IN THE INCOME TAX APPELLATE TRIBUNAL

"L" BENCH, MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND

SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

S. No.	*Miscellaneous Application*	*Arising from Income Tax Appeal*
1.	143/M/2014	*3435/Mum/2008*
2.	*144/M/2014*	*3340/Mum/208*
3.	*166/M/2014*	*3431/Mum/2008*
4.	*167/M/2014*	*3436/Mum/2008*
5.	*168/M/2014*	*3441/Mum/2008*
6.	*188/M/2014*	*3432/Mum/2008*
7.	*189/M/2014*	*3437/Mum/2008*
8.	*190/M/2014*	*3442/Mum/2008*
9.	*211/M/2014*	*3433/Mum/2008*
10.	*212/M/2014*	*3438/Mum/2008*
11.	*213/M/2014*	*3443/Mum/2008*
12.	*234/M/2014*	*3434/Mum/2008*
13.	*235/M/2014*	*3439/Mum/2008*
14.	*236/M/2014*	*3444/Mum/2008*
15.	*419/M/2013*	*837/Mum/2007*
16.	*139/M/2014*	*5080/Mum/2008*
17.	*1771M/2014*	*4909/Mum/2007*
18.	*222/M/2014*	*4901/Mum/2007*
19.	*461/M/2013*	*4672/Mum/2007*
20.	*145/M/2014*	*4278/Mum/2008*
21.	*169/M/2014*	*4279/Mum/2008*
22.	*170lMl2014*	*4284/Mum/2008*
23.	*180/M/2014*	*5373/Mum/2007*
24.	*193/M/2014*	*4246/Mum/2008*
25.	*237/M/2014*	*4282/Mum/2008*
26.	*233/M/2014*	*5477lMum/2008*
27.	*217/M/2014*	*4252/Mum/2008*
28.	*247/M/2014*	*4917/Mum/2007*
29.	*159/M/2014*	*4674/Mum/2007*
30.	*198/M/2014*	*4875/Mum/2007*
31.	*152/M/2014*	*4873/Mum/2007*
32.	*192/M/2014*	*4285/Mum/2008*
33.	*194/M/2014*	*4251/Mum/2008*
34.	*215/M/2014*	*4286/Mum/2008*
35.	*161/M/2014*	*5076/Mum/2008*
36.	*184/M/2014*	*5082/Mum/2008*
37.	*228/M/2014*	*5075/Mum/2008*
38.	*230/M/2014*	*5084/Mum/2008*
39.	*156/M/2014*	*4918/Mum/2007*

40.	*173/M/2014*	*4260/Mum/2008*
41.	*196/M/2014*	*4261/Mum/2008*
42.	*199/M/2014*	*4900/Mum/2007*
43.	*204/M/2014*	*4676/Mum/2007*
44.	*219/M/2014*	*4291/Mum/2008*
45.	*221/M/2014*	*4876/Mum/2007*
46.	*227/M/2014*	*4677/Mum/2007*
47.	*243/M/2014*	*4310/Mum/2008*
48.	*246/M/2014*	*4907/Mum/2007*
49.	*179/M/2014*	*4924/Mum/2007*
50.	*158/M/2014*	*4928/Mum/2007*
51.	*162/M/2014*	*5081/Mum/2008*
52.	*210/M/2014*	*5476/mum/2008*
53.	*163/M/2014*	*5086/Mum/2008*
54.	*182/M/2014*	*5073/mum/2008*
55.	*202/M/2 0 14*	*4920/mum/2007*
56.	*209/M/2014*	*5467/Mum/2008*
57.	*248/M/2014*	*4922/mum/2007*
58.	*154/M/2014*	*4903/Mum/2007*
59.	*241/M/2014*	*4258/mum/2008*
60.	*411/M/2013*	*4899/Mum/2007*
61.	*195/M/2014*	*4256/Mum/2008*
62.	*220/M/2014*	*4309/mum/200 8*
63.	*232/M/2014*	*5469/Mum/2008*
64.	*249/M/2014*	*4927/mum/2007*
65.	*409/M/2013*	*4255/Mum/2008*
66.	*141/M/2014*	*5090/mum/2008*
67.	*165/M/2014*	*5474/mum/2008*
68.	*231/M/2014*	*5089/mum/2008*
69.	*142/M/2014*	*5470/mum/2008*
70.	*149/M/2014*	*4254/Mum/2008*
71.	*172/M/2014*	*4250/Mum/2008*
72.	*191/M/2014*	*4280/Muml2008*
73.	*197/M/2014*	*4308/Mum12008*
74.	*240/M/2014*	*4253/Mum/2008*
75.	*250/M/2014*	*4673/Mum/2007*
76.	*164/M/2014*	*5091/Mum/2008*
77.	*207/M/2014*	*5083/Mum/2008*
78.	*148/M/2014*	*4249/Mum/2008*
79.	*150/M/2014*	*4259/Mum/2008*
80.	*171/M/2014*	*4245/mum/2008*
81.	*174/M/2014*	*4307/Mum/2008*
82.	*218/M/2014*	*4257/Mum/2008*
83.	*239/M/2014*	*4248/Mum/2008*
84.	*242/M/2014*	*4305/Mum/2008*
85.	*175/M/2014*	*4874/Mum/2007*

86.	*226/M/2014*	*4926/Mum/2007*
87.	*205/M/2014*	*5074/Mum/200 8*
88.	*208/M/2014*	*5088/Mum/2008*
89.	*160/M/2014*	*5072/Mum/2008*
90.	*157/M/2014*	*4923/Mum/2007*
91.	*238/M/2014*	*4287/Mum/2008*
92.	*183/M/2014*	*5077/Mum/2008*
93.	*140/M/2014*	*5085/Mum/2008*
94.	*251/M/2014*	*5071/Mum/2008*
95.	*214/M/2014*	*4281/Mum/2008*
96.	*245/M/2014*	*4902/Mum/2007*
97.	*203/M/2014*	*4925/Mum/2007*
98.	*224/M/2014*	*4916/Mum/2007*
99.	*185/M/2014*	*5087/Mum/2008*
100.	*153/M/2014*	*4878/Mum/2007*
101.	*155/M/2014*	*4908/Mum/2007*
102.	*176/M/2014*	*4904/Mum/2007*
103.	*181/M/2014*	*4675/Mum/2007*
104.	*187/M/2014*	*5475/Mum/2008*
105.	*186/M/2014*	*5092/Mum/2008*
106.	*206/M/2014*	*5078/Mum/2008*
107.	*229/M/2014*	*5079/Mum/2008*
108.	*178/M/2014*	*4919/Mum/2007*
109.	*223/M/2014*	*4906/Mum/2007*
110.	*225/M12014*	*4921/Mum/2007*
111.	*146/M/2014*	*4283/Mum/2008*
112.	*147/M/2014*	*4244/Mum/2008*
113.	*151/M/2014*	*4306/Mum/2008*
114.	*200/M/2014*	*4905/Mum/2007*
115.	*201lM/2014*	*4910/Mum/2007*
116.	*216/M/2014*	*4247/Mum/2008*
117.	*244/M/2014*	*4877/Mum/2007*

Reliance Communications Ltd.
C–Block, 1st Floor
Dhirubhai Ambani Knowledge City ……. Appellant
Koperkhairne, Navi Mumbai 400 710
PAN – AACCR7832C

v/s

Dy. Director of Income Tax–2(1)
Scindia House, Ballard Estate
N.M. Road, Mumbai 400 038 ……. Respondent
PAN – AAFFR9494N

RELIANCE COMMUNICATIONS INFRASTRUCTURE LIMITED

118.	*252/M/2014*	*5468/Mum/2008*
119.	*254/M/2014*	*5472/Mum/2008*
120.	*255/Ml2014*	*5473/Mum/2008*
121.	*253/Ml2014*	*5471/Mum/2008*
122.	*256/M/2014*	*4501/Mum/2009*

RELIANCE BPO LIMITED

123.	*257/M/2014*	*730/Mum/2009*

RELIANCE TELECOM LIMITED

124.	*258/Ml2014*	*5093/Mum/2008*
125.	*259/Ml2014*	*5094/Mum/2008*
126.	*260/M/2014*	*5095/Mum/2008*
127.	*261/M/2014*	*5096/Mum/2008*

Assessee by : Shri Yogesh Thar a/w
Shri Deepak Jain and
Shri Manthan Shah
Revenue by : Shri Parag Vyas

Date of Hearing – 13.05.2016	Date of Order – 18.11.2016

O R D E R

PER BENCH:

These bunch of miscellaneous applications have been filed by different assessees viz., Reliance Communications Ltd., (formerly known as Reliance Infocom Ltd.), Reliance Communications Infrastructure Ltd., Reliance BPO Pvt. Ltd. (formerly known as Reliance Infostream Pvt. Ltd.) and Reliance Telecom Ltd., seeking rectification of mistake apparent on record in the order dated 6th September 2013,

passed by the Tribunal while disposing off a bunch of appeals filed by the Department in relation to these assessees.

