IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, BENGALURU

BEFORE SHRI JASON P.BOAZ, ACCOUNTANT MEMBER
and
SHRI LALIET KUMAR, JUDICIAL MEMBER

IT(TP)A.1511 to 1518/Bang/2013
(Asst. Years 2007-08 to 2012-13)

M/s.Google India Private Ltd.
No.3, RMZ Infinity Tower-E, 4th floor,
Old Madras Road,
Bengaluru-560016. … Appellant
PAN:AACCG 0527D

Vs.

Addl. Commissioner of Income-tax,
Range-11,
Bengaluru. … Respondent

Assessee by : Shri Percy Pardiwala, Sr. Counsel, Smt. Tanmayee Rajkumar, Advocate & Shri. Vinay Mangla, CA.
Revenue by : Shri K.V.Arvind, Standing Counsel for Department

Date of hearing : 31/08/2017
Date of pronouncement: 23/10/2017

O R D E R

PER LALIET KUMAR, JM :

These are in all six appeals are by the assessee against the order of the CIT(A) –IV, Bengaluru, dt.20.09.2013, for the assessment years 2007-08 to 2012-13.

02. The assessee raised the following common grounds of appeal in ITA Nos.1511 to 1516/Bang/2013 for the assessment years 2007-08 to 2012-13.

Ground 1: Erred in holding that the Ad Words program is a complex computer software, the right to use has been granted to the Appellant without appreciating the fact that Adwords program is a standard advertisement product through which the advertiser is able to publish its advertisement on the Google website.

Ground 2: Erred in holding that Google Ireland Limited, Ireland has granted the Appellant the right to use of the Adwords program, which is a complex computer program without parting with the copyright, thus granting license to use the software without appreciating the fact that the Appellant is only involved in marketing and distribution of advertisement space to the Indian advertisers and that it is GIL which uses the back end process/ program for processing and displaying the advertisement.

Ground 3: Erred in holding that the amount payable towards purchase of advertisement space to be in the nature of 'Royalty' under the Act, even after acknowledging that the Appellant is distributing advertisement space to the advertisers in India.

Ground 4: Erred in confirming that Distribution Agreement cannot be read without the service agreement (ITES agreement) between the Appellant and GIL and the Appellant has been granted right to use intellectual property owned by GIL without appreciating the fact that ITES service agreement is a separate agreement under which the Appellant performs an independent global outsourcing function for GIL for which it receives consideration and is not linked in any manner to the function of sale of advertisement space to the Indian advertisers being performed by the Appellant.

Ground, 5: Erred in confirming that the distribution rights granted are itself IP rights covered by "similar property"

used in See 9(1)(vi) of the Act after holding that as per the distribution agreement GIL has agreed to provide advertisement space to the Appellant through Adwords program for distribution to the Indian Advertisers.

Ground 6: Erred in holding the amount payable by the Appellant to GIL as Royalty by attributing the same towards right to use of Trademark even after concluding that the assesse company was permitted to use the trademarks of Google for the purpose of marketing and distribution of Adwords program.

Ground 7: Without appreciating the facts of the case, erred in holding that the amount payable by the Appellant to GIL towards purchase of advertisement space to be in the nature of 'royalty' under Section 9(1)(vi) of the Act.

Ground 8: Erred in upholding the order of the AO that the amount payable by the Appellant to GIL is towards right to use of trademark and copyrighted computer program and process, hence is in the nature of 'Royalty' as per the Article 12 of the India Ireland DTAA.

Ground 9: Erred in holding that the training provided in relation to the advertisement program, its functionality, tools available etc. to the distribution team of the appellant who markets and distributes the same to advertisers in India tantamount to rendering of services to the Appellant even after concluding that such training is restricted to use of the Adwords program and not how to develop the Adwords program.

Ground 10: Erred in not following the principle laid down by Hon'ble Mumbai Tribunal in the case of Yahoo India and Pinstorm Technology on similar facts by stating that the facts and issues are completely different and at no stage the Mumbai Tribunal consider what exactly is the Adwords Program, nor did it have occasion to examine the right to use trademark or other IP rights.

Ground 11: Erred in not following the decision of the Calcutta Tribunal in the case of Income Tax Officer vs Right Florists Pvt Ltd (ITA No. 1336/KolI2011) on similar facts.

03. In addition to above common grounds of appeal, the assessee raised the following common ground in ITA Nos.1511 & 1512/Bang/2013 for assessment year 2007-08 and 2008-09:

12. Erred in upholding the validity of initiation of proceedings under section 201(1) of the Income-tax Act, 1961 for the subject assessment year after the expiry of four years from the end of the relevant financial year.

Brief facts

04. The assessee Google India Private Limited (Google India) company registered under the provisions of the Companies Act and wholly subsidiary of Google International LLC, US. Google India is appointed as a non-exclusive authorized distributor of Adword programs to the advertisers in India by Google Ireland. Google is specialized in Internet search engines and related advertising services. Google maintains an index of websites and other online content which is made available through its search engine to anyone with an Internet connection.

05. Under the Google Adword Program Distribution agreement dated 12/12/2005, Google India was granted the marketing and distribution rights of Adword program to the advertisers in India.

06. As per assessee it is engaged in information technology (IT) and IT enabled service (ITES) to its overseas group companies and is also engaged as an non exclusive distributor of the online advertising space under Google Adword Program to various advertisers in India. It is the case of the assessee that the Google India entered into an agreement with Google Ireland Limited (herein after called GIL) for resale of online advertising space under the advertisers program to advertisers in India. For the purpose of sales and marketing the space work wise flow of activities of the assessee and advertiser were as under :

i. Enter into resale agreement with GIL (Google Ireland Limited) and resale on advertising space under the Adword program under the Indian advertisers.

ii. Perform marketing related activities in order to promote the sales of advertising space to Indian Advertisers. After training to its own sale flows above the features / tools available as part of Adword program to enable them to effectively market the same to advertisers.

iii. Enter into a contract with Indian advertisers in relation to sale of space under the Adword program.

iv. Provide assistance / training to Indian advertisers if needed in order to familiarize that with the features / tools available as part of our Adword product.

v. Resale invoice to the above advertisers.

vi. Collect payments from the aforesaid advertisers.

vii. Remit payment to Google Ireland Ltd payment (GIL) for purchase of advertising space from it under the resale agreement.

