SCOPE OF S 254(2).IMPLICATIONS OF RELIANCE TELECOM JUDGMENT ON 3.12.2021

1.In the recent decision of the Honourable Supreme Court in the case of **Reliance Telecom Limited reported in 133 taxmann.com 41 on 3RD December 2021** the scope of powers conferred upon the Income Tax Appellate Tribunal under section 254 (2) is in sharp focus. Some very interesting and significant findings were made by the Honourable Court while giving ruling under issue.

2.The facts of the case as noted by the Honourable Supreme Court are as under

*''**2.1** That the Assessee entered into Supply Contract dated 15-6-2004 with Ericsson A.B. **Assessee filed an application under section 195(2)** of the Act before the Assessing Officer, to make payment to the non-resident company for purchase of software without TDS. It was contended by the Assessee **that it was for the purchase of software** and Ericsson A.B. had no permanent establishment in India and in terms of the DTAA between India and Sweden & USA, the amount paid is not taxable in India."*

3. The assessing officer went on to hold that **the consideration for software licensing constituted under section 9(1)(*vi*) of the Act and under Article 12(3) of the DTAA is liable to be taxed in India** and accordingly directed the assessee to deduct tax at the rate of 10% as royalty.

3.1 The first appellate authority ruled in favour of the assessee on merit. However the Tribunal **allowed the Revenue's appeal by relying upon the judgments/decisions of the Karnataka High Court** and held that

payments made for purchase of software are in the nature of royalty. Thereafter the assessee preferred both a rectification application under section 254 (2) as well as an appeal before the Honourable High Court. The ITAT went on to allow the rectification application and RECALLED its own order upon which the assessee withdrew the appeal from the High Court. The consequent writ petition preferred by the revenue was dismissed by the Honourable high Court.

4.On an appeal before the Honourable Supreme Court the Apex Court ruled as follows :

*"**3.2** Having gone through both the orders passed by the ITAT, we are of the opinion that **the order passed by the ITAT dated 18-11-2016 recalling its earlier order dated 6-9-2013 is beyond the scope and ambit of the powers under section 254(2) of the Act.** While allowing the application under section 254(2) of the Act and recalling its earlier order dated 6-9-2013, it appears that **the ITAT has re-heard the entire appeal on merits as if the ITAT was deciding the appeal against the order passed by the C.I.T.** In exercise of powers under section 254(2) of the Act, the Appellate Tribunal may amend any order passed by it under sub-section (1) of Section 254 of the Act **with a view to rectifying any mistake apparent from the record only.** Therefore, **the powers under section 254(2) of the Act are akin to Order XLVII Rule 1 CPC.** While considering the application under section 254(2) of the Act, the Appellate Tribunal is **not required to re-visit its earlier order and to go into detail on merits.** The powers under section 254(2) of the Act are only to rectify/correct any mistake apparent from the record."*

4.1 Apart from the above ruling on merit the Honourable Supreme Court also made a very significant finding subsequently which is given as under:

*"**5.** From the impugned judgment and order passed by the High Court, it appears that the High Court has dismissed the writ petitions by observing that (i) the Revenue itself had in detail gone into merits of the case before the ITAT and the parties filed detailed submissions based on which the ITAT passed its order recalling its earlier order; (ii) the Revenue had not contended that the ITAT had become functus officio after delivering its original order and that if it had to relook/revisit the order, it must be for limited purpose as permitted by Section 254(2) of the Act; and (iii) that the merits might have been decided erroneously but ITAT had the jurisdiction and within its powers it may pass an erroneous order and that such objections had not been raised before ITAT.*

***6.** None of the aforesaid grounds are tenable in law. Merely because the Revenue might have in detail gone into the merits of the case before the ITAT and merely because the parties might have filed detailed submissions, **it does not confer jurisdiction upon the ITAT to pass the order de hors Section 254(2) of the Act.** As observed hereinabove, the powers under section 254(2) of the Act are only to correct and/or rectify the mistake apparent from the record and not beyond that.*

Even the observations that the merits might have been decided erroneously and the ITAT had jurisdiction and within its powers it may pass an order recalling its earlier order which is an erroneous order, cannot be accepted.....".

