



IN THE INCOME TAX APPELLATE TRIBUNAL "L", BENCH MUMBAI

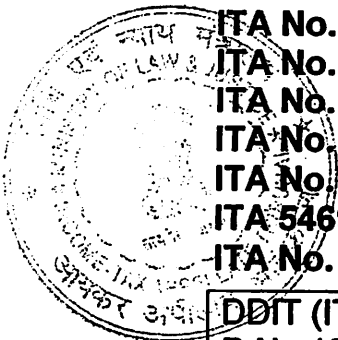
BEFORE SHRI R.C.SHARMA, AM

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SHRI C.N. PRASAD, JM

ITA No.4672/M/2007
ITA No. 3431 to 3437/M/07
ITA No. 3440 to 3444/M/07
ITA 4245/M/07
ITA 4247/M/07
ITA 4249 to 4253/M/07
ITA 4255/M/07
ITA 4261/M/07
ITA No. 4280to4283/M/08
ITA No. 4291/M/08
ITA No. 4307/M/08
ITA No. 4310/M/08
ITA No.4873/Mum/2007
ITA No.4878/Mum/2007
ITA No. 4902/M/07
ITA No. 4904to4906/M/07
ITA No. 4909-4910/M/07
ITA No. 4917-4918/M/07
ITA No. 4920-4923/M/07
ITA No. 4927/M/07
ITA No. 5071to5073/M/08
ITA No. 5077/M/08
ITA No. 5081/M/08
ITA No. 5083/M/08
ITA No. 5086-5087/M/08
ITA No. 5091-5092/M/08
ITA No. 5474/M/08
ITA 5469-70/M/08
ITA No. 5476/M/08

ITA No. 837/M/07
ITA No. 3438-3439/M/08
ITA No. 4244/M/08
ITA No. 4246/M/08
ITA No. 4248/M/08
ITA No. 4254/M/08
ITA No. 4256 to 4260/M/08
ITA 4278&4279/M/08
ITA 4284to4287/M/08
ITA 4305-4306/M/08
ITA 4308-4309/M/08
ITA No.4673 to 4677/M/2007
ITA No. 4874-4877/M/07
ITA No.4899 to 4901/Mum/2007
ITA No.4903/Mum/2007
ITA No. 4907-4908/M/07
ITA No. 4916/M/07
ITA No. 4919/M/07
ITA No. 4924to4926/M/07
ITA No. 4928/M/07
ITA 5074to5076/M/08
ITA 5078to5080/M/08
ITA 5082/M/08
ITA 5084-5085/M/08
ITA 5088to5090/M/08
ITA No. 5373/M/07
ITA 5467/M/08
ITA 5475/M/08
ITA 5477/M/08



DDIT (IT)-2(1) R.No.120, 1 st Floor Scindia House, Ballard Estate N.M.Road Mumbai – 400 038	Vs.	Reliance Communication Ltd., (Formerly known as M/s.Reliance Infocomm.Ltd.,) C-Block, 1st Floor, Dhirubhai Ambani Knowledge City, Koperkhairne Navi Mumbai-400 710.
PAN/GIR No.		AACCR4472J
Appellant)	..	Respondent)

ITA No. 4501/M/09

ITA No. 5468/M/08

ITA No. 5471/M/08

ITA No. 5472/M/08

ITA No. 5473/M/08

DDIT (IT)-2(1) R.No.120, 1 st Floor Scindia House, Ballard Estate N.M.Road Mumbai – 400 038	Vs.	Reliance Communication Infrastructure Ltd.,
PAN:		AACCR7832C
Appellant)	..	Respondent)

ITA No. 730/M/09

DDIT (IT)-2(1) R.No.120, 1 st Floor Scindia House, Ballard Estate N.M.Road Mumbai – 400 038	Vs.	Reliance BPO Limited
PAN		AABCR7392A
Appellant)	..	Respondent)

ITA No. 5093 to 5096/Mum/2008

DDIT (IT)-2(1) R.No.120, 1 st Floor Scindia House, Ballard Estate N.M.Road Mumbai – 400 038	Vs.	Reliance Telecom Limited
PAN		AAACR2658E
Appellant)	..	Respondent)