It was the case of the assessee that no rights in the intellectual property of the Google were transferred to the assessee from GIL. Assessee was mere reseller of advertising space made available under the Adword distribution program by GIL. Further as per appellant, the assessee is a distributor of advertising space and it do not have any access or control over the infrastructure or the process that are involved in running the Adword program, as program runs on software, Algorithm, data center which are owned by Google and its subsidies outside India. It was also the case of the assessee that the Adword platform is running on servers located outside India that belonged to or hired by Google. Assessee in India has no control over the server of Google.

07. Moreover, it was submitted that the Google does not sell any software but resells products and services which are developed by Google incorporation USA and its subsidiaries outside India. It was the case of the assessee that neither the assessee nor its advertisers get any right or right to use or exploitation over the underlying I.P. or software which is entirely owned by Google incorporation and its subsidies.

08. It was submitted by the assessee that the advertisers gets its advertisement uploaded into Adword program, and thereafter it directly logged on the Adword program website owned by Google and follows the various steps to create the Adword account for itself. It is also the assessee's case that the advertisers select the key words, content and presentation related to its ads and places a bid on the online system for the price it is willing to pay overtime its user clicks on its advertisement. One of the steps is the selection of the payment in INR and once the terms and conditions displayed are accepted an assigning contract is entered between the advertiser and Google India (assessee) for sale of ad space. It was further submitted that once the advertisers creates the accounts and upload and advertisement the same automatically gets stored on Adword platform owned by Google on the servers outside the India and the ads are displayed in the manner determined by the programs running on automated platform. The assessee periodically raises the bill on advertisers for advertising spend incurred by the advertiser on clicks through the users.

09. In a nutshell, it was the contention of the assessee that it is merely a reseller of advertisement space. The assessee only performs market related activities to promote the sales of advertisement space. No right or intellectual properties were transferred by Google to the assessee or to the advertiser. The assessee has no control or access to the software, Algorithm and data centre. The server on which the Adword program runs are located outside India over which it is not

having control. The assessee or the advertisers do not have any right of any use or exploitation or the underlying I.P. and software. The advertisers select key works and place a bid on the online auction. The assessee periodically raises invoice on advertisers for advertising spend incurred by the advertisers.

10. On verification of the financial for the FY 2007-08 relevant to AY 2008-09, it was noticed that assessee had credited a sum of Rs.119 crores to the account of Google Ireland without deduction of tax at source. Further, GIL (Google Ireland) had also not obtained a NIL deduction certificate on the sums payable to it from the Department. Similar are the facts for the other assessment years and therefore, we are not reproducing here the same for the sake of brevity.

10.1 As the appellant had not complied with the provisions of section 195, therefore the proceedings were initiated u/s.201 by issuing the notice on 20.11.2011, calling upon the appellant why it should not be treated as assessee in default for not deducting the tax at source on the sum payable to GIL.

10.2 The appellant had filed the detailed reply and submitted the detail of the distribution fees payable to Google Ireland on which the TDS was not deducted by it :

Financial year	Distribution fee payable (In Rs.)
2005-06	Nil
2006-07	42,57,53,347
2007-08	1,19,82,61,982
2008-09	1,66,58,00,134
2009-10	1,85,68,92,343
2010-11	3,72,01,00,048
2011-12	5,70,74,19,173

10.3 Before the AO, the assessee filed the detailed reply for all the five years. However the AO was not convinced with the reasoning and accordingly the tax liability of the appellant u/s.201 (1) and 201(1A) for the AY 2007-08 to 2012-13 were determined by considering the amounts payable to GIL as royalty under the Act and under the DTAA.

10.4 Feeling aggrieved by the order passed by The AO, appeals were preferred before the CIT (A). However the CIT (A) vide impugned order had decided the issues against the appellant by treating the amounts payable to GIL as royalty under the Act and under the DTAA. Hence the present appeals were filed by the assessee before us on various grounds mentioned herein above.

10.5 It may be appropriate to mention here that the assessee, had raised the common ground no.1 to 11 in all the six appeals and the ground no.12 was only restricted to two assessment years for 2007-08

and 2008-09. During the course of argument it was pointed out that the assessee had not raised the ground no.11 raised before CIT (A) pertaining to royalty income, if any, is taxable on receipt basis. Therefore, the assessee, in all the appeals had filed the additional ground bearing no.13, before us. We have heard the argument on admissibility of additional ground at this stage from both the sides. In our view the assessee had raised this ground before the CIT (A) as ground no.11 which is clear from the record and the CIT (A) had also recorded the finding on this issue. Moreover this issue is legal in nature and therefore no prejudice would be caused to the Revenue if this ground is permitted to be raised before us. Accordingly we allow admission of additional ground no.13 to be raised in the present appeals. We will be reproducing and dealing the said ground 13 herein below on its own turn.

11. The AO after issuing the show cause notice to assessee had passed the speaking order. In respect to grounds 1-11 above the finding of the AO were as under :

A. The AO held that the amount payable by the Appellant to Google Ireland for the subject assessment years is royalty as the said term is defined in Explanation 2 to section 9(l)(vi) of the Act. The AO has relied on the following observations to conclude as above:

B. The 'distribution rights' are 'Intellectual Property rights' covered by 'similar property' and the

distribution fee payable is in relation to transfer of distribution rights.

C. Google Ireland has granted the Appellant the right access to confidential information and intellectual property rights.

D. Google India has been allowed the use or the right to use of a variety of specified IP rights and other IP rights covered by "similar property".

E. Grant of distribution right also involves transfer of right in copyright

F. By exercising its right as the owner of copyright in the software, Google Ireland is authorizing Google India to sell or offer for sale, i.e., marketing and distribution of Adwords Software to various advertisers in India.

G. The consideration paid by Google India is for granting license/authorization to use the copyright in the Ad Words program and not for purchase of such software.

H. GIPL has been given right to use Google Trademarks and other Brand Features in order to market and distribute of Adwords program.

I. Grant of distribution right also involves transfer of know-how

J. Google Ireland is obliged to train the distributor so

that Appellant can market and distribute Ad Words program.

K. Referring to clause 2 of Non-disclosure Agreement ('NDA') forming part of Distribution Agreement, Google Ireland being the copyright holder of the Ad Words program, is in a position to share confidential information whenever required with Appellant.

L. Grant of distribution right also involves transfer of process

M. Without access to the back-end, Google India cannot perform its marketing and distribution activities. Google India has access to the processes running on the data centers, based on the distribution rights granted to it by Google Ireland

N. Appellant is granted the use or the right to use the process in the Adwords platform for the purpose of marketing and distribution. (Page 49 of the order u/s 201)

O. Grant of distribution right also involves use of Industrial, commercial and scientific equipment

P. Adwords program, in one way, is also commercial cum scientific equipment and without having access to servers running the Ad Words platform, Google India cannot perform its functions as per the Distribution Agreement.