5. **The key takeaways from para 3.2,5 & 6 cited by me above are as follows:**

a. The **ITAT CANNOT re hear** the entire appeal on merits as if it is deciding the appeal against the order passed by the C.I.T. in exercise of powers under section 254(2) of the Act. The Appellate Tribunal cannot re-visit its earlier order WHILE considering the application under section 254(2).

b. The Appellate Tribunal **may ONLY amend** any order passed by it under sub-section (1) of Section 254 of the Act with a view to rectifying any mistake apparent from the record only. The powers under section 254(2) of the Act are only to rectify/correct any mistake apparent from the record.

c.The powers under section 254(2) of the Act are **akin to Order XLVII Rule 1** CPC.

d.Jurisdiction cannot be conferred by consent.

e.Orders,even on consent ,de hors the provisions of law, are unsustainable.

f.Failure to raise objections is not fatal to case of a party.The decision is still circumscribed by the scope of the relevant section.

g.**Correct,Rectify ,Amend**: a mistake apparent from record:is all there is to 254(2).

h.**Recall is alien to powers** of a quasi judicial authority like the ITAT.

6.Some humble observations of the undersigned seem in order now.

i.What happens to summary dismissals then?**Can those be recalled under s 254(2)**?First of all ,the issue is,can the Tribunal summarily dismiss a case e.g.on non appearance or some other default?

Appellate Tribunal Rules,1963 provide some light:

24. Hearing of appeal ex parte for default by the appellant.- Where, on the day fixed for hearing or on any other date to which the hearing may be adjourned**, the appellant does not appear** in person or through an authorised representative when the appeal is called on for hearing, the Tribunal may dispose of the appeal on merits after hearing the respondent:
Provided that where an appeal has been disposed of as provided above and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order setting aside the ex parte order and restoring the appeal.

25. Hearing of appeal ex parte for default by the respondent.- Where, on the day fixed for hearing or any other day to which the hearing may be adjourned**, the appellant appears and the respondent does not appear** in person or through an authorised representative when the appeal is called on for hearing, the Tribunal may dispose of the appeal **on merits** after hearing the appellant:
Provided that where an appeal has been disposed of as provided above and the respondent appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order setting aside the ex-parte order and restore the appeal.

ii. It is noteworthy that the power is strictly circumscribed and is restricted to the **restoration of the appeal and not a review**. The order has to be made on merit in case of non appearance of the either party and after hearing the party present. If sufficient cause is established by the affording party the appeal is to be restored which means that it shall be considered afresh and there shall be no review. So review is an absolute no no as far as the Tribunal is concerned.

iii. Time has come for ITAT to recognise in its true perspective, the concept espoused in the judgement in the case of **Multiplan India Ltd reported in 38 ITD 320.** This is so because often the said judgement is cited in summary dismissal of the defaulting parties cause. It has been observed at times that if the appellant has not appeared the appeals are dismissed by resorting to the said judgement. The judgement, respectfully, is much misunderstood. **The decision is about non-admission of an appeal** and its impact **and not a dismissal of an admitted appeal** in view of nonappearance of party per se.See the finding: *"It was submitted at the time of hearing of the Reference Application that the language of Rule 24 of the Appellate Tribunal Rules required the Tribunal to dispose of the appeal on merits after hearing the respondent. It may be stated here that* ***the Tribunal has not passed any order on the basis of Rule 24 of the Tribunal Rules which presupposes admission of appeal under section 253 of the Act*** *besides there was no question of hearing the respondent since none could be notified because of incorrect address given by the appellant and proper particulars not furnished so far."*

So the conclusion is , to answer the issue raised at the start of this point, **such recalls also are not covered under section 254** and are to be preferred and decided under rule 24 or rule 25 of the Appellate Tribunal rules 1963. For this, appeal has to be admitted first and an unadmitted appeal does not qualify for relief either under section 254 or under rule 24 or 25.In any case an ex parte order cannot be held to be amenable now in view of the latest ruling for a 254(2) application.