2. Brief facts leading to the filing of aforesaid applications are, the assessee companies being desirous of setting–up Wireless Telecom Network in India, wanted to purchase both hardware and software from several non–resident companies for which payments were to be made to them. For enabling the assessee to make payments to these non–resident companies towards purchase of software without deduction of tax at source, the assessee filed applications under section 195(2) of the Income Tax Act, 1961 (for short *"the Act"*) before the Assessing Officer. The Assessing Officer rejected the applications of the assessee and passed an order under section 195 of the Act holding that the payment made towards purchase of software is in the nature of royalty, therefore, liable to be taxed in India. Accordingly, the Assessing Officer directed the assessee companies to deduct tax at source at the prescribed rate before making payments to the non–resident payees towards purchase of software. Being aggrieved of the orders passed under section 195 of the Act, assessee companies preferred appeal before the learned Commissioner (Appeals) under section 248 of the Act. Learned Commissioner (Appeals) allowed the appeals holding that the payments made by the assessee being not in the nature of royalty, there is no requirement of

deduction of tax at source. Being aggrieved of the said order of the first appellate authority, the Revenue came in appeal before the Tribunal. The Tribunal, vide a common order dated 6th September 2013, disposed of all the appeals preferred by the Revenue upholding the orders passed under section 195 by the Assessing Officer, thereby holding that assessee companies are liable to deduct tax at source on payments made to the non–resident companies towards purchase of software, as according to the Tribunal, such payments are in the nature of *Royalty* in terms of provisions contained under section 9 of the Act r/w relevant DTAAs. In the said common order, the Tribunal also disposed of appeals preferred by Lucent Technologies GRL LLC, USA, (for short *"Lucent"*), a non–resident company, which also received payment from the assessee towards supply of software. This is the genesis of the present applications.

3. It is the contention of the learned Counsel for the assessee, the appellate order of the Tribunal suffers from various mistakes which are apparent on record, hence, the appeal order passed has to be recalled.

4. Brief submissions of the learned Counsel, as summarised in the written note dated 30th May 2016, a copy of which is placed on record, are as under:–

"1. Submissions made by the Applicant lost sight of and decision rendered based on submissions made by Lucent's Counsel:

a. It was pointed out by the Applicant before the CIT(A) that the Applicant's case was that of software is specific to telecom hardware (Pg. 9 and 10 of the Tribunal's order);

b. Para 13 Pg. 26 and 27 of the Tribunal's order records the Applicant's submissions that the transactions under consideration is not a case of shrink wrapped software and this software is specific to the machinery on which it works;

c. Para 16 Pg. 28 of the Tribunal's order states the argument of the Applicant's Counsel distinguishing the decision of the Hon'ble Karnataka High Court in Samsung (supra) and thereby stating that it was not a case of purchase of shrink wrapped software;

d. Para 39 Pg. 91 of the Tribunal's order states that "in the cases before us, the learned Counsel for Lucent fairly admitted that the issue is to be decided in the light of the judgment of the Hon'ble Delhi High Court vis-à-vis the judgment of the Hon'ble Karnataka High Court;

e. The Tribunal has decided the appeals explicitly based on certain concessions made by Lucent's Counsel in their set of appeals. Their arguments and/ or concessions cannot be the basis to decide the Applicant's case which involves numerous other contracts/ agreements for purchase of software. It is not known how this could ever be the basis for deciding the Applicant's appeal when the Applicant was neither a party nor heard at the time when Lucent's appeals were being argued. The impugned order suffers from gross violation of principles of natural justice and the right to be heard, which itself constitutes a mistake apparent from record.

2. Co-ordinate Bench decision not followed:

(a). During the course of hearing, the Applicant had placed reliance on the decision of Solid Works (supra). The Tribunal recorded the Applicant's reliance on Solid Works (supra) at the bottom of Pg. 28 of the order. The Tribunal ought to have followed the decision of Solid Works (supra) cited by the Applicant during the course of hearing and in not doing so, there is a mistake apparent from record in the Tribunal's order in accordance with the decision of the Hon'ble Supreme Court in the case of Honda Siel Power Products Ltd. v. CIT (295 ITR 466) wherein it has been held as

under:

> *"Rule of precedent' is an important aspect of legal certainty in rule of law. That principle is not obliterated by section 254(2). When prejudice results from an order attributable to the Tribunal's mistake, error or omission, then it is the duty of the Tribunal to set it right. Atonement to the wronged party by the Court or Tribunal for the wrong committed by it has nothing to do with the concept of inherent power to review. In the instant case, the Tribunal was justified in exercising its powers under section 254(2) when it was pointed out to the Tribunal that the judgment of the coordinate Bench was placed before the Tribunal when the original order came to be passed but it had committed a mistake in not considering the material, which was already on record. The Tribunal had acknowledged its mistake; it had accordingly rectified its order. If prejudice had resulted to the party, which prejudice is attributable to the Tribunal's mistake, error or omission and which error is a manifest error then the Tribunal would be justified in rectifying its mistake. The same thing had been done in the instant case. [Para 13] "*

Further, the Hon'ble Mumbai Tribunal in the case of Shri Prerak Goel v. ACIT (MA No. 325/Mum/2010) has held as under:

> *"4. It is the contention of the assessee that the above said case of Mrs. Bakhtawar Dubhash B. Dubhash in 2009-TIOL-288-ITAT- MUM was relied upon but the same was not discussed or distinguished. Since this Coordinate Bench decision has a bearing on the issue the Tribunal ought to have considered the same and not considering the same would he considered as a mistake apparent from record on various principles on this issue.*
>
> *5. As seen from the record the above said decision was placed before the Bench but inadvertently the same was not discussed or distinguished. In view of this, we are of the opinion that the assessee should be given an opportunity to place the arguments in this regard and the Miscellaneous Application is to be allowed by recalling the order dated 10.08.2010. It is also necessary to examine whether the above Coordinate Bench decision is applicable on the facts of the case. For these reasons the order is recalled and the Registry is directed to post the cases afresh for fresh consideration in the due course."*

The Third Member decision of Hon'ble Delhi Tribunal in the case

of Mohan Meakin Ltd. v. ITO (89 ITD 179) has held as under:

