ITAT remanded matter to examine whether payment made for acquiring software licence was royalty

Summary – The Chennai ITAT in a recent case of Cognizant Technology Solutions India (P.) Ltd., (the Assessee) held that where assessee, engaged in business of software development paid annual maintenance charges to various Non-Resident companies which was regarded as fee for technical services taxable in India, in view of fact that revenue authorities did not go into question whether non-resident companies made available any technical knowledge to assessee through AMCs, impugned order was to be set aside and, matter was to be remanded back for disposal afresh

Where assessee made payments to a Singapore based company for acquiring licence for software which was treated as royalty by revenue authorities liable to tax in India, in view of fact that no examination was done on real nature of software, whether it was firmware or embedded software or standalone software impugned order was to be set aside and, matter was to be remanded back for disposal afresh

Facts

- The assessee-company was primarily engaged in the business of software development. During relevant year, the assessee paid annual maintenance charges to various Non-Resident companies.
- In course of assessment, the Assessing Officer opined that said payments were in nature of fee for technical services taxable in India.
- The Commissioner (Appeals) confirmed the order of the Assessing Officer.
- On second appeal:

Held

- The main contention of assessee was that AMC payments made to the non-resident companies, did not make available any technical knowledge to the assessee. The Commissioner (Appeals) did not go into the question whether the technical services were made available to the assessee companies through the AMCs. He held that the payments made, fell within the meaning of fees for technical services, applying certain tests like nature of services, requirement of professional expertise for running the services, element of human interface while providing services, whether the non-resident companies had provided standard facilities or something more including any use of special machinery, etc. The Commissioner (Appeals) however did not test the transactions with the relevant articles in respective DTAAs, with regard to definition of royalty and fees for included services. The assessee can always opt for the provision in the DTAA, if it finds such provisions to be more beneficial than the Act. Even in the orders passed by the Assessing Officer under section 201(1) and 201(1A) of the Act, application of ''making available'' clause in the Article defining Royalty and fees for included services, in the respective DTAA's have not been considered.

- Considering the facts and circumstances of the case, it is opined that the question whether assessee was liable to deduct tax on AMC charges to Non-Residents requires a fresh look by the Assessing Officer. Thus, the orders of the lower authorities are set aside and issue is remitted back to the file of the Assessing Officer for consideration afresh in accordance with law.