12. The appellant had challenged the order passed by the AO however the CIT(A) had decided the issues against the assessee and confirmed the withholding tax liability in the hands of the Appellant on the basis that the amount payable by the Appellant to Google Ireland is in the nature royalty under the provisions of the Act as well as under the India-Ireland DTAA.

13. Feeling aggrieved by the order of CIT(A) the assessee challenged the order of lower authorities on the above said grounds.

14. The LD AR for the assessee had made elaborate arguments before us which continued for four days and also filed detailed written submissions running into more than 110 pages. The submissions of the Ld. AR relevant for grounds no 1-11 are reproduced herein for the purposes of record :

2.3.1 Provision of Information Technology enabled services ('ITES services) by the Appellant is independent of the distribution of advertisement space under the Adwords Program by the Appellant to the advertisers in India

(i) At the outset, it is respectfully submitted that the ITES division of the Appellant is a separate outsourcing business segment, for which it earns revenue under a separate outsourcing service agreement with Google Ireland.

(ii) Appellant was providing ITES services even prior to commencement of the distribution activity.

(iii) No amount is paid / payable by the Appellant to Google Ireland under ITES Agreement. Please refer Page 22 to 35 of the Paper book for the copy of the ITES agreement between the Appellant and Google Ireland in relation to the ITES outsourcing function being performed by the Appellant.

(iv) The provision of ITES services by the Appellant is independent of the distribution of advertising space to the advertisers in India, considering the following:

> *(a) The ITES function was undertaken by the Appellant even prior to the appointment as a non-exclusive distributor of advertisement space. The ITES function operates independently and is unrelated to the Adwords distribution business. That is, even where Google Ireland terminates its reseller contract with the Appellant, the ITES outsourcing business would continue and vice versa.*

(b) The role of distribution function is limited to distribution activities inter alia, whereas, the ITES services performed are to ensure the advertisements placed by advertisers globally confirm with Google editorial guidelines/local Government regulations of the country (from where the Ad originated).

For example, where an is Ad originated from South Africa, the ITES team in the Appellant may review as a part of its outsourcing services, whether the South African Ad conformed with the local government regulations of South Africa.

Likewise an advertisement placed by an Indian advertiser who has entered into a contract with the Appellant may be reviewed by any other center rendering said services.

Similarly the Appellant may record an advertisement placed by a customer situated in the Europe.

There is no professional interaction between the distribution team and ITES team since these are separate functions performed independent of each other.

(c) The process of review of advertisements is largely automated and run outside India, and the Appellant is involved in reviewing only those Ads which cannot be completely reviewed by the automated system.

(d) The function of providing ad policy administration services can be outsourced to another third party company or another company outside of India. That is, this outsourcing function does not need to be located in India. It is mere coincidence that the Appellant has undertaken to perform ITES outsourcing services as a part of its business.

Thus, based on the above, we wish to submit that the roles of ITES and the distribution team are different in nature and are not inter related or inter-dependent.

Use of Intellectual Property through ITES agreement

The AO has assumed that the right to use the intellectual property granted under ITES agreement was used by the Appellant for the purposes of distribution of ad space. Basis this presumption, the AO has adjudged that the payments made by the Appellant were towards the use of intellectual property and thus taxable under section 9(1)(vi)of the Act.

It is submitted that firstly, even under the ITES agreement, only limited rights to the use of the intellectual property of Google Ireland is granted to the Appellant only to carry out the work under the said agreement. Further, the ITES agreement,

providing such limited rights to the use of the intellectual property of Google Ireland, is entered on 1 April 2004, which is much before the agreement for Adwords program i.e. 12 December 2005.

Confidentiality clause under the reseller agreement

As submitted earlier, ITES Agreement which lays down terms and conditions for 'Confidential Information' shared by Google Ireland to Google India for the purposes of providing ITES services.

The purpose of insertion of the said clause is independent of payments made by the Appellant under the reseller agreement. The Confidentiality clause under the ITES agreement is a generic clause included for the purposes of protecting information exchanged by Google Ireland and to further sue the persons who breach sensitive and confidential information that they may acquire as a consequence of rendering services to Google Ireland.

The AO and CIT(A) seem to have overlooked a basic fact evident from Clause 6.1 of the ITES Agreement which was reproduced by the CIT(A) in Para 11.6 (Page 39) of his order.

The said clause permits the Appellant to use the confidential information which is largely customer data (not in the nature of intellectual property) solely for the purpose of performing its obligations under the ITES Agreement and does not give the Appellant the right to use the same under the Distribution Agreement. Further, the Appellant wishes to reiterate that the Ad Words division and the ITES division operate separately and there is no overlap of any activities and responsibilities between the two divisions.

The approach of the AO and the CIT(A) to read one agreement into the other for the purposes of concluding the taxability as royalty is baseless Such an approach adopted by the AO and CIT(A) would only lead to circuitous arguments leading to no definite conclusion.

2.3.2 Amount Payable by the Appellant to Google Ireland for purchase of advertisement space under the Distribution Agreement is not in the nature of 'Royalty'

In terms of Explanation 2 to section 9(1)(vi), the term 'royalty' means consideration for transfer of all or any rights (including the granting of a license) in respect of use of a patent, invention, model, design, secret formula, process, trademark, similar intellectual property or in relation to imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill.

In the instant case, as per the 'Google Ad Words Program Distribution Agreement' between the Appellant and Google Ireland:

- *the Appellant is appointed as a mere non-exclusive distributor of*

advertisement space to the advertisers in India;

- *the amount payable to Google Ireland is for purchase of advertisement space under the Ad Words program and is not in relation to any 'transfer of any right' or any 'right to use' any copyright, patent, invention etc.;*
- *the Agreement does not involve any use of patents, invention, model, design, secret formula or process or trademark or similar property by the Appellant Further, all the rights title, and interest in and to all information and data, including user data (i.e., data provided by users) are owned by Google Ireland;*
- *the amount payable under the Agreement is not in relation to any knowledge concerning a patent or invention, and is not concerned with the use or the right to use any scientific equipment; further, Google Ireland does not, in any manner, provide to the Appellant any use of or right to use any copyright in the intellectual property owned by Google Ireland.*

Given the above, it is submitted that the amount payable by the Appellant to Google Ireland, being an advertisement fee, is not in the nature of 'royalty' under the Act. The Appellant provides its detailed submissions on specific contentions of the AO under each of the clauses of Explanation 2 to section 9(l)(vi) of the Act in the ensuing paragraphs:

At the outset, it is submitted that the price that the Appellant pays Google Ireland is the consideration for the advertisement space sold. If the revenue alleges it is not so, it must demonstrate with evidence that such is the position. It has to clearly establish that the payment is for one of the specific intellectual property rights that are covered by the various clauses of Explanation 2. It cannot allege that the Appellant has a right to use various intellectual property rights without tracing such right to a specific clause to the agreement.