> *"REFERENCE U/S 255(4) OF THE INCOME-TAX ACT 1961*
>
> *Since there is a difference of opinion between the Members, the following questions are referred to the Hon'ble President of the Tribunal under section 255(4) of the Income-tax Act, 1961:"*
>
> *2. Whether on facts and in law, the Tribunal committed an apparent mistake in upholding the addition of Rs. 79,99,706 in para 26 of the impugned order by ignoring the Special Bench decision in the case of Food Specialties, 49 ITD 21 , though inadvertently, which was cited and relied upon by the assessee 's counsel?*
>
> *5. After considering the rival submissions, I am of the view that the decision of the Ld. JM to substitute the earlier observations by a different set of observations was the correct view and approach to be taken and inasmuch as the earlier directions of the Division Bench were not in conformity with the legal position there was a mistake apparent from the record and which was rectifiable under section 254(2). I, therefore, agree with the view expressed by the Id. JM and the first point of reference is therefore treated as disposed of*.
>
> *9. After considering the rival submissions, Jam of the view of the order passed by the id. JM is the correct one both on facts and in law. As rightly* argued by the L*d. counsel the non-consideration of a judgment cited before the Tribunal constitutes a mistake apparent from the record within the meaning of section 254(2) and on being pointed out by any of the parties, the Tribunal is obliged to take into account the judgment so cited irrespective of the results that would follow. In the present case, the ld. JM has very aptly compared the facts of the assessee case with those prevailing in the case of Food Specialities Ltd. (supra) and thereafter directed requisite relief"*

Similar view has also been expressed in a recent decision of the Hon'ble Vishakhapatnam Tribunal in the case of Smt. Nishi Devi Tanuku v. DCIT (MP No. 1/Vizag/2016) wherein it has been held as follows:

> *"2. During the course of hearing, the Ld. A.R. of the assessee submitted that on going through the order*

passed by the Hon'ble Bench, it is noticed that there was a mistake in non-consideration of coordinate bench decision of ITA T, Visakhapatnam in the case of Dr. Ch. Sri Padmavati Vs. DCJT in ITA No.624/Vizag/2013 dated 4.7.2014, which is a mistake apparent from the records, it requires rectification u/s 254(2) of the Income-Tax Act, 1961 (hereinafter called as the Act).

4. We have heard both the parties, perused the materials available on record. On verification of the order passed by this bench, in JTA No. 1861Vizag/201 1 dated 11.12.2015, we find that the bench, by oversight has not given any findings on the coordinate bench decision cited by the assessee. Therefore, we are of the opinion that it is a mistake apparent from the records which needs to be rectified u/s 254(2) of the Act. Hence, by exercising the powers vested with the Tribunal u/s 254(2) of the Act and also by relied upon the judgement of Hon 'ble Supreme Court of India, in the case of Honda Siel Power Products Ltd. Vs. CIT (2007) 295 ITR 466, the order passed by this Tribunal in ITA No.1861Vizag/2011 dated 11.12.2015 has been recalled, heard and disposed of as under."

(b). If the Tribunal was not inclined to follow the earlier decision of the co-ordinate Bench, it ought to have referred the matter to the President for constitution of a larger Special Bench. In this regards, reliance is placed on the decision of the Hon'ble Bombay High Court in the case of CIT v. Goodlas Nerolac Paints Ltd. (188 ITR 1) which holds as follows:

"6. Before parting with this question, we consider it desirable to mention that the Tribunal is a final Judge of facts. The High Court in reference does not interfere with the findings effect unless such a finding is perverse or is such that no reasonable person can come to such a finding. This will be so even when the High Court feels that it would have come to a different conclusion, if it was sitting in appeal. In that sense, when the High Court declines to interfere with finding of fact given by the Tribunal in an earlier year, it may not mean that the High Court had approved of such findings. This, however, does not mean that a subsequent Bench of the Tribunal should come to a conclusion totally contradictory to the conclusion reached by the earlier Bench of the Tribunal in the same case for an earlier year on a similar set of facts. Such a thing may not be in the larger public interest as it is likely to shake the confidence of the public in the system. It is, therefore, desirable that in case a

> *subsequent Bench of the Tribunal is of the view that the finding given by the Tribunal in an earlier year requires reappraisal either because the appreciation in its view was not quite correct or inequitable or some new facts have come to light justifying reappraisal or reappreciation of the evidence on record, it should have the matter placed before the President of the Tribunal so that the case can be referred to a larger Bench of the Tribunal for adjudication and for which there is a provision in the Act."*

(Underlined for emphasis)

Similar view has also been taken by the Hon'ble Madras High Court in the case of CIT v. L. G. Ramamurthi (110 ITR 453) wherein it has been held as under:

> *It may be that the members who constituted the Tribunal and decided on the earlier occasion are different from the members who decided the case on the present occasion. But what is relevant is not the personality of officers presiding over the Tribunal or participating in the hearing, but the Tribunal as an institution. If it is to be conceded that simply because of the change in the personnel of the officers who manned the Tribunal, it is open to the new officers to come to a conclusion totally contradictory to the conclusion which had been reached by the earlier officers manning the same Tribunal on the same set of facts, it will not only shake the confidence of the public in judicial procedure as such, but it will also totally destroy such confidence. The result of this will be conclusions based on arbitrariness and whims and fancies of the individuals presiding over the courts or the Tribunals and not reached objectively on the basis of the facts placed before the authorities.*
>
> *If a Bench of a Tribunal on the identical facts is allowed to come to a conclusion directly opposed to the conclusion reached by another Bench of the Tribunal on an earlier occasion that will be destructive of the institutional integrity itself That is the reason why in a High Court, if single judge takes a view different from the one taken by another judge on a question of law, he does not finally pronounce his view and the matter is referred to a Division Bench. Similarly, if a Division* Bench defers *from the view taken by another Division Bench, it does not express disagreement and pronounce its different views, but has the matter posted before a Fuller Bench for considering the question. If that is the position even with regard to a question of law, the position will be* a *fortiori with regard to*

a question of fact.

(c). The co-ordinate Bench decision in the case of Solid Works (supra) which was cited by the Applicant is not dealt with in the operative part of the Tribunal's order and to that extent, there is a mistake apparent from records. The Hon'ble Bombay High Court in the case of DSP Investment Pvt. Ltd. v. ACIT (ITA No. 2432 of 2013) has held that if the Tribunal's order was a non-speaking one, the same was to be restored back for fresh disposal. The relevant extracts of the decision is reproduced as under:

> *"2. The appeal is admitted on the following substantial question of law:"*
>
> *Whether on the facts and in the circumstances of the case and in law, was the Tribunal justified in referring to its coordinate Bench decision in I K Investors (Bombay) Ltd. being relied upon by the appellant and yet not dealing with the same in the impugned order?"*
>
> *5.....In support of its aforesaid contention, the appellant placed reliance upon the decision of an coordinate Bench of the Tribunal in J.K. Investors (Bombay) Ltd. V/s. Assistant Commissioner of Income Tax (ITA No. 7858/MUM/2011) decided on 13th March, 2013.*
>
> *6 In fact the impugned order of the Tribunal in paragraph 6 thereof does record the appellant's reliance upon the decision of the Court of its coordinate Bench in J. K Investors (supra). However, thereafter the impugned order does not deal with the appellant's reliance upon the decision of the Tribunal in .JK Investors (supra) while dismissing the appellant assessee's appeal before it. In fact the impugned order of the Tribunal ought to have dealt with its decision in J. K Investors (supra) and considered its applicability to the present facts.*
>
> *7. In view of the fact that the impugned order of the Tribunal does not deal with its decision in J. K Investors (supra) relied upon by the appellant assessee in support of its submission as recorded in the impugned order itself makes the impugned order a nonspeaking order and, therefore, in breach of principles of natural justice. In the above view, the substantial question of law is answered in the affirmative i.e. in favour of the appellant assessee and against the revenue. However, the issue of applicability of Rule 8D of the Rules or otherwise has yet to be*

determined by the Tribunal. In these circumstances, we set aside the impugned order dated 10th July, 2013 passed by the Tribunal and restore the entire appeal to the Tribunal for fresh disposal in accordance with law. All contentions of both sides left open."

(d). Further, the Hon'ble Mumbai Tribunal in a subsequent decision in the case of Solid Works Corporation v. ADIT (ITA No. 8721/Mum/2010) has once again reiterated the settled proposition that when no decision of the Jurisdictional High Court is available on a particular issue and when there are contrary decisions of other High Courts, the view favourable to the assessee ought to be adopted.

