JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

WRIT PETITION NO. 4348 OF 2016

M/s Pak Telecom Mobile Limited
Versus
Chief Commissioner, Inland Revenue, etc.

Petitioner by	**:**	**Mr. Usman Shaukat, Advocate.**
Respondents by	**:**	**Barrister Atif Rahim Burki, Advocate.**
Date of hearing	**:**	**02.04.2026**

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MUHAMMAD AZAM KHAN, J. The brief facts giving rise to the filing of the instant constitutional petition are that the Petitioner, M/s Pak Telecom Mobile Limited (hereinafter referred to as the "**Petitioner**"), a public limited company, entered into an agreement dated April 26, 2007, with Emitech Mobile Solutions LLC, Dubai, UAE (hereinafter referred to as "**EMS**"), whereby EMS undertook to provide certain services to the Petitioner. Subsequently, for the purpose of remitting payments to EMS, the Petitioner submitted an application before the Commissioner Inland Revenue (Respondent No. 2) under Section 152(5) of the Income Tax Ordinance, 2001 (hereinafter referred to as the "**the Ordinance**"), seeking exemption from the deduction of tax on payments to be made to EMS. The said payments pertained to the acquisition of BlackBerry handheld devices, along with technical know-how, support solutions, and managerial and implementation services. The exemption was claimed under Article 7(1) of the Convention between the United Arab Emirates and Pakistan for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income (hereinafter referred to as the "**Treaty**").

2. The application seeking exemption from deduction of tax was, however, declined by Respondent No. 2, who directed the Petitioner to deduct withholding tax at the rate of 12% in terms of the relevant provisions of the Treaty. Feeling aggrieved, the Petitioner invoked the constitutional jurisdiction of this Court by

filing Constitutional Petitions bearing Nos. 4413 to 4424 of 2012 under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. The said petitions were, however, disposed of by this Court on the ground that an adequate and efficacious alternate remedy was available to the Petitioner under Section 122B of the Income Tax Ordinance, 2001, and that the constitutional jurisdiction ought not to be exercised where such statutory remedy exists. For the sake of convenience and ready reference, the relevant extract from the aforesaid judgment is reproduced hereunder: -

> *"The petitioners had applied to the Commissioner under Section 152(5) of the Ordinance. The Commissioner in pursuance of powers vested under Section 152(5A) passed respective orders and did not accept the contentions of the petitioners. The petitioners instead of availing the statutory remedy available under Section 122B of the Ordinance invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. It is also pertinent to note that the question raised in the instant petition and the nature of grievance is similar to the grievance raised in the petitions listed in Category-II. It is settled law that if there is an adequate remedy available in law then this Court will refuse to exercise jurisdiction under Article 199 of the Constitution. The remedy by way of invoking the revisional powers under Section 122B of the Ordinance is an adequate statutory remedy. The august Supreme Court has consistently held that bypassing statutory remedy and pressing into service constitutional jurisdiction of the High Court is to be discouraged. Reliance is placed on the cases of Collector of Customs, Customs House, Lahore v. S. M. Ahmad & Company (Pvt) Ltd., Islamabad (1999 SCMR 1381), Khalid Mehmood v. Collector of Customs, Customs House, Lahore (1999 SCMR 1881), Muhammad Hussain Qazi v. Govt. of the Punjab (PLD 1983 SC 187), Rana of Income Tax v. Hamdard Dawakhana (Waqf) Pak (PLD 1992 SC 847), 1279]. However, in order to meet the ends of justice, it would be appropriate to convert all the petitions listed under this Category into representations pending before the competent authority under Section 122B of the Ordinance. The competent authority is expected to afford an opportunity of hearing to the petitioners and thereafter pass speaking orders in accordance with law."*

3. In compliance thereof, Respondent No. 1, i.e., the Chief Commissioner Inland Revenue, after providing an opportunity of hearing to the Petitioner, decided the revision petition vide order dated May 27, 2015, whereby the earlier

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order of Respondent No. 2 was upheld. Thereafter, the Petitioner preferred a representation under Section 7 of the Federal Board of Revenue Act, 2007 before Respondent No. 3 (FBR), which too was dismissed vide order dated August 7, 2016. Being aggrieved by the aforesaid orders, the Petitioner has once again invoked the constitutional jurisdiction of this Court and seeks the following reliefs: -

a. To declare that the impugned Orders as mentioned in para3(iv); May 27, 2015 and August 25, 2016 passed by the respondents are illegal, without lawful authority and of no legal effect.
b. To declare that the payments made to EMS (Non-Resident) is a payment that does not fall within the definition of "Fee for Technical Services" as given in Article 13(3) of the Treaty.
c. To direct the respondents to issue exemption certificates u/s 152 of the Ordinance for payment on account of BlackBerry related services without deduction of tax.