(i) ***Grant of IP rights***

Similar Property u/s 9(1) (vi)

Having upheld that Google Ireland agreed to provide ad space to the Appellant for distribution to the Indian Advertisers, the CIT(A) erred in concluding that (oog1e Ireland has granted the rights covered by 'similar property' under in section 9(1)(vi) of the Act. In this regard, we wish to submit the following:

- *The Appellant is unable to comprehend how non-exclusive right to distribute the advertisement space under the Ad Words program would be regarded as falling within the scope of 'similar property' referred to in section 9(l)(vi) of the Act.*
- *Applying the principle of ejusdem generis and 'Noscitur a sociis', to interpret the meaning of the term "similar property" mentioned in Explanation 2(i) to section 9(1)(vi) of the Act, it shall be understood in the context of patent, invention, model, design, secret formula or process or trade mark which are all form of intellectual property.*
    - *From the definitions of intellectual property, it may be inferred that the term "Intellectual Property' refers to property which is the essentially the product of human intellect.*

The present non-exclusive right to distribute the advertisement space is a commercial right and not an intellectual property rights.

In any event it is submitted that no payment is made by the Appellant to Google Ireland for grant of such right. Further the definition of the tax royalty in Article 12(5) of the India Ireland DTAA is narrower in scope than the definition in Explanation 2 as inter alia the words "similar property" has not to be found.

(ii) Grant of distribution rights in Adwords Program involves transfer of right in copyright

The AO observed that Google Ireland has granted the Appellant the right to use of the Ad Words program, which is a computer software without parting with the copyright, thus granting a license to use the software. The AO and the CIT(A) have factually erred in stating that the Appellant gets the right to use the Ad Words program. Drawing reference to the description of the Ad Words Program and the role played by the Appellant during the sale of the ad space, it is submitted that the Appellant neither receives any right nor access to the Ad Words program under the Distribution Agreement and does not use it in any manner whatsoever. The amount payable y the Appellant is merely towards purchase of the ad space for resale without access to any underlying computer program.

In arriving at his conclusion the AO primarily relied on the judgment of the Honorable High Court in Samsung and as indicated earlier the Appellant's representative was categorically told not to deal with this judgment in his rejoinder and, hence, the same is not being dealt with.

In the instant case, the Appellant is a mere non-exclusive distributor of adspace through the Ad Words program in India. The Appellant merely purchases advertisement space under the Adwords Program from Google Ireland and distributes the same to advertisers in India. Hence, the consideration received by the Appellant from the advertisers in India is in the nature of advertisement fees and the consideration paid by the Appellant to Google Ireland is for purchase of ad space which is also in the nature of advertisement fees.

- *For advertisements in other mediums like newspapers, magazines, the customers approach advertising agency to have their advertisement published in one or more newspapers. The advertising agency in turn, approaches the respective newspaper entity or an entity that has bought media space for the publishing of the advertisement of their customers. The consideration paid by the customer to the advertising agency is in the nature of advertisement fees and the consideration paid by the advertising agency to the respective newspaper entity is also in the nature of advertisement fees.*

Similarly, in the instant case, the consideration received by the Appellant from the advertisers in India is in the nature of advertisement fees and the consideration paid by the Appellant to Google Ireland for purchase of advertisement space through Adwords program is also in the nature of advertisement fees.

(iii) Grant of right to use Trademarks and Brand features

The AO sought to characterise the amount payable to Google Ireland as royalty, considering that the Appellant uses the brand name 'Google', which would amount to use of trademark under the provisions of the Act.

Google Trademarks and other brand features being referred to in the Distribution Agreement are mere incidental to enable the Appellant to distribute the ad space in India. There has been no specific transfer of any patent/ trademark to the Appellant in this regard.

Any reseller or distributor to perform its obligations as a reseller needs to use the brand of the product being sold. For example, if Raymond appoints a person as its authorised distributor, such person may identify himself as an authorised reseller of Raymond products through signage board. This does not mean that payments by the reseller to Raymond for purchase of products is royalty.

It is submitted that mere use of name of brand for procuring ad contracts would not amount to use of trademark and, hence, even assuming that a view is taken that a part of the price paid by the Appellant to Google Ireland can be characterized as a payment for the alleged use (which is denied) such income would not be liable to tax as royalty under the provisions of the Act. Reliance is placed on the judgements referred to in para 3.3.5 in Section II (in relation to submissions for AY 2008-09 i.e. ITA No 374 of 2013) wherein it has been held that incidental use of trademark should not over shadow the main purpose of entering into the agreement which was marketing and publicity.

(iv) Grant of distribution rights involves transfer of rights in process

The AO, drawing reference to the activities undertaken by the ITES division, observed (in Para 1.2, page 47 of the Order) that the Appellant has to perform functions which involve approving and administering advertisements to conform to the Google editorial guidelines and responding to customer queries. The AO also observed that the front-end portion is what the Advertiser or the end-user sees while the back-end portion is accessible only by Google Ireland and Google India. The AO further observed that without access to the back-end, the Appellant cannot perform its activities of marketing and distribution.

In this regard, it is important to highlight that the Appellant does not have access to any back-end portion as referred by the AO as databases, software tools, etc under the Distribution Agreement. Therefore, the conclusion of the that the Appellant has been granted the use of or the right to use the process in the Ad Words platform, especially for the purpose of marketing and distribution is factually incorrect and is based on surmise and conjecture.

Without prejudice to the above, the Appellant humbly submits that the Adwords, though a program, cannot be considered as a "process" within the meaning under Explanation 2(i) to section 9(1)(vi) of the Act on account of the following:

- *Explanation 2(i) refers to transfer of rights in intellectual property. The term "process" used therein is to be understood in the context of intellectual property based on principle of `noscitur a sociis'. Hence, the term "process" referred in Explanation 2(i) needs to be a secret process or one that can be classified under intellectual property.*

- *However, the Adwords program cannot be equated to a secret process since information relating to the program is freely available to the public on Google's website along with explanatory videos regarding the same.*

Hence, Google Ad Words program cannot be considered a secret process and hence, it does not constitute "process" within the meaning of the term as defined in Clause (i).