Assessee by	Shri Parag Vyas
Revenue by	Shri J.D.Mistry, Shri Deepak and Shri Ritu Panjabi
Date of Hearing	21/12/2017
Date of Pronouncement	03/01/2018

आदेश / ORDER

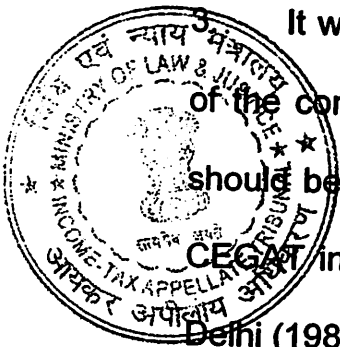
PER R.C.SHARMA (A.M):

A bunch of appeals by Revenue against various companies of Reliance (ADAG) group, hereinafter referred as "Reliance" for the sake of convenience, which include Reliance Communications Ltd., Reliance Telecom Ltd., Reliance BPO Ltd., and Reliance Communications Infrastructure Ltd.,

2. Revenue has made a request to the Hon'ble President of the Income Tax Appellate Tribunal, Mumbai for constitution of Special Bench to decide the appeals pending before the 'L' Bench of the Hon'ble Tribunal pursuant to the order passed by the Hon'ble Tribunal allowing the Miscellaneous applications filed by it against the Original Order dated September 06, 2013. Accordingly, Hon'ble President vide order dated 12th December 2017 directed the Registry to put up the matter before the Division Bench for giving recommendation as to whether or not Special Bench needs to be constituted in these appeals.

It was argued by learned DR appearing for the Revenue that in view of the conflicting decision of the non-jurisdictional High Courts, the matter should be referred to the Special Bench, he also relied on the decision of CEGAT in case of Shri Ram Rayons vs. Collector of Central Excise, New Delhi (1987) (30) ELT 850 (Tribunal).

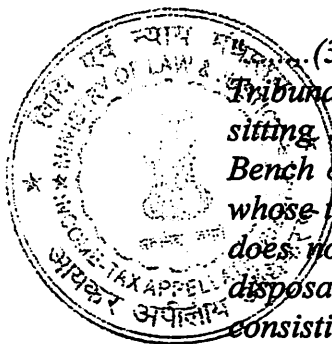
4. On the other hand, it was submitted by learned AR that against the MA order dated November 18, 2016 passed by the Hon'ble Tribunal, the Revenue had filed a Writ Petition before the Hon'ble Jurisdictional High Court challenging the said MA order. The Hon'ble High Court has



dismissed the Writ Petition vide order dated August 8, 2017 directing the Hon'ble Tribunal to dispose the appeals afresh within a period of 6 months. The relevant extract of the same is reproduced as under for ready reference:

" In the light of the above, we dismiss these petitions. We clarify that the appeals of the Revenue which stand restored to file of the Tribunal shall be heard as expeditiously as possible and should be disposed of within a period of six months from the date of receipt of a copy of this order. We stipulate this outer limit in the light of the controversy involved in these appeals and which may arise in subsequent appeals in the case of this very assessee or others in identical business. While we direct the Tribunal to dispose of the appeals within six months, we will not extend the time under any circumstances. We clarify that all contentions of all the parties are open. They shall be open for being agitated, raised and considered by the Tribunal afresh. While deciding the appeals pursuant to our order and directions, the Tribunal shall not be influenced in any manner by any finding and conclusions in the order dated 6th September, 2013 or 18th November, 2016. We clarify that this order dated 18th November, 2016, was passed considering a limited request and all other conclusions in that order shall not influence the outcome of these appeals. "

5. Learned AR also invited our attention to section 255 of the Income-tax Act, 1961 which deals with procedures of Appellate Tribunal. The relevant extract of the aforesaid section is reproduced as under:



(3) The President or any other member of the Appellate Tribunal authorised in this behalf by the Central Government may, sitting singly, dispose of any case which has been allotted to the Bench of which he is a member and which pertains to an assessee whose total income as computed by the Assessing Officer in the case does not exceed fifty lakh rupees, and the President may, for the disposal of any particular case, constitute a Special Bench consisting of three or more members, one of whom shall necessarily be a judicial member and one an accountant member.