iv.Hence the decisions in cases like **Universal Cold Storage Ltd *v.*DCIT**. **[2020] 268 Taxman 178 (Madras)** cannot be held to be good law.[In that case the head note read as follows:

Section 254 of the Income-tax Act, 1961 - Appellate Tribunal - Powers of (Power of rectification) - Assessment year 2000-01 - **In course of appellate proceedings, assessee did not cause appearance before Tribunal** - Tribunal thus allowed revenue's appeal ex-parte - **Assessee filed an application under section 254(2) to recall said order** - Tribunal rejected assessee's application on ground that assessee was not able to point out any mistake in Tribunal's order - It was noted that Tribunal had decided issue in revenue's favour on first date of hearing itself and, thus, Tribunal could have accommodated assessee's request for rectification of order - It was also noticed that issue before Tribunal was a recurrent issue and assessee had succeeded in respect of same in earlier years - **Whether in view of aforesaid, impugned order of Tribunal rejecting assessee's application under section 254(2) was to be set aside** and, matter was to be remanded back to Tribunal for disposal on merits of case - Held, yes [Paras 9, 10 and 11][In favour of assessee/Matter remanded]

v.Decisions like **Amore Jewels (2018) 2 NYPCTR 734 (Bom)** holding that non consideration of case laws cited and hence covered under s 254(2) respectfully ,will need to be revisited in my humble understanding. [HEAD NOTE EXTRACT: ***Appeal (Tribunal)—Rectification under s. 254(2)—Order passed by Tribunal without considering/discussing relevant case law- Though the appellate order does render a finding that no positive material was brought on record, there is no discussion whatsoever of the various case laws detailed in the submissions which according to***

the assessee clinches the issues in support of its case that the shareholding investment by the five companies was genuine—Thus, the Tribunal ought to have allowed the assessee's rectification application]

It is undisputed that the finding that the order is non speaking has merit,but whether that is rectifiable under s 254(2) is the issue.A regular appeal is in order on that,but respectfully, the ruling giving relief by relying on rectification law needs to be revisited.

7. The 2nd most significant finding from the ruling of the Honourable Supreme Court is that the powers under section 254(2) **are akin** to that of order 47 rule 1 of the civil procedure code 1908.Let us have a look at that:

ORDER XLVII : Review

1. Application for review of judgment.—

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order **may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant** and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applied for the review.

1 [Explanation.—The fact that the decision on a question of law on which the judgment of the Court is based **has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review** of such judgment.]

1. Ins. by Act 104 of 1976, s. 92 (w.e.f. 1-2-1977).

It is noteworthy that the powers are akin to that of rule 1 and not identical. This is so because rule 1 cited above also allows a review on ground discovery of new material/evidence or presence of sufficient cause. That part is clearly inapplicable in case of section 254 and the only reason behind rectification is a mistake apparent from record.

8. **What is a mistake apparent from record?** This has been well adjudicated and commented upon. A brief chronicling is in order.But prior to that we need to put on record **the subsection in question and its history** on record for an interesting and germane point missed entirely by assesse in the SC ruling in question,though it may not have altered the decision finally rendered:

254 (2) The Appellate Tribunal may, at any time within [76][six months from the end of the month in which the order was passed], **with a view to rectifying any mistake apparent from the record**[77], **amend any order passed by it** under sub-section (1), and [77]shall make such amendment[77] if the mistake is brought to its notice by the assessee or the [78][Assessing] Officer :

Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard :

[79][**Provided further** that any application filed by the assessee in this sub-section on or after the 1st day of October, 1998, shall be accompanied by a fee of fifty rupees.]

8.1 This is in pari materia with **powers of IT Authorities unders 154:**

Rectification of mistake.