3. Payees held as not chargeable to tax by various Benches of the Tribunal and in some cases even by High Courts:

a. The Applicant, during the course of the present proceedings, has furnished a chart which had 21 appeals where it was submitted that in the hands of the payee, the amount received towards the sale of software was not taxable as "royalty" and hence not liable to tax.

b. In such a scenario, where the payee cannot be taxed for a particular income, it cannot be held that the payer i.e. the Applicants in the present proceedings is liable to deduct tax at source. The Tribunal is an institution and what is relevant is not the personality of officers presiding over the Tribunal or participating in the hearing, but the Tribunal as an institution. Thus, there cannot be two contrary views on the same payment and such a situation is un-stateble in law.

c. Tax deduction at source is only a collection mechanism and not a charging section. Thus, if the Tribunal holds that a charge on a particular sum does not exist, then the same appellate authority cannot hold that tax should be deducted at source on the same sum. This is a glaring mistake of law. A mistake of fact and mistake of law both qualify for rectification u/s. 254 of the Act.

d. The Applicant, during the course of hearing has relied on a decision of the Hon'ble Mumbai Tribunal in the case of DDIT v. Reliance Infocomm Ltd. and vice versa (ITA Nos. 5374 & 6093/Mum/2008). These were two appeals where the Applicant had filed Miscellaneous Applications and were recalled by the Tribunal vide order dated April 16, 2014. The payee in the said two appeals was MIs. New Skies Satellites N.Y. ("New Skies")

and it was held by the Tribunal at Page 13 of the recalled order dated September 7, 2015 as follows:

> *"It has been now brought on record by the Ld. Senior Counsel that in the case of payee itself, that is, M/s New Skies Satellites NV, it has been decided categorically by the Tribunal that such a payment made by the assessee to MIs New Skies Satellites NV does not amount to "Royalty" as per the detail finding incorporated in the foregoing paras. Such an order of the Tribunal dated 11.03.2011 has now been approved and affirmed by the Hon'ble Delhi High Court vide order dated 30.092011. Not only that, in subsequent years also in the case of the payee, it has been consistently held that such a payment does not constitute payment for royalty. In view of this conclusion of fact and law in case of payee, we cannot reckon the payment as royalty in the hands of payee."*

In the above-mentioned list of 21 appeals provided to the Tribunal during the course of the present proceedings, the Applicant had mentioned a decision of the Hon'ble Delhi High Court in the case of DIT v. Ericsson A.B., New Delhi (16 taxmann.com 371). Ericsson was one of the payee of the Applicant. The said decision was also forming part of Pgs. 94 to 117 of the Legal Paper Book filed by the Applicant during the course of original hearing. Thus, the Applicant submits that even at the time of original hearing, the Tribunal had an occasion to consider that since the income of the payee has been held to be not chargeable to tax, there cannot be any liability of the payer to deduct tax at source on the said payment. Thus, the Tribunal, by taking a contrary view has committed a mistake apparent from records which needs to be rectified.

f. Further, the Applicant submits that at the time of hearing of the original appeals, the Ld. DR had argued only for the appeal relating to ITA No. 837/Mum12007 and the Applicant had also given a rejoinder for the Ld. DR's arguments. All the appeals being that of the Department, in the absence of any arguments by the Ld. DR for any other appeal, the Applicant was never given an opportunity to present the above facts.

4. Specific agreements not considered:

a. As stated above, the CIT(A), in his orders, had reviewed each agreement relating to 130 appeals and concluded that no tax ought to be deducted at source on payments made for purchase of software.

b. The Applicant, during the course of original hearing, had submitted an exhaustive chart stating various details relating to each and every payee such as name, paragraph reference to the CIT(A)'s order relating to the nature of software, relevant clauses of agreements with payees, whether software was supplied with the hardware, whether software is telecom hardware specific, etc.

c. One of the contentions of the Ld. DR during, the course of present proceedings is that, since in the case of Lucent, the agreement for supply of software is separate from supply of hardware as is evident from Para 7 Pg. 5 of the Tribunal's order, the purchase of software is a separate activity as compared to purchase of hardware. Thus, software is not an integral part of the hardware thereby falling under the definition of royalty. Assuming that the argument of the Ld. DR is correct, there are several payees in these appeals where there is a common agreement for purchase of both, software and hardware. For example:

S.no.	*M.A. no.*	*ITA no.*	*Name of Payee*	*Relevant Pg. no. of P.B. filed by the Department*
1.	*139/M/2014*	*5080/M/2008*	*Ericsson AB Sweden*	*176 to 213*
2.	*177/M/2014*	*4909/M/2007*		
3.	*222/M/2014*	*4901/M/2007*		
4.	*461/M/2013*	*4672/M/2007*		
5.	*192/M/22014*	*4285/M/2008*	*Ericsson Wireless Comm. Inc., USA*	*1155–1207*
6.	*194/M/2014*	*4251/M/2008*		
7.	*215/M/2014*	*4286/M/2008*		
8.	*230/M/2014*	*5084/M/2008*	*ZTE Corporation China*	*316–440*
9.	*162/M/2014*	*5081/M/2008*	*Nuera Communica–tions Inc. USA*	*214–246*

The above appeals being filed by the Department, the said fact ought to have been pointed out by the Department during the course of hearing. Further, no opportunity was provided to the Applicant to point out these vital facts.

d. Thus, the Applicant submits that the Tribunal did not consider the correct facts and came to a conclusion which was contrary to the facts. Thus, this is a mistake apparent from record which need to be rectified.

5. Embedded theory not argued by the Ld. DR:

a. At the time of the original hearing, the only argument put forth by the Ld. DR was on the issue that the payment made to Lucent was "for the use of, or the right to use, any copyright" and there was no argument put forth by the Ld. DR whether the software was "embedded" in the hardware or not. The Ld. DR tried to distinguish the Hon'ble Delhi High Court's decision in Ericsson (supra) on the footing that the said decision was concerned with licensing of software along with sale of substantial hardware and was not restricted to cases of licensing of only software.

b. As is evident from Para 12 Pg. 26 of the Tribunal's order which records the arguments of the Ld. DR, the "embedded" theory was never argued by the Ld. DR.

c. The CIT(A)'s order which has been reproduced by the Tribunal at Para 10 shows at Pg. 9 and 10 of the Tribunal's order that the Applicant had submitted that software is specific to telecom hardware and the simultaneous purchase orders of software and hardware, wherever applicable.

d. As stated in Para 13 Pg. 26 and 27 of the Tribunal's order, the Counsel for the Applicant had stated that the software does not work without the hardware and the software is specific to the hardware. Thus, the software is "embedded" in the hardware. Further, as stated in Pt. 4 above, an exhaustive chart was also submitted to the Tribunal which contained a column whether the software was supplied along with the hardware or not and whether software is specific to hardware or not. However, these facts were lost sight of by the Tribunal.

e. Since the "embedded" theory was not argued, the decision does not lay down what "embedded" means except to say that it is an 'integral part' of supply of equipment. The Tribunal, at Para 28 Pg. 63 of its order, explains the meaning of "embedded" that it is an integral part of the hardware. However, after explaining these facts, the Tribunal has lost sight of, in its operative portion, the Applicant's arguments.

f. If 'integral part' means 'specific to hardware' and

'necessary to run the hardware', then, as clarified in the charts submitted by the Applicant during the course of original hearings, all the software purchased by the Applicants are specific to telecom hardware.

