JUDGE

JUDGE