154. [(1) With a view to **rectifying any mistake apparent from the record** an income-tax authority referred to in section 116 may,—

(*a*) amend any order passed by it under the provisions of this Act ;

8.2 These provisions existed in the **1922 Act** as well:

35. RECTIFICATION OF MISTAKE

(1) The Commissioner or Appellate Assistant Commissioner may, at any time within four years from the date of any order passed by him in appeal or, in the case of the Commissioner, in revision under section 33A and the Income-tax Officer may, at any time within four years from the date of any assessment order or refund order passed by him on his own motion rectify any mistake apparent from the record of the appeal, revision, assessment or refund as the

case may be, and shall within the like period rectify any such mistake which has been brought to his notice by an assessee:

Provided that no such rectification shall be made, having the effect of enhancing an assessment or reducing a refund unless the Commissioner, the Appellate Assistant Commissioner or the Income-tax Officer, as the case may be, has given notice to the assessee of his intention so to do and has allowed him a reasonable opportunity of being heard:

Provided further that no such rectification shall be made of any mistake in any order passed more than one year before the commencement of the Indian Income-tax (Amendment) Act, 1939.

(2) The provisions of sub-section (1) apply also in like manner to the rectification of mistakes by the Appellate Tribunal.

8.2.1 So in 1922 Act the rectification provision for both,IT Authorities and ITAT existed in the same section.What is important is that in all cases at all times what was allowed was a RECTIFICATION ,leading to AMENDING of the order.

8.3 Let us see what mistake apparent from record means through three landmark decisions before making a few points from my humble understanding.

I. T.S. Balaram, ITO *v.* Volkart Brothers*[1971] 82 ITR 50 (SC)

DB

''A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn

process of reasoning on points on which there may conceivably be two opinions. As seen earlier, the High Court of Bombay opined that the original assessments were in accordance with law though in our opinion the High Court was not justified in going into that question. In *Satyanarayan Laxminarayan Hegde* v. *MallikarjunBhavanappa Tirumale* [1960] 1 SCR 890, this court while spelling out the scope of the power of a High Court under article 226 of the Constitution ruled that an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record. **A decision on a debatable point of law is not a mistake apparent from the record—see *Sidhramappa AndannappaManvi* v. *Commissioner of Income-tax* [1952] 21 ITR 333 (Bom.).** The power of the officers mentioned in section 154 of the Income-tax Act, 1961, to correct "any mistake apparent from the record" is undoubtedly not more than that of the High Court to entertain a writ petition on the basis of an "error apparent on the face of the record." **In this case it is not necessary for us to spell out the distinction between the expressions "error apparent on the face of the record" and "mistake apparent from the record".** But suffice it to say that the Income-tax Officer was wholly wrong in holding that there was a mistake apparent from the record of the assessments of the first respondent."

II.CIT vs. HERO CYCLES (P) LTD.etc.etc. (1997)228 ITR 463(SC)

Civil Appeal No. 7665/96

.....

2. The High Court declined to call for a reference under s. 256(2) of the IT Act, 1961. It appears that the claim for deduction under s. 35B was not originally allowed at all. Thereafter, on an assessee's application an order was passed by the CIT(A), Jalandhar, in which he directed certain allowances to be given on proportionate basis after verification of the assessee's claim under s. 35B.

The ITO thereafter entertained assessee's prayer for rectification of the order and allowed the assessee's claim in respect of matters like coloured albums, export staff travelling expenses, export sales commission, ECGC, foreign dealers visiting expenses. **Rectification under s. 154 can only be made when glaring mistake of fact or law has been committed by the officer passing the order becomes apparent from the record. Rectification is not possible if the question is debatable. Moreover, the point which was not examined on fact or in law cannot be dealt as mistake apparent on the record. The dispute raised a mixed question of fact and law.**

The Tribunal was in error in upholding the assessee's claim for weighted deductions.

There is no point in sending the matter to the High Court to deal with the question raised at this stage. We treat the question as referred to this Court and answer the question in the negative and in favour of the Revenue. There will be no order as to costs. The appeal is allowed.

