

## **Payment made for supply of software embedded in mobile phones couldn't be taxed as royalty**

**Summary – The High Court of Delhi in a recent case of ZTE Corporation., (the Assessee) held that where assessee, a china based company, sold telecom equipments i.e. mobile handsets to various customers in India, since, supply of software embedded in telecom equipment enabled use of hardware sold, it amounted to a case of sale of copyrighted good and, thus, payment made towards supply of software was not taxable as royalty**

### **Facts**

- The assessee was a tax resident of the Republic of China. It was engaged in the business of supplying telecom equipment i.e. mobile handsets.
- The assessee's plea was that the payments for supply of software embedded in hardware were in the nature of business profits and not royalty.
- The Assessing Officer held that the payments made for the right to use the software was royalty as per clause(I),(ii) and (v) to Explanation 2 to section 9(1)(vi) of the Act.
- The Tribunal, however, allowed assessee's claim.

### **Held**

- 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. Thus, it being a case of sale of copyrighted good, payment made for supply of software was not taxable as royalty.