6. *Misreading of decision of the Hon'ble Delhi High Court in the case of Ericsson (supra):*

a. *The Tribunal, in its order, has completely misread the decision of the Hon'ble Delhi High Court in the case of Ericsson (supra) (submitted at Pgs. 94 to 117 of the LPB submitted by the Applicant during the course of the original hearing).*

b. *Paras 59 and 60 of Ericsson's decision clearly shows that the decision has been rendered on the footing that there is a distinction between the acquisition of a 'copyright right' and 'copyrighted article'.*

c. *At Para 57 to 60 Pg. 20 to 21 of the said decision (Pgs. 113 and 114 of the LPB filed by the Applicant), it has been stated that in the case of Ericsson, the bifurcation of software and hardware was necessary for customs duty purposes. Further, at Para 59, the opening words read as "Be that as it may." thereby stating that irrespective of whether or not it was purchase of only software or software along with hardware, the Hon'ble High Court held the purchase of software not to be royalty.*

d. *In fact the decision of Solid Works (supra), at Para 13 internal Pg. 23 (Pg. 92 of the LPB filed by the Applicant) also states that the ratio laid down by the Delhi High Court in the case of Ericsson (supra) would also apply when shrink wrapped software is sold. Thus, the Applicant submits that the Tribunal has completely misread the decision of the Delhi High Court in Ericsson's case.*

e. *A subsequent decision of the Hon'ble Delhi High Court in the case of DIT v. Infrasoft Ltd. (220 Taxman 273) has held that the findings of Ericsson (supra) would hold good even in the case of shrink wrapped software.*

f. *For the proposition that misreading of a decision amounts to mistake apparent from record, the Applicant relies on a decision of the Hon'ble Allahabad High Court in the case of CIT v. Quality Steel Tubes Ltd. (253 CTR 298) wherein it has been held as under:*

"11. In the present case though the Tribunal had referred

to the judgment in Swadeshi Cotton Mills Co. Ltd. (supra), but later on, on the application given by the assessee that it wrongly applied the principle of law in Swadeshi Cotton Mills Co. Ltd. (supra) to the present case, found that there is difference between hypothecation and pledge of the stock. The hypothecation of the .goods could not be treated as same as in the case of pledge. The Tribunal realized its mistake in wrongly applying the principles laid down in Swadeshi Cotton Mills Co. Ltd. (supra), and rectified the mistake. In the absence of power of review, where the Tribunal finds that there was apparent mistake in its order, which has caused serious prejudice to the assessee, in view of the judgments in Honda Siel *Power Products Ltd. (supra) and Saurashtra Kutch Stock Exchange Ltd. (supra), it could have rectified the mistake, which was apparent on record.*

12. We do not find any difference in the circumstances where the Tribunal ignores the judgment of the jurisdictional Court, or wrongly relies upon the principle of law laid down by the jurisdictional Court. In case of misreading or relying upon a principle, which was never laid down in such judgment, the reasoning would be the same as if the Tribunal had not noticed the judgment?"

g. Even the Jurisdictional Tribunal in the case of Plaza Investments (P.) Ltd. v. ITO (108 lTD 239) has held as under:

"Thus, the question left for consideration in the instant case was as to whether misreading of the Supreme Court's judgment in Western States Trading Co. (P.) Ltd.'s case (supra) on the facts of the instant case would constitute a mistake apparent from records. In the Tribunal's order, which had been called into question by way of instant application, it was observed that in the light of the Supreme Court's judgment in the case of Western States Trading Co. (P.) Ltd. (supra) "when shares are held as part of the trading assets, dividend on those shares would form part of 'income from business', and, therefore, in the instant case the dividend income was to be assessed as 'income from business .....

The next issue for consideration is as to whether a considered view of the Tribunal can be subjected to rectification of mistake. Undoubtedly, all mistakes cannot be rectified under section 254(2). The rectifiable mistakes are the mistakes which are obvious, patent, and glaring on which no two views are possible. Once a mistake fits in this

category, as in the instant case, it is immaterial whether it is a conscious mistake or unconscious mistake. If a judicial body like the Tribunal applies its mind to a situation but reaches a wrong conclusion because of a simple mistake committed in the process of reasoning, on which no two views are possible, it will indeed be unreasonable to suggest that only because this mistake is committed after application of mind on a situation, this is not a mistake apparent from record. It cannot be termed as an error of judgment, but it has to be termed as a mistake apparent from record resulting in a vitiated Judgment. The difference between an error of judgment vis-a-vis an error apparent from record leading to an erroneous judgment may be thin but is too subtle to be ignored by a judicial body. The question of error of judgment can only arise when two views are possible and one of the views is adopted. That was not in the instant case. It was a simple case of omission to take note of the context in which the Supreme Court made certain observations and then interpreting those observations as complete exposition of law on that subject....

In view of the above, the Tribunal did commit an error, which was apparent from record, in holding that the assessee's dividend income could be taxed under the head income from business'. Merely because the exercise of powers under section 254(2) in the instant case was close to a review of the Tribunal's order, negation of a remedy provided to the applicant under the scheme, could not be justified. There cannot conceivably be two opinions on the question as to under which head dividend income can be taxed. Treating the dividend income as income from business' for the purposes of chargeability is a mistake, which is not capable of two views being taken in that respect. The stand taken by the Tribunal being directly contrary to the law settled by the Supreme Court and directly opposed to the clear pro visions of law, was so fundamental that it went to the root of the matter and might directly affect the conclusions arrived at by the Tribunal. The only ground of appeal in the Tribunal's order, related to that issue and, therefore, the appeal had to be recalled in entirety. [Para 10]"

(Underlined for emphasis)

In view of the above, it is submitted that misreading of the decision of the Hon'ble Delhi High Court is a mistake apparent from records.

7. No proper opportunity granted to the Applicant:

a. The ground in Lucent's appeal regarding grant of credit for tax deducted at source has been decided without hearing the Applicant. This is inspite of the fact that the Applicant is affected by the said grant of credit and even though an oral request was made by the Applicant's Counsel to be provided with an opportunity in case any ground in Lucent's appeal is decided that would affect the Applicant.

b. Thus, the order suffers from an obvious mistake of law, namely, want of natural justice."

5. The Ld Sr. Counsel appearing for the revenue, however, strongly opposed the applications filed by the assessees. He submitted that the facts available in the case of Ericsson A.B., which was considered by Hon'ble Delhi High Court, are that the software was supplied along with hardware as part of equipment. However, in the instant cases, the software was supplied by way of licensing by a different company, i.e., a company different from that supplied the hardware. Even if the hardware and software were purchased from the same company, licensing of software was done separately. Hence the Tribunal has taken the view that the decision rendered by Hon'ble Delhi High Court in the case of Ericsson A.B shall not be applicable to the assessee. Thus, the Tribunal has taken a view in this matter which cannot be subject to rectification u/s 254(2) of the Act. The Ld D.R further submitted that the Tribunal has taken note of the decision rendered by the Co-ordinate bench in the case of Solid Works at page 28, but preferred to follow the decision rendered by Hon'ble Karnataka High

Court in the case of Lucent Technologies 348 ITR 1, noted in paragraph 37 & 38 of the order. By placing reliance on the decision rendered by Hon'ble Supreme Court in the case of State of Gujarat Vs. Mirzapur Moti Kureshi Kassad Jamat and Ors (Civil appeal Nos. 4397 – 4940 and 4941-44 of 1998 dated 26-10-2005), the Ld D.R submitted that the Hon'ble Supreme Court has observed that, in the case of modern economic issues which are posed for resolution in advancing society or developing country, the court cannot afford to be static by simplistically taking shelter behind principles such as stare decisis and refuse to examine the issues in the light of present facts and circumstances… The doctrine of Stare decisis is generally to be adhered to because of well settled principles of law… yet the demands of changed facts and circumstances supported by logic, amply justify the need for a fresh look. Accordingly the Ld D.R submitted that the Tribunal is not bound by its earlier decisions and may take a different view. The Ld D.R submitted that the Tribunal has consciously adopted the decision rendered by Hon'ble Karnataka High Court, since the same appeared to be better to it as held by the Special bench of ITAT in the case of Rishiroop Chemicals Pvt Ltd Vs. ITO (36 ITD 35). He also submitted that the Hon'ble Supreme Court has held in the case of Union of India Vs. Paras Laminates (para 9) that a bench of two members must not lightly regard the decision of another bench of

same bench and that it is but natural and efficacious that the case is referred to a larger bench. He submitted that the Hon'ble Supreme Court nowhere states that the Tribunal is prohibited from deciding the issue on its own if it disagrees with the decision of the co-ordinate bench. Further the provisions of sec. 254(1) empower the Hon'ble Tribunal to pass such orders as it thinks fit. The Statute does not require the Tribunal to necessarily refer the matter to a larger bench.