III. ACIT *v.* SAURASHTRA KUTCH STOCK EXCHANGE LTD. [2008] 305 ITR 227 (SC)

DB

37. In our judgment, therefore**, a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish it, can be said to be an error apparent on the face of the record and can be corrected** while exercising certiorari jurisdiction**. An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not. An error apparent on the face of the record means an error which strikes on mere looking and does not need a long drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. To put it differently, it should be so manifest and clear that no court would permit it to remain on record. If the view accepted by the court in the original judgment is one of possible views, the case cannot be said to be covered by an error apparent on the face of the record.**

38. Though learned counsel for the assessee submitted that the phrase "to rectify any mistake apparent from the record" used in section 254(2) (as also in section 154) is wider in its content than the expression "mistake or error apparent on the face of the record" **occurring in rule 1 of Order 47 of the Code of Civil Procedure, 1908** (vide Kil Kotagiri Tea and Coffee Estates Co. Ltd. v. ITAT [1988] 174 ITR 579 (Ker)), it is not necessary for us to enter into the said question in the present case.

9. I now make the point in regard to the observation by hon'ble SC that **254(2) is akin to Order 47 Rule 1 of CPC 1908**.This aspect has been a subject matter of muted protestations and peripheral contest .The phrase used in the latter **is 'mistake or error apparent on the face of record"** whereas the phrase in s 254(2) **is ''mistake apparent from record"**.

9.1 ARE THE TWO IDENTICAL?In TS BALARAM the honble SC REFERRED TO THIS: **''In this case it is not necessary for us to spell out the distinction between the expressions "error apparent on the face of the record" and "mistake apparent from the record" ''**

9.1.1 In Saurashtra Kutch(supra)the hon'ble Court again referred to it on being contested *'' Though learned counsel for the assessee submitted that the phrase "to rectify any mistake apparent from the record" used in section 254(2) (as also in section 154) is wider in its content than the expression "mistake or error apparent on the face of the record"* ***occurring in rule 1 of Order 47 of the Code of Civil Procedure, 1908*** *(vide Kil Kotagiri Tea and Coffee Estates Co. Ltd. v. ITAT [1988] 174 ITR 579 (Ker)), it is not necessary for us to enter into the said question in the present case."*

9.1.3 We can notice this in several other cases as well, in which muted references without any ruling have occurred ,though in Balaram case the distinction has been clearly acknowledged.

9.2 **Why is this point important**?Till such time as 254(2) is decided on its own legs there is no issue.But if order 47 rulings and understanding is relied upon to adjudicate 254(2) scope,I humbly submit, there is an issue.I feel the assessee missed a trick in the Reliance case due to lack of adequate research.The issue is settled in a THREE JUDGE BENCH of the S.C. which

should have been cited and argued by it.The decision brilliantly distinguishes beteen an ‘’error’’ and a ‘’mistake’’.The judgment is as under:

Income-tax Officer *v.* Asok Textiles Ltd. [1961] 41 ITR 732 (SC)

J.L. KAPUR, M. HIDAYATULLAH AND J.C. SHAH, JJ.

DECEMBER 13, 1960

Kapur, J.—This is an appeal pursuant to a certificate of the High Court of Kerala against the judgment and order of that court and the question for decision is the applicability of section 35 of the Indian Income-tax Act (hereinafter termed the "Act").

The facts which have given rise to the appeal are these: The respondent is a limited company which owns a spinning mill at Alwaye. It commenced business in January, 1951, and its first accounting year ended on December 31,1951, and the relevant assessment year is 1952-53. It filed its return showing an income of Rs. 3,21,284 without taking into account the amount allowable under section 15C of the Act. On February 2, 1953, the net assessable income of the respondent was determined at Rs. 1,47,083 after deducting Rs. 1,79,081 under section 15C. The respondent, however, declared a dividend of Rs. 4,72,415 which attracted the application of section 2 of the Finance Act, 1952, read with Part B, proviso (*ii*), of the First Schedule and thus it became liable to the payment of additional income-tax and this fact was overlooked by the Income-tax Officer. After giving notice under section 35 of the Act, the Income-tax Officer by an order dated January 25, 1954, rectified this error and imposed an additional tax at the rate of one anna in the rupee. He later discovered that this was also erroneous and the rate should have been 5 annas in a rupee. By an order dated August 12,1954, he rectified the error. Under section 18A advance income-tax had to be paid and the respondent company had deposited only Rs. 5,000 and, therefore, became liable to penal interest under section 18A(8) of the Act. By the same order this omission to impose penal interest was corrected and this error was thus rectified.