(v) Grant** of **distribution rights also involves transfer** of **know-how

The AO observed that Google Ireland is obliged to train Google India for marketing and distribution of Ad Words Program. Further, the AO also draws unwarranted reference to the ITES division in this regard.
The AO has again disregarded the fact that review of advertisements as per the local law requirements and Google Editorial policies is undertaken by the ITES division and not by the Ad Words division.

Further, the AO observed that the training is given to Google India for the purpose of imparting of information concerning technical, commercial or scientific knowledge, experience or skill as specified in clause (iv) of Explanation 2 to Section 9(l)(vi) of the Act.

In this regard, it is pertinent to note that the term information' has not been defined under the Act. Used independently, the word 'information' may convey a very broad meaning. The term 'information' as used in clause (iv) would draw its meaning in the light of the meaning of the term as used in the main body of the section. The term 'information' for section 9(1)(vi) would allude to the concept of know-how. The various types of knowledge, experience or skill referred to in the definition would refer to know-how being made available in light of the original essence of the term royalty.

Circular No. 202 dated 05 July 1976 issued by the CBDT which explains the ambit of section 9(1)(vi) of the Act, has clearly brought out that the payment for information should be in respect of any data, documentation, drawing or specifications relating to any patent, invention, model, design, secret formula or process or trademark.

In the instant case:

- *There has been no provision of specific information concerning technical, industrial, commercial or scientific knowledge, experience or skill.*
- *The information being referred by the AO under the NDA is a standard*

non-disclosure clause. There is no specific information actually received by the Appellant from Google Ireland. The said clause is intended to protect confidentiality of the information, if any, which either party gathers during the course of the business.

Further, the training material/ information are also publicly available online. Hence, the same cannot be considered imparting of information concerning working of or use of patent.

- *The access to information in relation to the Adwords accounts, billing, etc is also available to the advertisers. Hence, the same is not in the nature of 'royalty'.*

***Further, the CIT(A) has upheld that there has been no imparting of know-how to the Appellant and the revenue has not challenged the finding of the CIT(A) by filing an independent** appeal.*

(vi) Grant of distribution rights also involves use of Industrial, commercial and scientific equipment

> *As per clause (iva) of Explanation 2 to section 9(1)(vi) of the Act, consideration for the to "use" or "right to use" any industrial, commercial or scientific equipment is classified as "royalties." The sin qua non to tax a payment as royalty is that the sai7 is for the "use of" or "the right to use" an intellectual property right. Where such use or right to use has not been granted, the payment cannot be characterized as "royalty.*
>
> *The term "use" or "right to use" has not been defined under the Act. As per Oxford Advanced Learner's Dictionary and treatise authored by D P Mittal titled "Indian Double Taxation Agreements & Tax Laws", to constitute "use" or "right to use" the payer should have (a) complete control of the IP and (b) exclusive use which excludes multiple users.*
>
> *In the instant case, the amount payable by the Appellant to Google Ireland is not for the use or for right to use any scientific equipment. Hence, based on the following facts, the same is not in the nature of 'royalty' even under Explanation 2(iva) to section 9(l)(vi) of the Act.*
>
> *- No part of the server is devoted and earmarked for the Appellant;*

- "Use" or "right to use" equipment connotes that the Appellant has the possession and control over the equipment and the equipment is virtually at its disposal. The Appellant does not exercise any possessory rights in relation to the server.

- The Appellant is not concerned with the infrastructure/ server installed by Google Ireland or the components embedded in it. The operation, control and maintenance of the server, solely rests with Google Ireland.

- The Appellant does not have any right to modify or deal with the server which only vests with Google Ireland.

Further, the CIT(A) has confirmed that the Appellant has not gained any right to use any scientific equipment as captured in clause (iv) and as submitted earlier the revenue has not filed any appeal in this regard.

2.3.3 Amount payable to Google Ireland is in the nature of business profits

The Appellant places reliance on its submissions in Para 3.3.4 of Section II of this submission (i.e. Submission for AY 2008-09 in ITA No 374 of 2013) in support of its contention that the amount payable to Google Ireland is in fact, in the nature of business profits and not royalty.

15. Before us, the assessee has further submitted that the Adword programs enable the advertiser to change and monitor the performance of sponsored linked to set a landing page for advertising and only pay when people clicks the ad. The advertiser can provide the text of the advertisement and by providing such term or phrase or key word which is relevant for the advertiser prospective so that when the said term or phrase is searched by any user on the Google search engine, advertisement (Ad) may get displayed on the search results in addition to the organic search result alongwith the sponsored linked ad. The key words selected / purchased / sought to be purchased by the advertiser through the Adword program would pop up with the help of Algorithm. It was submitted that the quality and relevance of key words and various parameters of landing pages plays significant role for determining the price of the advertisement. It was contended before us that success of the ads not only depend upon the bidding but also depend upon the relevant key words selected for the advertisement.

16. On the other hand, the learned standing counsel for revenue had submitted that the Google is specialized in internet search engines and related advertising services. Google maintained index of website and other online content which is made available through its search engine to anyone with an internet connection. It was submitted that the amount credited by Google India to the account of GIL would constitute a sum chargeable under the provisions of the Act as the payment is in the nature of royalty for the purposes of license to use to the intellectual property rights (IPR). It was submitted that amount credited by Google India to the account of Google Ireland would constitute sum chargeable under the provisions of the Act as the payment is in the nature of royalty for the purpose of license to use Intellectual Property Rights (IPR).

17. Show cause notice under section 201 of the Act was issued as Google India failed to comply with provisions of Section 195 of the Act. In para-3, page 5 of the order, the AO has recorded that the distribution Adword program involves three parties viz, the licensor, the reseller and the advertiser. The licensor is Google Ireland, the distributor is Google India and the end-user is the advertiser. The Assessing Officer by considering the judgment of the Madras High Court in the case of Consim Inidia Pvt Ltd Vs Google India Pvt Ltd dated 30/9/2010 explained the concept of search engine and explained how search engine operate. The AO considering the provisions of section 9(1)(vi) r.w Explanation-2 of the Act read with DTAA concluded that the payment by Google India to Google Ireland is in

the nature of royalty. A reference is invited to Google Adword program distribution agreement considered by the AO at page 15 of the order.