6. The Ld D.R submitted that the Tribunal has considered and followed the decision rendered by the Hon'ble High Court of Karnataka and hence non-consideration of the co-ordinate bench decision in the case of Solid Works (supra) will not render the same as a mistake apparent from record. Accordingly he submitted that the decision rendered by Hon'ble Supreme Court in the case of Honda Siel Power Products Ltd Vs. CIT (supra) is distinguishable. With regard to the claim of the assessee that the payees have been held to be not taxable by the Tribunal and hence the Tribunal could not have taken a different view from the point of deduction of tax at source, the Ld D.R submitted that this issue has been duly addressed by the Tribunal in paragraph 49 by stating that the persons deducting tax at the time of making payments are not concerned with the ultimate results of the assessment of the non-resident persons. He submitted that the

Hon'ble Supreme Court has held in the case of Hero Vinoth Vs. Seshammal (Civil Appeal No.4715 of 2000) at para 25 that the recitals or contents of a document is a question of fact but the legal effect of a document is a question of law. In the instant cases, the Hon'ble Tribunal has interpreted, after detailed examination, that the legal effect of the agreement to be of licensing of software and therefore there is no mistake apparent from record as contemplated u/s 254(2) of the Act.

7. During the course of hearing, the assessees filed affidavits to support their contentions that the Tribunal has proceeded to decide the appeals on the basis of concession given by the Counsel of other four appeals filed by M/s Lucent Technologies GRL LLC, USA. It was further submitted in the affidavit that the assessees herein had sought opportunity to be heard in respect of arguments advanced by the counsel of M/s Lucent, but the Tribunal has proceeded to decide the appeals without affording opportunity to the assessees. It was further submitted that the assessee's counsel was not present when the appeals of M/s Lucent were heard by the bench. The affidavit further states that the observation made by the Tribunal in paragraph 47 (available at page 101 of the order) that "*the assessees herein have admitted that there was supply of software without purchase of*

equipment/hardware either from the same party or from any other party" is an erroneous statement. In the rejoinder, the revenue has stated that certain representatives of M/s Reliance Communications were present at the time when the appeals of M/s Lucent were heard. *The revenue has, however, agreed that the Ld Sr. Counsel for the assessees had sought an opportunity of being heard.* The Revenue has further stated that the assessees herein should have filed intervener application in the appeals of M/s Lucent, which they have failed to do. With regard to the submission of the assessees that they did not admit that there were only supply of software, without purchase of equipments from the same party or from any other party, the revenue has stated that the paragraph 47 of the Tribunal's order should be read as a whole and the same refers to many agreements, where there was only licensing of software and it is not a comment related to Lucent.

8. The Ld A.R, in his rejoinder, submitted that the Tribunal did not afford opportunity to the assesses on the arguments advanced by M/s Lucent, even though the same was specifically sought for by the assessees. The inference that could be drawn in this matter is that the Tribunal might be under the inference that the arguments of M/s Lucent would not go against the assessees. He further submitted that

the Tribunal ought to have heard the assessees because, once the credit is granted to Lucent, the purpose of appeal u/s 248 of the Act gets defeated and the assessees will never be able to claim any refund of taxes deducted even if the issue is decided in favour by the higher appellate authorities. With regard to the submission of the revenue that the comment made by the Tribunal in paragraph 47 is not a comment that is related to Lucent, the Ld A.R submitted that the revenue is agreeing that Lucent's transaction is indeed that of embedded software, which supports the contention of the assessee and hence the order needs to be recalled.

9. We heard the rival contentions and perused the record. As could be seen from the arguments advanced on behalf of the assessees, they have pointed out following mistakes apparent from record in the order of the Tribunal:–

i) Assessee's submissions not considered and on the basis of submissions made on behalf of Lucent the Tribunal decided the issue;

ii) Co–ordinate Bench decision of the Tribunal not followed;

iii) Payees not held chargeable to tax by the Tribunal and the High Court;

iv) Specific agreements not considered by the Tribunal while deciding the issue, whereas, the Commissioner (Appeals) has gone through all the agreements;

v) Embedded theory not argued by the Revenue;

vi) Misreading of decision of Ericson A.B; and

vii) Proper opportunity not granted to the assessee.

10. The main contention of the assessees is that the Tribunal did not follow the co-ordinate bench decision rendered in the case of Solid Works Corporation (51 SOT 34) and the same has resulted in a mistake apparent from record. In this regard, the assessees have placed reliance on various decisions referred supra to support their contentions. It is an admitted fact that the decision rendered by co-ordinate bench has been relied upon by the counsel of the assessees and the Tribunal has also noted the same in page 28 of the order. In the case of Solid Works Corporation (supra), the co-ordinate bench of Tribunal has considered the issue, viz., whether the payment received by the assessee cited above from resellers in India on sale of computer software is royalty or not as per DTAA between India and USA. The co-ordinate bench of the Tribunal considered the decisions rendered by the Hon'ble Karnataka High Court in the case of Samsung Electronics Co. Ltd (2009)(185 Taxman 313) and the Hon'ble Delhi High Court in the case of DIT Vs. Ericsson AB (ITA No.504/2007 dated 23.12.2007) and held that the consideration received by the assessee for sale of software was not royalty. The co-ordinate bench held so by following the view expressed by the Hon'ble Delhi High Court in the case of DIT Vs. Ericsson AB, New Delhi (supra) since the same was favourable to

the assessee. In this regard, the co-ordinate bench has followed the principle laid down by Hon'ble Supreme Court in the case of Vegetable Products Ltd (88 ITR 192).

11. In the instant appeals, the Tribunal admittedly did not consider the decision rendered by co-ordinate bench in the case of Solid Works Corporation (supra), even though it was relied upon by the assessees herein. The assessees have contended that the non-consideration of the decision of co-ordinate bench, when it was specifically relied upon by the assessee would result in a mistake apparent from record and would warrant recall of the order. In support of this contention, the assessees have placed their reliance on the decision rendered by Hon'ble Supreme Court in the case of Honda Siel Power Products Ltd (supra), wherein the Hon'ble Apex Court has held that the Tribunal was justified in exercising its power u/s 254(2) when it was pointed out to the Tribunal that the judgement of co-ordinate bench was placed before the Tribunal when the original order came to be passed but it had committed a mistake in not considering the material which was already on record.

12. The Hon'ble jurisdictional Bombay High Court had an occasion, in the case of Hatkesh Co. op Hsg Society Ltd Vs. ACIT (ITA No.328 of

2014 dated 22-08-2016), to consider the question as to whether the Tribunal was justified in taking a view contrary to the decision of the co-ordinate bench of the Tribunal rendered in the appellant's own case on identical facts without making reference to a larger bench. In the above said case, the Tribunal had passed order in favour of the assessee in AY 2003-04, 2004-05 and 2005-06 after considering the decision rendered by Hon'ble Bombay High Court in the case of Sind Co-op Hsg. Society Vs. ITO (2009)(317 ITR 47)(Bom). However, the Tribunal has taken a different view in another year in the subsequent decision rendered by it and for that purpose; the Tribunal placed reliance on the decision rendered by Hon'ble Bombay High Court in the case of Sind Co-op Hsg. Society (supra). When the assessee filed appeals before Hon'ble Bombay High Court, the Hon'ble High Court held as under:-

> "4. We find that the impugned order makes reference to the appellant's submission that the issue arising in the appeal before it is covered by the order of a Coordinate Bench of the Tribunal dated 24 June 2011 in its own case in respect of Assessment Years 2003-04 2004-05 and 2005-06. The order dated 24 June 2011 of the Tribunal was with regard to the two issues, which arose for consideration before the Tribunal in these six Assessment Years, namely, the application of principle of mutuality in respect of transfer fees and TDR premium received by the Assessee from its members. The order dated 24 June 2011 inter alia considered the decision of this Court in Sind Co. Op. Hsg. Society vs. ITO (2009) 317 ITR 47 (Bom.) before coming to the conclusion that transfer fees as well as TDR

premium received from Cooperative Societies is covered by the principle of mutuality.