4. Learned counsel for the Petitioner contends that the payments made to EMS have been inconsistently characterized by the Respondents, at times as royalty and at other times as fees, whereas in substance the same constitute "business income." It is argued that EMS, being a non-resident entity, is entitled to exemption under Article 7(1) of the Treaty, as its core business involves the provision of telecommunication solutions relating to handheld devices. Therefore, such receipts cannot be brought within the ambit of "Fee for Technical Services." It is further submitted that, in the absence of any efficacious alternative remedy against the impugned orders, the Petitioner was justified in invoking the constitutional jurisdiction of this Court. Reliance has been placed upon the judgments reported as M/s Inter Quest Information Services v. Commissioner of Income Tax (2007 PTD 2549), Commissioner of Income Tax

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v. M/s Inter Quest Information Services (2023 SCMR 1803), and M/s Inter Quest Information Services v. Commissioner of Income Tax (2025 SCMR 257).

5. Conversely, learned counsel for the Respondents has vehemently opposed the petition and submits that the services rendered by EMS squarely fall within the scope of "Fee for Technical Services" under Article 13 of the Treaty and are, therefore, subject to withholding tax at the rate of 12% on gross payments. It is contended that the payments in question pertain to consultancy, managerial, and technical services, and do not constitute business profits; hence, reliance on Article 7 of the Treaty is misconceived. Reliance has been placed on the judgment reported as M/s Elite Estate (Pvt.) Ltd. v. Federation of Pakistan (2020 SCMR 494), as well as a judgment dated April 17, 2019, passed in Writ Petition No. 671 of 2017, wherein similar issues regarding withholding tax were adjudicated, and the denial of exemption was upheld. It is further argued that the Petitioner has once again invoked the constitutional jurisdiction despite the availability of adequate statutory remedies under the Ordinance.

6. We have given anxious and thoughtful consideration to the submissions advanced by the learned counsel for the parties and have carefully examined the contents of the instant petition in light of the applicable legal framework; we have also perused, with due care, the parawise comments submitted on behalf of the Respondents, along with the relevant record placed before this Court, and have further taken into account the case law relied upon by both sides, considering their respective contentions.

7. The sole question arising for determination in the instant constitutional petition is whether the Petitioner was under a legal obligation to deduct withholding tax at the rate of 12% on the payments made to EMS, which necessarily entails the determination of the true nature and character of such payments. It is an admitted position that the Petitioner entered into an agreement with EMS for the acquisition of BlackBerry handheld devices along with the provision of technical and support know-how, solutions, and allied services, including managerial, operational, and implementation support. At this juncture,

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and in the interest of clarity as well as for the facility of reference, it would be advantageous to reproduce, in brief, the factual assertions as set forth by the Petitioner itself in its application/representation submitted before respondent No.3 (FBR), wherein the order passed by respondent No.1 was impugned. The same are reproduced hereunder: -

> *"2.3. PTML has entered into an agreement with EMS for acquisition of Blackberry handheld devices, technical and support know-how and solutions including support and implementation services, product and project management services, employee training, pre and post launch management services for the Blackberry handheld devices to be used by its cellular communication subscribers. Under the agreement EMS provides Blackberry handheld devices, technical and support know-how and solutions that enable PTML to launch, support and manage Blackberry solutions in Pakistan comprising the following:*
>
> *Sale of Blackberry handhelds, accessories and related software licenses*
>
> *Project Management Pre-Launch Services comprising:*
>
> - *Pre-installation environment preparation*
> - *Assessment of internal technical environment preparation*
> - *Installation and configuration of environment*
> - *Pre-configuration and testing of devices prior to delivery to customer conducting*
> - *Training sessions for PTML personnel*
> - *Pre-requisite online training*
> - *Technical and escalation support*
> - *Technical follow-up and assistance*
>
> - *Sales support and planning*
> - *Project management including development of project plan, submission of reports, dispute resolution mechanism*
> - *Development of go-to-market strategy Design of business model and operational processes to support Blackberry*
> - *Product management including packaging, branding and labeling, pricing etc.*
> - *Marketing support including development of marketing plan, positioning, retail operations, product awareness programs, PR plans etc.*
> - *Customized training comprising."*