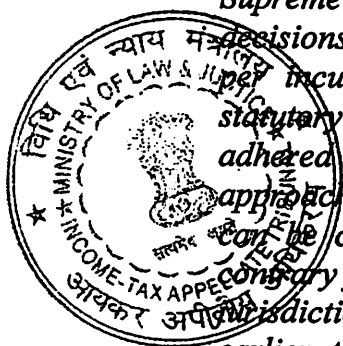
(4) If the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and the case shall be

referred by the President of the Appellate Tribunal for hearing on such point or points by one or more of the other members of the Appellate Tribunal, and such point or points shall be decided according to the opinion of the majority of the members of the Appellate Tribunal who have heard the case, including those who first heard it...."

6. Our attention was also invited to the decision of the Hon'ble Mumbai Tribunal in the case of **Homi K. Bhabha v. ITO (International)** (48 SOT 102) wherein it has been held that

"11. The arguments advanced by the assessee on merits are an attempt to persuade us for not following the aforementioned view taken against the assessee. We are not impressed with this argument. Judicial discipline requires that when a particular issue has been decided by a bench, then the subsequent co-ordinate benches should normally follow the same. At the same time, we want to clarify that there are no fetters on the powers of the subsequent benches to doubt the correctness of the earlier order, if they are not convinced with it. Whereas following the earlier decision is a rule, calling into question its correctness is only an exception. Unless there are compelling reasons for not following the earlier view, such as, if it is inconsistent with judgment of the Hon'ble Supreme Court or that of the jurisdictional High Court or earlier decisions of the same rank; or if it is sub silentio; or if it is rendered per incuriam in the sense that it is patently inconsistent with the statutory or settled legal position, the same should be respected and adhered to by the subsequent benches so that consistency in the approach of the tribunal is achieved. The above referred exceptions can be classified into two categories. First, when there is a direct contrary judgment of the Hon'ble Supreme court or that of the Hon'ble jurisdictional High Court on the point, rendered prior to or after the earlier tribunal order, the later Bench would be fully justified in differing from the earlier contrary view and following the higher wisdom. Second, when the subsequent bench perceives earlier view to be rendered per incuriam or sub silentio etc., the right course for it is to make a reference to the President of the tribunal for constitution of a Special Bench on the point so that the larger bench may consider whether the earlier view is correct or the perception of the latter bench is correct.

12. Ordinarily neither the assessee nor the Revenue can be allowed to reargue the same issue over and over again, when it has already been decided by a coordinate bench of the tribunal. If such a course is allowed, then every single repetitive issue would require reconsideration time and again because the aggrieved party would

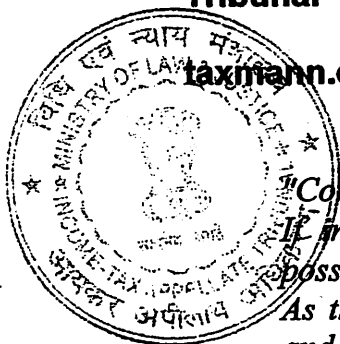


always try to convince the later bench over its point of view. Following the earlier order or making a reference to the special bench depends on the satisfaction of the Bench about the correctness or otherwise of the earlier order and not that on the view point of the aggrieved party, it is only when a subsequent bench, on being seized of the matter, finds itself unable to endorse the earlier view, either now or on the arguments of the parties, that it may make reference for the constitution of the special bench. The party dissatisfied with the earlier view cannot compel the later bench to either take a contrary view or make a reference for the constitution of the special bench. Thus it follows that once a 'particular view is taken, the subsequent benches of the tribunal become functus officio on that issue, subject to the exceptions discussed supra. Needless to mention at this juncture that the party unconvinced with the tribunal order is not -without remedy as the Act enshrines the provisions enabling it to appeal to the Hon'ble High Court against the order and convince it about its stand. "

7. In view of the above decision, it was contended by learned AR that reference to constitute Special Bench must necessarily flow from the members and not from the parties to the case. Further, such reference by the members could be made in case they did not agree with the view taken by the earlier order.