Against this order the respondent company went in revision under section 33A (2) to the Commissioner of Income-tax but the revision was dismissed. Thereupon the respondent company filed a petition in the High Court of Kerala under article 226 of the Constitution on the ground that section 35 of the Act did not apply and that on the merits additional tax could not be imposed. The High

Court by its judgment dated October 31, 1955, held that the orders made were without jurisdiction and, therefore, granted a writ of *certiorari* quashing the orders and the Income-tax Officer has brought this appeal pursuant to a certificate of that High Court.

According to the High Court section 35 of the Act was a provision for rectification of "mistakes apparent on the record" and in the opinion of the High Court it was a mistake analogous to Order XLVII, rule 1, of the Code of Civil Procedure for grant of review on the ground of mistake or error apparent on the face of the record and it construed it in the following words *Asoka Textiles Ltd.* v. *ITO* [1956] 29 ITR 672:

> "*i.e.,* an evident error which does not require any extraneous matter to show its incorrectness. The error may be one of fact but is not limited to matters of fact and include also errors of law. But the law must be definite and capable of ascertainment. An erroneous view of law on a debatable point or a wrong exposition of the law or a wrong application of the law or a failure to apply the appropriate law cannot be considered a mistake or error apparent on the face of the record: see ***Chitaley's Civil Procedure Code,*** **Volume III, pp. 3549-50, 5th edition.**"

On the ground that the applicability of proviso (*ii*) of Part B of the First Schedule of the Finance Act was a complex question which could not be said to be "apparent on the face of the record", the High Court held that the necessary foundation for the exercise of the powers under section 35 had not been laid and, therefore, the Income-tax Officer had no jurisdiction to make the order that he did. The High Court also held that the levy of penal interest under section 18A(8) of the Act for failure to make advance deposit under section 18A(3) was also without jurisdiction.

The learned judges of the High Court seem to have fallen into an error in equating the language and scope of section 35 of the Act with that of Order XLVII, rule 1, Civil Procedure Code. The language of the two is different because according to section 35 of the Act which provides for rectification of mistakes the power is given to the various income-tax authorities within four years from the date of any assessment passed by them **to rectify any mistake "apparent from the record" and in the Civil Procedure Code the words are "an error apparent on the face of the record" and the two provisions do not mean the same thing.** This court, in ***Maharana***

Mills* (*Private*) *Ltd.* v. *Income-tax Officer, Porbandar [1959] 36 ITR 350**,** has laid down the scope of section 35 at page 358 in the following words:

> "The power under section 35 is no doubt limited to rectification of mistakes which are apparent from the record. A mistake contemplated by this section is not one which is to be discovered as a result of an argument but it is open to the Income-tax Officer to examine the record including the evidence and if he discovers any mistake he is entitled to rectify the error provided that if the result is enhancement of assessment or reducing the refund then notice has to be given to the assessee and he should be allowed a reasonable opportunity of being heard."

In that case the error arose because of an initial mistake in determining the written down value which was subsequently rectified. In an earlier case, ***Venkatachalam* v. *Bombay Dyeing & Manufacturing Co. Ltd.*** [1958] 34 ITR 143**,** where as a consequence of a subsequent amendment of the law having retrospective effect, the Income-tax Officer reduced the amount of interest under section 18A(5) of the Act and the assessee obtained from the High Court a writ of prohibition against the Income-tax Officer on the ground that **the mistake contemplated had to be apparent on the face of the order and not a mistake resulting from an amendment of the law even though it was retrospective in its effect,** it was held that it was a case of error apparent from the record. Gajendragadkar, J., in his judgment said :

> "At the time when the Income-tax Officer applied his mind to the question of rectifying the alleged mistake, there can be no doubt that he had to read the principal Act as containing the inserted proviso as from April 1, 1952."