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8. A holistic and purposive reading of the agreement between the Petitioner and EMS unequivocally establishes that the arrangement transcends a mere sale of BlackBerry handheld devices or related software and, instead, constitutes a composite and integrated service framework encompassing pre-launch preparation, system installation and configuration, operational readiness, continuous technical support, project management, and strategic as well as commercial consultancy. The pre-launch activities, including technical environment assessment, testing, and system enablement, are inherently technical, requiring specialized expertise; the ongoing support services, such as escalation handling and system assistance, reflect a sustained technical engagement; while the inclusion of project governance, reporting structures, and implementation oversight demonstrates a clear managerial dimension. Furthermore, services relating to business model development, go-to-market strategy, pricing, branding, and marketing support bear the unmistakable character of consultancy, involving advisory and decision-making inputs at a strategic level, complemented by training services that entail the dissemination of specialized operational knowledge. When viewed cumulatively, these elements reveal that the dominant and substantive character of the agreement lies in end-to-end technical, managerial, and consultancy services; consequently, such a comprehensive and continuing service arrangement cannot, by any reasonable interpretation, be reduced to a transaction of sale of goods or classified as ordinary business profits.

9. It is a settled proposition that the nature of income is to be determined with reference to the specific services rendered and consideration paid, and not merely by reference to the general business profile of the non-resident entity. In the present case, the agreement explicitly provides for project management fees, post-launch management fees, technical hand-off fees, and call center support services, all of which unmistakably reflect managerial, technical, and consultancy services. The detailed fee structure, including monthly management fees, technical support charges, and 24/7 call center support by trained and

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certified resources, further reinforces that the payments are not linked to mere acquisition of software but are directly attributable to continuous technical and managerial services rendered by EMS. Such recurring payments based on user connectivity and system usage cannot be equated with a one-time sale of goods. Such considerations fall squarely within the ambit of 'Fee for Technical Services' under Article 13 of the Treaty. An identical issue has already been examined and conclusively settled by this Court in its judgment dated 17.04.2019 passed in Writ Petition No. 671 of 2017 (*M/s Elite Estate (Pvt.) Ltd. v. Federation of Pakistan and others*), wherein it was categorically held that payments made in consideration of technical or consultancy services cannot be re-characterized as business profits so as to avoid the statutory obligation of withholding tax. The said judgment has since attained finality, having been affirmed by the Hon'ble Supreme Court of Pakistan, reported as 2020 SCMR 494, thereby lending authoritative weight to the principle that such payments are to be taxed under the relevant treaty provisions governing technical services. The relevant portion of the said judgment is reproduced as under: -

> *"6. The sole question involved in the instant petition is whether the petitioner is liable to deduct withholding tax @ 15% with respect to payment made to the Egyptian Company. The terms and conditions of Consultancy Agreement between the Petitioner and Egyptian Company show that the Consultant (Egyptian Company) is to perform all services with the degree of skill, care and diligence exercised by professional architects, urban/town planners and Engineering Consultant. Moreover, the scope of services is consultancy qua development of infrastructure, golf course and planning for construction of the consultancy services. The Egyptian Company is to be paid fee which is termed as Consultancy Services. Payment is to be made over period of 48 weeks as is borne out from the payment schedule to the agreement. Pakistan has a taxation treaty with Egyptian Company that provides avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income derived from technical services as covered under Article 12 thereof. Under Clause 12.1, fee for technical services arising in a Contracting State and paid to the enterprise of the other Contracting State may be taxed in that other State. Under Clause 12.2, such fees for technical services is to be taxed in the Contracting State in which they arise and according to the laws of that State but if the recipient is the beneficial*

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> *owner thereof, the tax so charged shall not exceed 15% of the gross amount of the fees. The petitioner claims benefit of Article 7 i.e. Business Profits, which provide that enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in other Contracting State through a permanent establishment situated therein. In this behalf, the concept of "Permanent Establishment" is defined in Article 5 as encompassing supervisory activities which continue for a period of more than three months. The terms and conditions agreed between the petitioner and Egyptian Company clearly show that foreign company is providing consultancy qua development of projects and is being paid fee for the same, hence applicable Article is 12, which does provide deduction of withholding tax @ 15%."*

10. Applying the settled principle that the nature of income is to be determined with reference to the character of the underlying transaction, this Court finds that the payments made by the petitioner to the UAE entity are not in the nature of business profits simpliciter, but arise from a composite arrangement involving technical, managerial, and consultancy services. Consequently, the petitioner's reliance on Article 7 of the Treaty is misconceived, as the said provision applies only where income is not otherwise specifically covered. Once the payments are found to fall within the ambit of Article 13 relating to technical services, the question of the existence of a permanent establishment under Article 5 becomes irrelevant. The income, therefore, is taxable in the source State in accordance with the said Article, attracting withholding tax under the applicable law. As regards the case law relied upon by the learned counsel for the Petitioner i.e., M/s Inter Quest Information Services v. Commissioner of Income Tax (2007 PTD 2549), Commissioner of Income Tax v. M/s Inter Quest Information Services (2023 SCMR 1803), and M/s Inter Quest Information Services v. Commissioner of Income Tax (2025 SCMR 257), the same are clearly distinguishable on facts and circumstances and, therefore, do not lend any support to the case of the Petitioner. The factual matrix, nature of transactions, and legal questions involved in the cited judgments are materially different from those arising in the present matter, particularly in relation to the characterization of payments and the applicability of the relevant provisions of the Treaty. Consequently, the principles laid down in the aforementioned cases are not

