Sum paid for software without any right of utilizing copyright of said programme couldn't be held as royalty

Summary – The Chennai ITAT in a recent case of Atmel R & D India (P.) Ltd., (the Assessee) held that where assessee made payment for acquisition of software from its parent company to be used for its business purpose only, without any right of utilizing copyright of said programme, payment made in respect of same did not give rise to any royalty income

Facts

- The assessee company claimed Rs. 93.63 lakhs towards Software expenses paid to its parent company, Atmel Corporation, USA, however it had not deducted TDS on ground that mere reimbursement of expenses on cost to cost basis without any mark-up did not attract TDS under section 195.
- The Assessing Officer considered the assessee's explanation and found that it was not correct for the reason that the software expenses were in the nature of royalty as per provisions of section 9(1)(vi). Since the software was used in India for the purpose of business or profession carried on by the assessee in India, he invoked the provisions of section 195 and disallowed the expenditure since there was no deduction of TDS under section 40(a)(i).
- The DRP observed that the reimbursement of software expenses on a cost to cost basis without any mark-up would not constitute income chargeable to tax in India in the hands of Atmel US. Accordingly, assessee shall not be liable to withhold any tax under the provisions of the section 195 on such reimbursement. Accordingly, the Assessing Officer made addition of Rs. 93.63 lakhs.
- On appeal to the Tribunal the assessee contended that provisions of the section 195 could not be applied as the payment made to non-resident was not chargeable to tax under the Act and there was no question of withholding any tax.

Held

- The main contention of the assessee that the payment was made towards cost of the software namely 'Cadence' and 'Synopsis' paid to the Atmel Corporation USA at a cost without any mark-up and it does not include any profit element. However, the Assessing Officer is of the opinion that it is payment in the nature of Royalty as per provisions of the section 9(1)(vi). Since the software is used in India for the purpose of business or profession carried on by the assessee in India, he invoked the provisions of section 195 and disallowed the expenditure since there was no deduction of TDS under section 40(a)(i). Now the contention of the assessee is that it is only purchase of software to use in assessee's business and the assessee has not acquired the copyright of the programme. The revenue is not able to show that the assessee has got any right to use the copyright as software programme. In other words, if the assessee acquires only right to use software and not copyright of the software, then the order of Tribunal in the case of *Asstt. DIT(International Taxation)* v. *Bartronics India Ltd.*

[2014] 43 taxmann.com 16/62 SOT 141 (URO) (Hyd. - Trib.) is squarely applicable to the facts of the case wherein it was held that in order to qualify as royalty payment, it is necessary to establish that there is transfer of all or any rights (including the granting of any licence) in respect of copyright of a literary, artistic or scientific work. The right to use a copyright in a programme is totally different from the right to use a programme embedded in a software and the payment made for the same cannot be said to be received as consideration for the use of or right to use of any copyright to bring it within the definition of royalty. Thus, where assessee engaged in business of providing enterprise solutions based on smart cards, bar coding, biometrics *etc.,* purchased a readymade card operating system software from a foreign company to be used for its business purpose only and without any right of utilizing copyright of said programme, payment made in respect of same did not give rise to any royalty income. In view of the above, the ground taken by the assessee is allowed.