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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 763/2019

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -2 ..... Appellant

Through: Mr. Ruchir Bhatia, Advocate.

versus

ZTE CORPORATION ..... Respondent

Through: Mr. Rohan Khare, Advocate.

\+ ITA 769/2019

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -2 ..... Appellant

Through: Mr. Ruchir Bhatia, Advocate.

versus

ZTE CORPORATION ..... Respondent

Through: Mr. Rohan Khare, Advocate.

\+ ITA 771/2019

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -2 ..... Appellant

Through: Mr. Ruchir Bhatia, Advocate.

versus

ZTE CORPORATION ..... Respondent

Through: Mr. Rohan Khare, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

% 26.08.2019

CM. APPL. 37076/2019 in ITA 769/2019 & CM. APPL. 37077/2019 in ITA 771/2019

1. Exemption allowed, subject to all just exceptions.

2. The application stands disposed of.

ITA 763/2019, ITA 769/2019 & ITA 771/2019

3. At the outset, Mr. Ruchir Bhatia learned counsel for the Appellant very fairly states that the issues/questions framed in the present appeals are covered by the decision of this Court in ***Commissioner of Income Tax, International Taxation v. ZTE Corporation*** (2017) 392 ITR 80 (Delhi). The questions of law framed in the said appeal were as follows:

> *"(i) Are the ITAT's findings with respect to interpretation of Article 12 (3) of the Indo-China Double Taxation Avoidance Agreement (DTAA), in the light of Explanations 5 & 6 to Section 9 (1) (vi), erroneous in law.*
>
> *(ii) Is the impugned order correct in its interpretation of Section 234B of the Income Tax Act, 1961, in the facts and circumstances of the case."*

4. The findings returned by this Court in the said decision read as follows:

> *"22. In the present case, the facts are closely similar to Ericson. The supplies made (of the software) enabled the use of the hardware sold. It was not disputed that without the software, hardware use was not possible. The mere fact that separate invoicing was done for purchase and other transactions did not imply that it was royalty payment. In such cases, the nomenclature (of license or some other fee) is indeterminate of the true nature. Nor is the circumstance that updates of the software are routinely given to the assessee's customers. These facts do not detract from the nature of the transaction, which was supply of software, in the nature of articles or goods. This court*

is also not persuaded with the submission that the payments, if not royalty, amounted to payments for the use of machinery or equipment. Such a submission was never advanced before any of the lower tax authorities; moreover, even in Ericson (supra), a similar provision existed in the DTAA between India and Sweden.

23. As far as the question of interest payments and Section 234B is concerned, the court is of the opinion that the issue is covered by GE Packaging (supra). This question of law too is answered against the revenue, and in favour of the assessee."

5. In the present case as well, the same DTAA is under consideration as was considered by this Court in ***ZTE Corporation*** (supra). Following the aforesaid decision, we dismiss the present appeals.

VIBHU BAKHRU, J

SANJEEV NARULA, J

AUGUST 26, 2019
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