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directly applicable to the controversy at hand and are of no assistance to the petitioner in substantiating its claim. On the other hand, the judgment reported as 2020 SCMR 494 is directly on the point and squarely governs the controversy involved in the present case.

11. Now, adverting to the objection raised by the learned counsel for the Respondents regarding the availability of an adequate alternative remedy under the Ordinance, this Court finds considerable substance in the said contention. This Court has carefully examined the earlier order dated 11.05.2015 (referred to in the preceding paragraphs), wherein, while placing reliance upon authoritative pronouncements reported as 1999 SCMR 1381, 1999 SCMR 1881, PLD 1983 SC 187, and PLD 1992 SC 847, it was unequivocally held that it is a settled proposition of law that where an adequate and efficacious remedy is available under the statute, the constitutional jurisdiction of this Court under Article 199 of the Constitution is not to be invoked. The use of the expression "settled law" by the Court was of wide import and not confined merely to directing the Petitioner to avail the remedy under Section 122B of the Ordinance; rather, it encompasses the entire statutory framework, which provides a complete hierarchy of remedies to an aggrieved party, even against orders passed under Section 122B.

12. It is a well-established principle that legislation is enacted for the facilitation and orderly regulation of rights and obligations of the public, and where a specific remedy is provided by law to address a grievance, the same is intended to be availed by the aggrieved party in the manner prescribed. Such remedies are neither ornamental nor optional, but are substantive rights coupled with corresponding obligations. Once the legislature, in its wisdom, has provided a complete mechanism for redressal of grievances, it is not open to a litigant to adopt a selective or pick-and-choose approach so as to bypass the prescribed forum and directly invoke the constitutional jurisdiction of this Court, unless exceptional circumstances exist. Any such attempt would amount to circumventing the statutory scheme and undermining the legislative intent. The

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august Supreme Court of Pakistan, in PLD 1992 SC 847, has categorically disapproved the tendency of litigants to abandon or bypass statutory remedies without any valid and justifiable cause and to invoke constitutional jurisdiction as a matter of course. It has been authoritatively held that where a party has opted to avail the remedies provided under the relevant statute, it cannot, at its own volition, switch over to constitutional jurisdiction midway, except in cases where the impugned action is patently without jurisdiction or suffers from mala fides. The Hon'ble Supreme Court in the said judgment has conclusively held as under: -

> *"12. Before parting with the judgment we may observe that in cases where any party resorts to a statutory remedy against an order he cannot abandon or bypass it without any valid and reasonable cause and file Constitution petition challenging the same order. Such practice, in cases where statute provides alternate and efficacious remedy upto High Court, cannot be approved or encouraged. In a recent judgment of this Court in C.A. No. 79-K of 1991, one of us (Ajmal Mian, J.) in similar situation observed as follows:*
>
> > *"We may now revert to the question, whether the appellant was justified to file above Constitution petition against the order of the Tribunal instead of invoking section 136 of the Ordinance for making a reference to the High Court. According to Mr. Rehan Naqvi, a reference under the above provision would not have been adequate and efficacious remedy as it would have taken years before it could have been heard. The same could be true for a Constitution Petition. The tendency to bypass the remedy provided under the relevant statute and to press into service Constitutional jurisdiction of the High Court has developed lately, which is to be discouraged. However, in certain cases invoking of Constitutional jurisdiction of the High Court instead of availing of remedy provided for under the relevant statute may be justified, for example when the impugned order/action is palpably without jurisdiction and/or mala fide. To force an aggrieved person in such a case to approach the forum provided under the relevant statute may not be just and proper.*
> >
> > *In the present case, the appellant had opted to avail of the hierarchy of forums provided for under the Ordinance upto the stage of filing of appeal before the Tribunal and, therefore, it*

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> *would have been proper on the part of the appellant to have invoked section 136 of the Ordinance for making a reference to the High Court instead of filing a Constitutional petition. In our view, once a party opts to invoke the remedies provided for under the relevant statute, he cannot at his sweet will switch over to Constitutional jurisdiction of the High Court in the mid of the proceeding in the absence of any compelling and justifiable reason."*