Thus this court has held that discovery of an error on the basis of assessment due to an initial mistake in determining the written down value is a mistake from the record and so is a misapplication of the law even though the law came into operation retrospectively. **The Income-tax Officer can, under section 35 of the Act, examine the record and if he discovers that he has made a mistake, he can rectify the error and the error which can be corrected may be an error of fact or of law. The restrictive operation of the power of review under Order XLVII, rule 1, Civil Procedure Code, is not applicable in the case of section 35 of the Act and, in our opinion,**

it cannot be said that the order of the Income-tax Officer in regard to the assessment in dispute was without jurisdiction.

In regard to section 18A(8) also, the learned judges have misdirected themselves because that section is mandatory. It provides:

> "Where, on making the regular assessment, the Income-tax Officer finds that no payment of tax has been made in accordance with the foregoing provisions of this section, interest calculated in the manner laid down in sub-section (6) shall be added to the tax as determined on the basis of the regular assessment."

Therefore, the Income-tax Officer was required to calculate the interest in the manner provided under the provisions of that sub-section and had to add it to the assessment.

Counsel for the respondent sought to raise the question as to the applicability of proviso (*ii*) of Part B of the First Schedule of the Finance Act, 1952, and relied upon the judgments of this court in *Commissioner of Income-tax* v. *Elphinstone Spinning & Weaving Mills Co. Ltd.* [1960] 40 ITR 142 and similar cases reported as *Commissioner of Income-tax* v. *Jalgaon Electric Supply Co. Ltd.* [1960] 40 ITR 184 and *Commissioner of Income-tax* v. *Khatau Makanji Spinning and Weaving Co. Ltd.* [1960] 40 ITR 189; but the facts of those cases were different. In the first case there was no total income and the Finance Act was not applicable in that case. In the second there was no profit in any preceding year and, therefore, the fiction failed because it postulates that there should be undistributed profits of one or more years immediately preceding the previous year. In the third case also the Finance Act was inapplicable because the additional tax was not properly laid upon the total income and what was actually taxed was never a part of the total income of the previous year.

In our opinion the order of the High Court was erroneous. We, therefore, allow this appeal and set aside the judgment and order of the High Court with costs in this court and in the High Court.

9.2.1 [Section 35 of 1922 Act provides:

> "(1) The Commissioner or Appellate Assistant Commissioner may, at any time within four years from the date of any order passed by him in

appeal or, in the case of the Commissioner, in revision under section 33A and the Income-tax Officer may, at any time within four years from the date of any assessment order or refund order passed by him on his own motion rectify any mistake apparent from the record of the appeal, revision, assessment or refund as the case may be, and shall within the like period rectify any such mistake which has been brought to his notice by an assessee."]

9.3 The point is the words used in the section are "**apparent from the record" and the record does not mean only the order of assessment but it comprises all proceedings on which the assessment order is based and the Income-tax Officer is entitled for the purpose of exercising his jurisdiction under section 35 to look into the whole evidence and the law applicable to ascertain whether there was a mistake,** as argued in Maharana Mills case(supra) again a 3 judge decision.

10.In conclusion ,the bottom line is that **there has to be a clear distinction drawn between a ''mistake apparent'' and an ''appealable error**''.This fundamental distinction ,if lost sight of,shall give rise to litigation in which the aggrieved party may lose on a desirable result due to choice of a wrong option.Even the **pursuit of simultaneous remedies** in two different fora in the case of Reliance Telecom is a judicially undesirable practice and may lead to summary non admittance /dismissal by one of the fora since sufficient body of law exists to that effect.An unfavourable finding may give rise to an appealable error but can fall well short of mistake apparent.The party initiating a contest would be well advised to keep this in mind.