5. The impugned order of the Tribunal after making a note of its Coordinate Bench's order dated 24 June 2011 seeks to take a different view. This different view was taken in the impugned order inter alia by relying upon the decision of this Court in Sind Co.Op. Hsg. Society (supra) which was also subjected to consideration in its order dated 24 June 2011. We are of the view that when an identical issue, which had earlier arisen before the Coordinate Bench of the Tribunal on identical facts and a view has been taken on the issue then judicial discipline would demand that a subsequent bench of the Tribunal hearing the same issue should follow the view taken by its earlier Coordinate Bench. No doubt this discipline is subject to the well settled exceptions of the earlier order being passed per incurim or sub silentio or in the meantime, there has been any change in law, either statutory or by virtue of judicial pronouncement. If the earlier order does not fall within the exception which affects its binding character before a coordinate bench of the Tribunal, then it has to follow it. However, if the Tribunal has a view different then the view taken by its Coordinate Bench on an identical issue, then the order taking such a different view must record its reasons as to why it does not follow the earlier order of the Tribunal on an identical issue, which could only be on one of the well settled exceptions which affect the binding nature of the earlier order. It could also depart from the earlier view of the Tribunal if there is difference in facts from the earlier order of Coordinate Bench but the same must be recorded in the order. The impugned order is blissfully silent about the reason why it chooses to ignore the earlier decision of the Tribunal rendered after consideration of Sind Co. Op. Hsg. Society (supra), and take a view contrary to that taken by its earlier Coordinate Bench. It is made clear that in case a subsequent bench of the Tribunal does not agree with the reasons indicated in a binding decision of a coordinate bench, then for reason to be recorded, it must request the President of the Tribunal to constitute a larger bench to decide the difference of view on the issue.

6. In the present facts, the impugned order of the Tribunal is not legally sustainable. We, therefore, set aside the impugned order and restore the appeal to the Tribunal for fresh disposal."

13. Identical question was also considered in the case of Mohan Meaking Ltd Vs. ITO (89 ITD 179)(TM), wherein the Third member has held that the non-consideration of a judgment cited before the Tribunal constitutes a mistake apparent from record. The effect of non-consideration of the decision of Tribunal cited before it was discussed by Hon'ble Jurisdictional Bombay High Court in the case of DSP Investment Pvt Ltd Vs. ACIT (ITA No.2432 of 2013), wherein it was held as under:-

"6. In fact the impugned order of the Tribunal in paragraph 6 thereof does record the appellant's reliance upon the decision of the Court of its coordinate Bench in J.K.Investors (supra). However, thereafter the impugned order does not deal with the appellant's reliance upon the decision of the Tribunal in J.K. Investors (supra) while dismissing the appellant assessee's appeal before it. In fact the impugned order of the Tribunal ought to have dealt with its decision in J.K.Investors (supra) and considered its applicability to the present facts.

7. In view of the fact that impugned order of the Tribunal does not deal with its decision in J K Investors (supra) relied upon by the appellant assessee in support of its submissions as recorded in the impugned order itself makes the impugned order a non-speaking order and, therefore, in breach of principles of natural justice. In the above view, the substantial question of law is answered in the affirmative i.e., in favour of the assessee and against the revenue..."

14. Admittedly, in the instant cases, the Tribunal has not dealt with the case of Solid work Corporation (supra), even though the same has been relied upon by Ld Counsel appearing for the assessees and the Tribunal has also recorded the same in its order. In the foregoing case laws, it has been stated that non-consideration of the decision rendered by the co-ordinate bench on identical issue would result in a mistake apparent from record. Accordingly we find merit in the contentions of the assessees that the impugned order of the Tribunal suffers from mistake apparent from record.

15. The next main contention of the assessee is that the Tribunal has misread the decision rendered by Hon'ble Delhi High Court in the case of Ericsson (supra). We notice that the Tribunal has proceeded to distinguish the decision rendered by Hon'ble Delhi High Court, wherein it has by upheld the decision rendered by the Special bench in the case of Motorola (supra) and Ericssion, as under:-

> "28. There is no dispute with reference to the principles established by the Hon'ble Special Bench as approved by the Hon'ble Delhi High Court in the cases cited above. However, what is to be noted in the above judgements is that the software was supplied along with hardware as part of equipment and there is no separate sale of software. Software was integral part of supply of equipment for Tele-communications in those cases. It is generally called embedded software.
>
> 29. The facts in the present case of supply of software to Reliance are that the software was supplied separately and not

> along with the equipments, even though the software was stated to be specific for certain equipments supplied by LTGL…."

The assessees have contended that the Tribunal has not properly appreciated the decision rendered by Hon'ble Delhi High Court. In this regard it was submitted by the assessees as under:-

> "At Para 57 to 60 Pg. 20 to 21 of the said decision (Pgs. 113 and 114 of the LPB filed by the Applicant), it has been stated that in the case of Ericsson, *the bifurcation of software and hardware was necessary for customs duty purposes.* Further, at Para 59, the opening words read as "Be that as it may." thereby stating that irrespective of whether or not it was purchase of only software or software along with hardware, the Hon'ble High Court held the purchase of software not to be royalty."

The Ld A.R stated that the Hon'ble Delhi High Court has amply clarified that the software would not be royalty even if was supplied separately. Accordingly it was submitted that the manner in which the Tribunal has sought to distinguish the decision rendered by Hon'ble Delhi High Court is contradictory to the observations made by Hon'ble Delhi High Court. On a perusal of submissions made by the assessees, which are extracted above, we find merit in the contentions of the assessee that the Tribunal has not properly read the decision rendered by the Hon'ble Delhi High Court.

16. The Ld A.R submitted that the Tribunal has committed error in appreciating the facts also. He submitted that the Tribunal has observed as under in paragraph 36 of the order:-

> "36. The principles laid down by the two judgements of the Hon'ble Karnataka High Court are applicable to the present cases as the fact of supply of software is similar."

The Ld A.R submitted that the assessees have specifically argued that the software purchased by them is specific to telecom hardware, i.e., it was meant to run the hardware. The software does not have any other independent use or application. However, the Hon'ble Karnataka High Court was considering the cases of shrink wrapped software and the assessee has specifically argued, which was also noted by the Tribunal, that the decision of Hon'ble Karanataka High Court shall not apply to them. Accordingly it was contended that the Tribunal has committed an error in observing that the facts of the instant cases are similar to the facts available in the cases decided by Hon'ble Karnataka High Court.

17. In any case, the Tribunal has followed the decision rendered by the Hon'ble Karnataka High Court in the case of Samsung Co. (supra), which was rendered in the case of Shrink wrapped software. However, the Honble Delhi High Court has held in the case of DIT Vs. Infrasoft

Ltd that the findings given by it in the case of Ericsson (supra) would hold good even in case of Shrink wrapped software. Accordingly it was contended that the Tribunal should have followed the decision rendered by Hon'ble Delhi High Court as it was favourable to the assessee. In any case, the decision rendered by Hon'ble Delhi High Court would be applicable to the instant cases, since the Hon'ble Delhi High Court has held that the software would not be royalty, even if it was supplied separately. The Ld A.R also submitted that Ericsson was one of the suppliers of the software to the assessees and hence the Tribunal should have given preference to the decision rendered by Hon'ble Delhi High Court over the decision rendered by Hon'ble Karnataka High Court on this count and also on the principle that the view in favour of the assessee should be adopted in case of conflicting decision of non-jurisdictional High Courts.

18. We notice that the assessee has submitted that the software purchased by it is specific to run the hardware and its functionality is that of embedded software. This aspect has been distinguished by the Tribunal by observing that the software has been purchased separately. The Ld A.R submitted that the assessee has purchased software and hardware together in some cases, but the Tribunal has failed to consider those cases, even though the Ld CIT(A) has analysed

each of the agreements for purchase of hardwares/softwares. He submitted that these facts show that the Tribunal has not properly considered all the cases of software and decided the issue by generalizing the facts, which renders the order erroneous.