18. As per clause 2.6 of the Adword program distribution agreement, the distributor (Google India) will provide after sales services to advertisers in accordance with the broad instructions, training standards of Google. Clause 3.1 of the Adword agreement provides for Google Ireland to utilise the space through the Adword's program for distribution by Google India to advertisers as set forth. Clause 3.4 provides for minimum level of service as specified in Exhibit -C. Clause 7 of the Adword agreement provides for agreement to mutual nondisclosure agreement which is Exhibit - B to the Adword agreement. Exhibit C to Adword agreement, referred to as service level agreement provides for Google India shall be solely responsible for providing all customer services to advertisers, according to procedures, and in compliance with standards, provided by Google. All advertisers shall be instructed by distributor to contact distributor directly for support, and not to communicate directly with Google. our attention was invited to mutual nondisclosure agreement which is made part of the Adword agreement by virtue of Clause 7. It was submitted in view of the specific obligation to provide after sales support by the Google India to the advertisers and also in view of the service level agreement, the Google India would be providing services as per the services agreement dated 1/4/2004. By reading of the

service agreement dated 1/4/2004 it is clear that Google India has been provided with confidential information as referred to in clause 1.2 of the service agreement and obligation at clause 3.3 to render such services solely for Google Ireland or its affiliates. Clause 5 of the service agreement deals with ownership, clause 5.5 provides for no unauthorised use and clause 5.6 provides for no reproduction. Clause 6 of the service agreement provides for confidential information, access and use of confidential information, agreement not to disclose confidential information, ownership and return of confidential information and injunctive relief. Clause 12.5 of the service agreement provides for rights and duties on termination. From the reading of all the clauses of various agreements in conjunction with the Google Adword program distribution agreement, it is clear beyond doubt that the Google India has been provided license to use IPR for which Google India has agreed to make certain payments to Google Ireland and the same is in the nature of royalty as per the provisions of section 9(1)(vi) of the Act read with DTAA.. The Google Ireland is allowing Google India access to all intellectual property and confidential information and is used by the Google India for activities related to distribution agreement. The obligations under the distribution agreement and the service agreement would make it clear that both the documents cannot be separated from each other. For the purpose of marketing and distribution activities Google India is granted the **right to use** the valuable business asset of Google Ireland which includes

intellectual property in the products and services offered by Google Ireland.

19. DR submitted that Intellectual Property Rights of Google resides in search engine technology, associated software and other features, hence right to use IPR for performing various activities like accepting advertisements and providing after sale services would clearly fall within the ambit of "Royalty".

20. As per the terms of the distribution agreement, Google India has been authorized to sell or offer for sale the Adword program to the advertisers which is nothing but granting of licence to Google India to sell or offer for sale to advertisers. By acquiring the distribution and marketing rights, Google India has been granted licence in respect of Adword's program, licensed to sell or offer for sale certain rights to the advertisers and such rights or the rights to use the Adword program. Therefore the license to use the Adword program by the copyright holder is licensed to market and sell the Adword program. The license to use the Adword program (search engine) which is copyrighted by Google would amount to right to use the copyright.

21. It was also canvassed before us that GIL is allowing the access to assessee all IPRs and confidential information which is soul of distribution activities of the assessee. It was submitted that in the absence of the access to the Google tools, IPRs, software, patented technology and confidential information, it is not possible for the

appellant to render the services to the advertisers. It was submitted that the appellant was given right to use the valuable assets of the Google Ireland which include the product and services offered by Google. It was submitted that Google research engine is a patented technology and the Adword programs, works of Algorithm which itself is patented and the engineering technology associated with that, all falls within the four corners of the Royalty.

22. It was further contended by the learned Advocate that the contention of the assessee that the Adword program is merely a program to sell the advertisement space is contrary to the facts and circumstances and attending features of the Adword program. Our attention was drawn to an agreements entered with the advertiser as well as with the other features of the Adword program. It was submitted that the assessee by acquiring the distribution and marketing rights from Google Ireland in respect of Adword program to the advertisers, is licensed to use the search engine which is copy righted and therefore falls within the definition royalty.

23. It was further submitted that the license to sell, presupposes license being granted to the distributor (Google India). The license to sell enables the Google India to transact the license/right to use the Adword program. The consideration paid is for the license to enable Google India to resell the license/right to use to the advertisers. As held by the jurisdictional High Court in the above referred cases but for the license, the sale of advertisement space to the advertiser by the

Google India in the search engine of Google which is an IP would amount to infringement.

24. Under the distribution agreement the assessee has been granted right to use **trademarks and brand features.** The grant of right to use trademarks and brand features is for the purpose of selling the advertisement space and the license to use the IP being **tool of the trade** for the Google India, right to use Google trademarks and other brand features without any ambiguity would amount to license to use IP and the consideration constitutes Royalty chargeable under section 195 of the Act.

25. Under the distribution agreement the assessee has been granted distribution rights involving transfer of rights in **process.** The entire search engine technology on which license has been granted to Google India for selling advertisement space to the advertisers is a "process". The search engine technology is an IP. Hence the license to use the "process" being IP and consequential payment is "royalty".

26. The distribution agreement was also entered for transfer of **know-how** in view of clause 3.1 of the distribution agreement wherein the Google India has been provided access to internal tool for the purpose of performing the obligations under the Adword agreement. The statements recorded from the persons concerned of the Google India reproduced at page 53 and 54 of the AO's order would make it clear that marketing,distribution and maintenance of Adword program

is the responsibility of Google India involving knowledge of tools and training on its usage, knowledge of trademark policy, add content policy. Such knowledge has been imported through extensive training by Google Ireland to Google India which would amount to transfer of know-how and liable for tax under section 9(1)(vi) of the Act as royalty.

27. It was further submitted that nondisclosure agreement which is Exhibit-B of the distribution agreement would clearly demonstrate that by virtue of the disclosure of the confidential information and access provided to the confidential information to the Google India by Google Ireland, the sums payable by Google India to Google Ireland is for information, know- how and skill imparted to Google India. Further grant of distribution rights involves use of industrial, commercial and scientific equipment. Adword platform is similar to portal running on servers and Adword's platform is based on search engine technology of Google. Hence Adword program is commercial and scientific equipment and without having access to the servers running on the Adword platform, Google India cannot perform its functions/ exploit its rights as per the distribution agreement. Hence the distribution rights include the right to use the industrial, commercial and scientific equipment which are the servers. Our attention was drawn to the case of Cargo Community Network Ltd (159 Taxman 243) wherein it was held that portal and server together constitute integrated commercial and scientific equipment and for

obtaining Internet access to airlines the use of portal without server is unthinkable. Ultimately it has been concluded that payments made for concurrent access to utilise the sophisticated services offered by the portal, would be covered by the expression royalties. Hence in view of the ruling of the AAR, the payment for license to use or for access to portal is royalty under section 9(1)(vi) of the Act.

