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

+ ITA 911/2019

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL
TAXATION -2 Appellant

Through: Mr. Ruchir Bhatia, Advocate.

versus

ZTE CORPORATION Respondent

Through: Mr. Harpreet Singh Ajmani and
Mr. Rohan Khare, Advocates.

+ ITA 817/2019

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL
TAXATION -2 Appellant

Through: Mr. Ruchir Bhatia, Advocate.

versus

ZTE CORPORATION Respondent

Through: Mr. Harpreet Singh Ajmani and
Mr. Rohan Khare, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

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18.10.2019

C.M. No. 45711/2019 in ITA 911/2019 (exemption)
C.M. No. 40377/2019 in ITA 817/2019 (exemption)

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

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C.M. No. 45712/2019 (delay) in ITA 911/2019

3. By this application the applicant seeks condonation of delay of 61 days in re-filing the application. For the reasons stated in the application, the delay is condoned.

4. The application stands disposed of in the aforesaid terms.

ITA 911/2019 & ITA 817/2019

5. Both these appeals have been preferred by the Revenue. The common order dated 15.02.2019 passed by the Income Tax Appellate Tribunal in ITA 817/2019 relates to the assessment year 2015-16 and ITA 911/2019 relates to the assessment year 2013-14. This Court has already considered the issues sought to be raised by the Appellant in *Commissioner of Income Tax, International Taxation v. ZTE Corporation*, 2017 392 ITR 18 (Delhi). Thereafter, we have also rejected the appeals preferred by the Revenue in ITA 763/2019, ITA 769/2019 and ITA 771/2019 vide order dated 26.08.2019. The following order came to be passed on that date:

“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.

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(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."

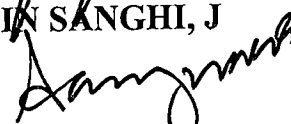
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6. Following our earlier decisions, we find no fresh question of law arises for our consideration.

7. In view of the above, these appeals are dismissed.



VIPIN SANGHI, J



SANJEEV NARULA, J

OCTOBER 18, 2019

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