8. Reliance was also placed on the decision of the Hon'ble Kolkata Tribunal in the case of **Prabir Kumar Mullick v. ITO** (2016) (70

taxmann.com 319), relevant extract of which is as under:



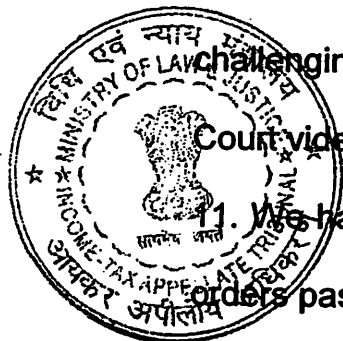
Conclusion :

If in case of a taxing provision two reasonable constructions are possible, construction which favours the assessee must be adopted.

As there are two different orders on the grounds of appeal favouring and against the assessee. The Hon'ble Apex Court directs to take the view favourable to the assessee. Therefore considering the facts of the case in totality and object of the section 40A(3) of the Act, we are of the considered view that this case does not require the reference to the Special Bench. Hence in our considered view this case does not require to be referred to the Special Bench. "

9. Ld. AR also relied decision of the Hon'ble Gujarat High Court in the case of Affection Investments Ltd. v. ACIT (326 ITR 255) (Guj.) wherein it has been held that where the facts of the case are similar to an earlier decision of the Tribunal, no co-ordinate bench has the power to record a contrary decision to the one reached by the earlier co-ordinate bench of the Tribunal. It was held that in case the subsequent co-ordinate Bench did not agree, the only recourse before it was to refer the matter to the President for constitution of Special Bench. Thus, the Respondent submitted that as per the decision of Gujarat High Court, the recourse available was with the dissenting subsequent Bench to refer the case to the Hon'ble President for constitution of Special Bench.

10. It was also submitted by learned AR that the reference of MA in the request filed by revenue was incorrect for the reason that MA applications have been already disposed of by the Hon'ble Tribunal vide order dated November 18, 2016. Not only this, the Department's Writ Petition challenging the MA order have also been dismissed by the Hon'ble High Court vide order dated August 8, 2017.



11. We have considered rival contentions and carefully gone through the orders passed by the Tribunal as well as High Court. In this case, Tribunal have passed orders in respect of the appeals filed by the Revenue, which was subsequently recalled in a M.A. vide order dated 18/11/2016.

12. Against the M.A. order, Department has filed writ petition challenging the same and the Hon'ble High Court vide order dated 08/08/2017 dismissed it. After the dismissal of the writ petition, Revenue has filed an application

before the Hon'ble President for making a reference to the Special Bench. The Hon'ble President vide its order dated 12/12/2017 directed the Registry to put up the matter before Division Bench for making recommendation as to whether or not Special Bench needs to be constituted in these appeals. So far as Constitution of special Bench is concerned, a reference to constitute a Special Bench flows from the members and not from the parties to the case. Furthermore, such a reference can be made by the members when they do not agree with the view taken by the earlier order of the Tribunal. However, in the instant cases before us, it is not a situation, only after hearing, the matter afresh by the division bench in terms of direction of Hon'ble High Court dated 08.08.2017, the bench may decide the issue to agree or disagree with the view already taken by the earlier bench. Furthermore merely on the conflict view of the decision of the High Court, a reference cannot be made to constitute Special Bench. If the present application of the Revenue is accepted, the process of reference to a Special Bench / larger Bench would never reach an end. Reference to Special Bench would continue to be moved by the parties upon every subsequent non-jurisdictional High Court decision, thus, leading to a number of cases being referred to constitute Special Bench. However, correct decision is to follow the judicial hierarchy and maintain judicial discipline. Furthermore, if the applications of the Revenue were to be allowed, it would lead to the violation of the principle laid down by the Hon'ble Supreme Court in the case of CIT Vs. Vegetable Products (1973) (188 ITR 192) (SC) wherein it has been held that where there are two possible views, the view



favourable to the assessee must be adopted. With regard to the merit of the case, it is open to the Revenue to argue before the Regular Bench, if there are favourable or unfavourable decisions other than jurisdictional High Court decision. At the time of hearing on merit, it is open to the Revenue to take and the types of contentions alongwith decision of Co-ordinate Bench of the Tribunal and non-jurisdictional High Courts. So far as reliance of Revenue on the decision of CEGAT in case of Shri Ram Rayons (supra) in support of the request for reference to Special Bench is concerned, we found that the said case law is not on the fact of reference to Special Bench. In this case law, it is only mentioned that the said matter was heard by the Larger Bench consisting of five members. Thus, the said decision is not relevant in the present case and moreover it is of a parallel appellate authority.