28. Ld Standing counsel relied upon jurisdictional High Court judgment in the case of Synopsis International Ltd (2013)212 Taxman 454 (Karnataka) Samsung Electronics Ltd (245 CTR (R) 481), CGI Information Systems and Management Consultants (2014) 226 Taxman 319, Authority for Advance Ruling in Skills of Ireland Ltd, Vodafone South Ltd (ITAT Bangalore bench) and ABB FZ-LCC (2017) 83 Taxman.com 86 (Bangalore -ITAT), the amount paid towards license to use IPR is the nature of royalty and chargeable under the Act under section 195 of the Act.

29. On the basis of the above, it was summarized learned Advocate for the Revenue that exploitation of search engine which is an IPR and the said IPR being used by the Google India as tools of trade and therefore is royalty and therefore liable for tax under the Act as well as DTAA.

30. The learned Advocate sought to distinguish the judgment relied upon by the assessee in the matter of Right Florist limited is not applicable to the facts and circumstances of the present case. In the

case relied on by the assessee, the advertiser has only placed advertisement in the search engine and no right in the IPR was conferred on the advertiser. In such circumstances it has been held that payment by the advertiser does not amount to royalty. Whereas in the present case the Google India has been provided access to the IPR and Google India has used IPR as tool of the trade for generation of income without which, it would have been an infringement of the copyright owned/retained by the Google Ireland (licensor). Similarly for High-Power Committee report dated 16/12/1999 and Tax Treaty dated 1/2/2001, it was submitted that payment made by the advertiser directly to the owner of the search engine would not amount to royalty.

Rebuttals against the arguments of DR

31. Ld AR in rebuttal had submitted that the brand features are predominantly commercial rights and are incidental/ consequential to the distribution activity and does not involve transfer of any separate right. In light of the decisions of the Hon'ble Delhi High Court in the case of Sheraton International *Inc(supra) and* Formula One World Championship Ltd *(supra),* the payment cannot be characterized as royalty.

32. Further, ld AR submitted that neither Appellant nor the advertisers have the access to the servers running the search engine. The distributor or advertisers are not concerned with the back end

functioning of the Adwords program which is solely carried out by Google Ireland. Further, ld AR submitted contention of the DR is that the payment is being made for the use of the search engine, the use of such search engine is by the end-user and not by the Indian Advertiser and therefore the contention is also incorrect. The person who uses the search engine to view ads provided by an Indian Advertiser may not necessarily be based in India. Use of software embedded in Google search service by the end user is solely to enable the end-user to use and enjoy benefit of the Services as provided by Google, in the manner permitted by the Terms. Further, ld AR submitted that advertiser is not interested in use of Search service. Objective of the advertiser is to get his advertisement placed along with the organic search results displayed basis the search results. Ad gets displayed once the search by the end user is over and search results are displayed.

33. Ld AR further submitted that the revenue failed to appreciate that the functioning of the Appellant under the ITeS service agreement is separate from that of the distribution function which ought to be treated distinctly.

34. Ld AR submitted that Both the reports of High Powered Committee as well as Technical Advisory Group have concluded that the payments in relation to advertisement fees are not in the nature of 'royalty'. Accordingly, when the payments made directly by advertisers to Google Ireland cannot be regarded as royalty,

the payments made by the distributor for the same ad space cannot be characterised as royalty.

35. Ld AR submitted that the minimum levels of service specified in Exhibit C cast obligations on GIL as a well as on the Appellant to render the services. In terms of Clause 2.6 of the Reseller agreement, the Appellant is required to provide after-sales support. In terms of Exhibit C, the advertisers are to contact the Appellant for support and the terms in the Exhibit only specify the minimum levels of service to be adhered to by the Appellant whilst communicating with the customers. The terms in the Exhibit cannot be read de hors the main agreement to conclude that Exhibit C is linked to the ITES agreement and neither does a reading of the Exhibit suggest that, even remotely. What is envisaged under the said Exhibit is only that the Appellant responds to all routine queries of customers without GIL having to do the same. Typically, sales and billing related questions are to be responded to the by the Appellant. In case of advertiser issues or technical issues, GIL would have to respond to the customer queries. Evidently, no right to use any IPs is granted to the Appellant. Further ld AR submitted that the reliance on clause 3 of the NDA by ld DR is also of no avail. Clauses containing protection of confidential information are generic to most agreements and this clause for protection per se cannot establish that there is a use of right to use any IPs. The Confidentiality clause is included for the purposes of protecting

information which may be exchanged by either party to the agreement (not Google Ireland alone) in the course of performing the obligations under the Reseller agreement. This cannot per se lead to the conclusion that there is a positive action of transfer of right to use/ imparting of confidential information by GIL to the Appellant. In any event, read with clauses 7 and 8, the information disclosed under the Reseller Agreement would if at all be user data which, at best is disclosed to the Appellant, without there being any right to use the same for any commercial exploitation, and which, is in any case, not in the nature of intellectual property.

Discussions and findings

36. We have heard the rival contentions of the parties and perused the record. We shall be collectively deciding all the grounds no 1-11 together as all the grounds are interlinked and interdependent. Before we adjudicate the all these issues, it is important to understand how the Google Adword program functions and work. During the course of argument, we have directed the parties to file detailed submissions on how the Google Adword program functions, tools and space used by assessee as well as advertiser for posting the advertisement on the Google search engine or displaying on the website.

37. In response to our pointed queries and directions the assessee, had filled the written submissions and in written submission in chapter 2, the assessee addressed to what is Google program. We are

reproducing herein below all these submissions made by the Ld. AR in this regard as under:

II. ABOUT ADWORDS PROGRAM

1. What is Google Adwords program?

Google Adwords program is a 'self-serve' online advertising service provided by Google (reference hereinafter to Google would include Google Inc / Google Ireland as the context may require) for business wanting to display ads in relation to their websites on Google property or third party property (advertising space'). The Adwords program enables advertiser to create, change and monitor the performance of 'sponsored links' to set a budget for advertising and only pay when people click the ads.