13. Further, the controversy involved in the present matter essentially revolves around disputed questions of fact arising out of the interpretation and application of the provisions of the Income Tax Ordinance, 2001, particularly with regard to the true nature and characterization of the payments made by the Petitioner to the non-resident entity. The determination of such questions necessarily entails an in-depth examination of the contractual arrangement, the scope of services rendered, and the attendant factual matrix, which, by their very nature, fall within the domain of the statutory fora constituted under the Ordinance. It is an established principle of law that constitutional jurisdiction under Article 199 of the Constitution is not intended to serve as a substitute for statutory remedies, nor is it designed to adjudicate upon intricate and disputed questions of fact requiring recording of evidence and detailed factual inquiry. The jurisdiction of this Court, in such matters, is primarily supervisory in nature and is to be exercised sparingly, only in cases where the impugned action is patently without jurisdiction, suffers from mala fides, or where no adequate and efficacious alternative remedy is available to the aggrieved party. In the case at hand, the Petitioner, having entered into the statutory regime, availed the remedies provided under the Ordinance up to a certain stage and, upon being dissatisfied with the outcome, has invoked the constitutional jurisdiction of this Court on the premise that it has exhausted the available remedies. Such an approach, in the considered view of this Court, is not in consonance with the settled principles governing the exercise of constitutional jurisdiction. The mere fact that a litigant perceives that the remedies availed have not yielded the desired result does not render the statutory mechanism ineffective or inadequate.

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14. Significantly, the scheme of the Income Tax Ordinance, 2001, provides a complete and self-contained mechanism for redressal of grievances, including the remedy of reference to the High Court on questions of law arising out of orders passed by the Appellate Tribunal. It is through such statutory reference that pure questions of law, including the interpretation of treaty provisions and characterization of income for tax purposes, are to be examined by this Court in its advisory jurisdiction. This statutory route ensures that findings on factual controversies are first conclusively determined by the specialized fora, after which only the legal questions are brought before the High Court for adjudication. The Hon'ble Supreme Court of Pakistan, in the case titled *M/s Payoneer Inc. through its authorized officer v. Federation of Pakistan through Secretary Revenue Division*, has reiterated the settled principle governing the exercise of constitutional jurisdiction in fiscal matters and has held as under: -

> *"The High Court dealt with the issue of the impugned notice/show-cause notice very aptly. The registration alone under the ITO or the issuance of National Tax Number does not qualify as a coercive action against any entity, hence the contention of the petitioner that there should have been a prior notice before registration would not make any difference. The primary grievance of the petitioner, however, remained that the notice under section 114 of the ITO was issued, which may affect petitioner's right, as the laws in respect of non-resident entity is well settled. The questions however remain if a better and statutory recourse is not available to avail the alternate writ jurisdiction. The simple answer is that such statutory recourse is available under ITO which has provided forums to resolve the raised questions. Mr. Awan has not been able to show if those forums are not efficacious..... This Court in Geofizyka dealt with those issues once the tax reference was decided by the Islamabad High Court in Tax Reference No. 16 of 2005. Thus issuance of a show-cause notice cannot be equated to be one without jurisdiction hence the High Court was right in not exercising writ jurisdiction and left it to the petitioner to exhaust its remedy under the hierarchy of ITO.)"*

15. The dictum laid down in the aforesaid judgment squarely applies to the case in hand. It clearly underscores that where the statute provides a complete and efficacious mechanism for redressal of grievances, including forums

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competent to examine both factual and legal controversies, the invocation of constitutional jurisdiction is neither warranted nor sustainable. The Hon'ble Supreme Court has emphatically held that even in cases involving non-resident entities and questions pertaining to tax liability, the proper course is to avail the remedies provided under the Income Tax Ordinance, 2001, unless it is demonstrated that such remedies are illusory or ineffective, which, in the present case, has not been established.

16. In view of the above authoritative pronouncement, this Court finds that the Petitioner, instead of invoking constitutional jurisdiction, ought to have pursued the remedies available under the Ordinance. The failure to demonstrate that such remedies are either unavailable or inefficacious disentitles the Petitioner from seeking relief under Article 199 of the Constitution, and the present petition is, therefore, not maintainable on this ground as well. Resultantly, the same is hereby **DISMISSED** with no order as to cost.

(INAAM AMEEN MINHAS)
JUDGE

(MUHAMMAD AZAM KHAN)
JUDGE

Announced in the Open Court on _____ day of April, 2026.

JUDGE

JUDGE

Sajid

Approved For Reporting
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