13. Furthermore, we found that out of 127 appeals pending before the Tribunal about 50 appeals were having tax effect of less than 10 lakhs,

which deserves to be dismissed in view of the CBDT Circular No. 21/2015 dated 10 December, 2015. We also found that as per the list of 21 cases

placed on record wherein in the hands of recipients / deductees, the High Courts/Tribunals have held that receipts from sale of software were not

taxable as 'Royalty'. This further supported the contention that the issue

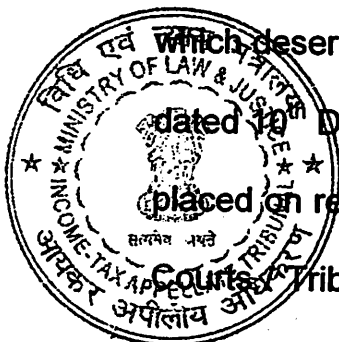
was settled by the High Courts and various benches of the Tribunal and

did not warrant constitution of Special Bench. If the application for

constitution of Special Bench of the revenue be accepted by the Bench

then all 21 cases where in hands of deductees the Hon'ble High Courts /

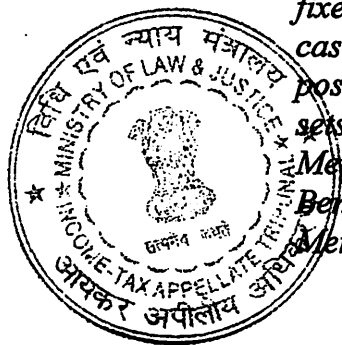
Tribunal has already held that income from sale of software is not royalty



will be affected. Under these facts and circumstances, if the application for constitution of Special Bench of the Revenue be accepted by the Bench then 44 Special Benches need to be constituted, as there are 44 separate agreements entered by the assessee for which payment was made for purchase of software. Since, some agreements contain purchase of independent software and some of the agreement contains purchase of software alongwith hardware, every agreement would have to be examined for which 44 Special Benches would have to be constituted.

14. We also observe that para 45 of the Office Manual of the Income Tax Appellate Tribunal dated October 24, 2008 the procedure for constitution of Special Bench is given. The same is reproduced below:-

"45. When different Benches have taken conflicting views on certain points, the President, under the provisions of Section 255(4), may, for the disposal of any particular case, constitute Special Bench consisting of three or more Members, one of whom shall necessarily be a Judicial Member and one an Accountant Member. Such cases are to be put up before the President for constituting Special Bench. Such cases may be fixed on any working day before those Members. While fixing such cases before the Special Bench, the Assistant Registrar/Head Clerk, posting such cases, shall request the Appellant to file as many more sets of documents (for preparation of brief) as there are additional Members in addition to the regular Bench constituting the Special Bench. The Assistant Registrar/Head Clerk shall write the names of the Members before whom such cases are posted for hearing. "



15. In view of the above facts and legal pronouncements, application for constitution of Special Bench made by the Revenue ought to be rejected and the appeals be heard by the regular Bench of the Hon'ble Tribunal. We direct accordingly.

16. In the result, reference made by the Hon'ble President is disposed of in terms indicated hereinabove.

Order pronounced in the open court on this

03/01/2018

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 03/01/2018

Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A), Mumbai. 58
4. Int. tax. IV
5. Dr. ITAT, Mumbai
6. Guard file.



सत्यापित प्रति //True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mumbai

वरिष्ठ निजी सचिव
Senior Private Secretary
आयकर अपीलालय अधिकरण
Income Tax Appellate Tribunal
मुंबई / Mumbai