19. Under these set of facts, it was contended that misreading of a decision would amount to mistake apparent from record and for this proposition the assessees have placed reliance on the decision rendered by Hon'ble Allahabad High Court in the case of CIT Vs. Quality steel Tubes Ltd (253 CTR 298), wherein it was held as under:-

> *"11. In the present case though the Tribunal had referred to the judgment in Swadeshi Cotton Mills Co. Ltd. (supra), but later on, on the application given by the assessee that it wrongly applied the principle of law in Swadeshi Cotton Mills Co. Ltd. (supra) to the present case, found that there is difference between hypothecation and pledge of the stock. The hypothecation of the goods could not be treated as same as in the case of pledge. The Tribunal realized its mistake in wrongly applying the principles laid down in Swadeshi Cotton Mills Co. Ltd. (supra), and rectified the mistake. In the absence of power of review, where the Tribunal finds that there was apparent mistake in its order, which has caused serious prejudice to the assessee, in view of the judgments in Honda Siel Power Products Ltd. (supra) and Saurashtra Kutch Stock Exchange Ltd. (supra), it could have rectified the mistake, which was apparent on record.*
>
> *12. We do not find any difference in the circumstances where the Tribunal ignores the judgment of the jurisdictional Court, or wrongly relies upon the principle of law laid down by the jurisdictional Court. In case of misreading or relying upon a principle, which was never*

laid down in such judgment, the reasoning would be the same as if the Tribunal had not noticed the judgment?"

It was also submitted that the co-ordinate bench of Tribunal has also considered an identical issue in the case of Plaza Investments (P) Ltd (108 ITD 239), wherein it has held as under:

"Thus, the question left for consideration in the instant case was as to whether misreading of the Supreme Court's judgment in Western States Trading Co. (P.) Ltd.'s case (supra) on the facts of the instant case would constitute a mistake apparent from records. In the Tribunal's order, which had been called into question by way of instant application, it was observed that in the light of the Supreme Court's judgment in the case of Western States Trading Co. (P.) Ltd. (supra) "when shares are held as part of the trading assets, dividend on those shares would form part of 'income from business', and, therefore, in the instant case the dividend income was to be assessed as 'income from business'…..

The next issue for consideration is as to whether a considered view of the Tribunal can be subjected to rectification of mistake. Undoubtedly, all mistakes cannot be rectified under section 254(2). The rectifiable mistakes are the mistakes which are obvious, patent, and glaring on which no two views are possible. Once a mistake fits in this category, as in the instant case, it is immaterial whether it is a conscious mistake or unconscious mistake. If a judicial body like the Tribunal applies its mind to a situation but reaches a wrong conclusion because of a simple mistake committed in the process of reasoning, on which no two views are possible, it will indeed be unreasonable to suggest that only because this mistake is committed after application of mind on a situation, this is not a mistake apparent from record. It cannot be termed as an error of judgment, but it has to be termed as a mistake apparent from record resulting in a vitiated judgment. The difference between an error of judgment vis-a-vis an error apparent from record leading to an erroneous

> *judgment may be thin but is too subtle to be ignored by a judicial body. The question of error of judgment can only arise when two views are possible and one of the views is adopted. That was not in the instant case. It was a simple case of omission to take note of the context in which the Supreme Court made certain observations and then interpreting those observations as complete exposition of law on that subject….*
>
> *In view of the above, the Tribunal did commit an error, which was apparent from record, in holding that the assessee's dividend income could be taxed under the head 'Income from business'. Merely because the exercise of powers under section 254(2) in the instant case was close to a review of the Tribunal's order, negation of a remedy provided to the applicant under the scheme, could not be justified. There cannot conceivably be two opinions on the question as to under which head dividend income can be taxed. Treating the dividend income as 'income from business' for the purposes of chargeability is a mistake, which is not capable of two views being taken in that respect. The stand taken by the Tribunal being directly contrary to the law settled by the Supreme Court and directly opposed to the clear provisions of law, was so fundamental that it went to the root of the matter and might directly affect the conclusions arrived at by the Tribunal. The only ground of appeal in the Tribunal's order, related to that issue and, therefore, the appeal had to be recalled in entirety. [Para 10]"*

The above cited decisions support the contentions of the assessee that misreading of decision of Hon'ble High Court would result in a mistake apparent from record warranting recall of the order. We have noticed that the assessees have submitted that the software purchased by them is specific to run the hardware and hence it was not a case of shrink wrapped software. Further the Hon'ble Delhi High Court has

held in the case of Ericsson (supra) that the software would not be royalty, even it was supplied separately. All these points support the case of the assessee that the Tribunal has misread the decision rendered by Hon'ble Delhi High Court in the case of Ericsson (supra). We also notice that the Tribunal has committed an error in not appreciating the facts prevailing in the instant cases. Hence we find merit in the contentions of the assessees that the impugned order of the Tribunal suffers from mistake apparent from record.

20. In view of the foregoing reasons alone, we are of the view that the impugned orders passed in Reliance Group cases deserve to be recalled.

21. The Applicant, during the course of hearing has relied on a decision of the Mumbai Tribunal in the case of DDIT v/s Reliance Infocomm Ltd. and vice versa (ITA no.5374 & 6093/Mum./2008). These were two appeals where the Applicant had filed Miscellaneous Applications and were recalled by the Tribunal vide order dated 16th April, 2014.

22. The Ld A.R also submitted that the Tribunal has considered about the taxability of these payments in the hands of recipients and it has been held that the consideration for sale of software received by

them are not royalty. He submitted that those decisions have been rendered prior to the passing of the order by the Tribunal in the hands of the assessees. Accordingly it was submitted that the Tribunal could not have taken a different view in the cases of the assessees, when it has been held in the hands of recipients that the payments received on supply of software are not in the nature of royalty. The Ld A.R fairly admitted that the assessees did not cite those decisions before the Tribunal at the time of hearing, but contended that the Tribunal is bound by the decision rendered by the co-ordinate benches, since they were available at that point of time itself. In our view, the Tribunal cannot be found fault for non-consideration of decisions which were not cited before it, though in principle there may be merit in the contentions of the assessees. Hence we are of the view that these contentions cannot be considered in the miscellaneous petitions filed u/s 254(2) of the Act.

23. The assessees have pointed that the Tribunal has not afforded an opportunity to the assessee to address the contentions raised by the counsel of M/s Lucent, in so far as they are against the case of the assessee. The Ld D.R also fairly conceded that the Ld A.R has sought such an opportunity before the bench. It was also submitted that the assessees have not made any admission as noted down by the

Tribunal in paragraph 47 of the order. In our considered view that the co-ordinate bench has passed the order after considering the various contentions raised by the assessee and hence it would be difficult, at this stage, to appreciate specific contentions raised on particular point in the proceedings u/s 254(2) of the Act.

24. The assessees have also urged other grounds viz., mistake in appreciation of certain other facts, specific agreements not considered, embedded theory not argued by Ld D.R. However, we do not find it necessary to address those contentions, since we have held that the impugned orders passed in Reliance group of cases need to be recalled for the reasons discussed in the earlier paragraphs.

25. Accordingly, we hold that the impugned orders passed in Reliance group of cases suffers from mistake apparent from record on account of non-consideration of the decision rendered by co-ordinate bench on identical issue and also on account of misreading of decision rendered by Hon'ble Delhi High Court in the case of Ericsson (supra). Accordingly we recall the impugned orders in exercise of powers granted u/s 254(2) of the Act.

26. In the result, all the miscellaneous applications filed by the assessees are allowed.

Order pronounced in the open Court on 18.11.2016

Sd/-	**Sd/-**
SAKTIJIT DEY	**B.R.BASKARAN**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

MUMBAI, DATED: 18.11.2016

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Dy./Asstt. Registrar)
ITAT, Mumbai