This, the advertiser can do by providing the "text" of the advertisement and by providing/registering a search term or phrase or a "keyword" which is relevant to the advertiser's website, so that when the said term or phrase is searched for by any user on the Google Search Engine, the Advertisement ("Ad") of the advertiser may also get displayed on the search results page in addition to the organic search results, though separately identified as 'Sponsored Links' or 'Ads'. A user thus gets an opportunity to make an informed decision as to which website he wants to explore.

Businesses that use Adwords can create relevant ads using keywords or phrases matching with the terms or phrases ('search query') that people who search the Web using the Google search engine. Multiple advertisers can provide/register the same Keyword and Google does not "sell" these Keywords nor does it allow only one advertiser to exclusively use a specific Keyword and restrict others. These Keywords are merely textual characters or strings that are used to algorithmically trigger advertisements through the "fresh flower delivery" as one

keyword in the Adwords campaign. When some user searches Google using the search query with phrase "fresh flower delivery" or a similar term, the advertiser's advertisement might appear next to Google organic search results.

The main components of Ad Rank are bids and ad relevance, the quality of the advertisements, keywords, and website as measured by what is referred to as the Quality Score. In this regard, the quality and relevance of the keywords, various parameters of landing pages (such as loading speed, content relevance, positioning of relevant information, website design, etc.), and the advertisement are every bit as important to the advertisement 's rank as the amount the advertiser is willing to spend. Therefore, even if an advertiser's competitors have higher bids, an advertiser can still win a higher position at a lower price by using highly relevant keywords and advertisements. Therefore, the price bid is not the only determinant as to whether an advertisement appears and where an advertisement appears - this enhances the user experience.

2. ***Who provides the advertisement space to advertisers in India under the Adwords program***

Google Ireland Limited ('GIL') markets and distributes the Google Group's products and services to customers in the Europe, Middle East and Africa and Asia Pacific regions. Google India Private Limited (GIPL) is appointed by Google Ireland Limited (GIL) as a non-exclusive authorised reseller of advertising space under the Adwords Program to the advertisers in India effective December 2005.

3. ***What are the steps involved for an advertiser in India to set up Adwords Account and Adwordise on Google?***

a. Step 1 (Email account & website)

In order to setup an Adwords account and begin advertising on Google, the advertiser needs an e- mail address and a website to which the user can be directed to from the Google search results page that displays the advertisement . (Please refer Annexure Page 212 of Paper Book Volume.

This step is generic to any advertiser in the world who wishes to Adwordise through the Adwords Program. The Adwords account is set-up on the servers owned/ hired by Google outside India. Accordingly, Google India does not have any role to play at this stage of the Adwords account set-up process. The advertiser would be first required to create a website having details of their products / services.

b. Step 2 (Setting up of Adwords Account basis Location, Time zone and Currency)

Advertiser will then be required to set up Adwords account ('https://Adwords.google.com). Once the email address is provided, the advertiser is required to select his location and time zone along with the currency that the advertiser wishes to use (Please refer Page 213 of Paper book Volume.

This part of the account set-up process is common for Advertisers across locations and not specific to India based customers. It is only after India is selected as the billing address and Indian Rupee as a billing currency is selected that Google India gets involved.

c. Step 3 (Selection of Advertisement Campaign Settings)

Pursuant to updating the above mentioned preferences, the Advertiser moves to the next step where details of the Advertising campaign would need to be keyed in by the Advertiser.

The following information is sought from the Advertiser to create an Advertisement campaign

- **Locations to be targeted in the advertisement campaign**

- **Language in which the advertisement should be published**

- Bidding and budget: The Advertiser has an option to submit a bid amount for a specific keyword that he wishes to use. The Advertiser also provides its budget rate/cost per click to display the advertisement and offer to pay to Google when the surfer/user click on the advertiser's website link. The advertiser can also fix the maximum amount of his budget. The advertiser pays only when the user clicks on the advertisement and visits the advertiser's website for detailed information on products/services or for purchasing such products/services.

- The Advertiser is also given an option to customize the target audience by selecting certain specified Ad extensions which enable the Advertiser to post additional information not forming part of the Advertisement content, such as location information, phone number, etc.

- Ad Group name: The Advertiser is required to identify the advertisement campaign through an Ad Group name (to be keyed in by the Advertiser

himself). This name would only be used to identify a specific advertisement campaign

•Form of Advertisement : The Advertiser is required to select whether the advertisement should be in the form of text, image, etc. and accordingly, provide the relevant headline, description and destination URL

•Keywords: Subsequently, the Advertiser is required to choose the keywords basis which the respective Advertisements can be displayed on the Google search results page

As mentioned above, the above information is submitted by the Advertiser directly and is stored on the servers outside India. Google India does not play any role in the uploading of the advertisement on the servers belonging to Google Ireland and does not have any access to these servers.

d. Step 4 (Billing details)

Under this section, the following payment methods would need to be selected by the Advertiser:

- Whether automatic or manual payments
- Whether through credit card, net banking or cheque

These options are also required to be selected by the Advertiser on the Google website, as per his discretion and without any interference from Google India Private Limited.

e. Step 5: Acceptance of Advertising Program Terms

This step requires the Advertiser to accept the Advertising Program Terms for the Adwords program.

These terms may be accepted by the Advertiser by selecting the box "Yes, I agree to the above Terms and Conditions". Where the Advertiser selects Indian Rupee as the billing currency (basis the country selected in Step 2) the Adwords program will automatically direct the Advertiser to the Advertising Program Terms relevant to Google India Private Limited.

When contract is entered into by Google India Private Limited, advertiser is bound by all Adwords program terms & conditions and Google Ireland Limited is bound to place th advertisement Subject to ad review process, pursuant to the obligation cast on Google Ireland Limited under the Amended and Restated Google Adwords Program Distribution Agreement dated 12 December 2005 (referred to as 'Distribution Agreement'). When the Advertiser accepts the Advertising Program Terms, the said terms bind both the Advertiser as well as Google India Private Limited into a contract. Google Ireland would provide the relevant information contained in the Advertiser account to Google India, as specified in Clause 5.1 of the 'Distribution Agreement' to enable Google India to collate the necessary information for its purpose and to prepare and share the requisite monthly reports that may need to furnish under Clause 5.2 of the Distribution Agreement.

4. How are Ads uploaded on Google Adwords account?

Process to upload Ads on Google Adwords account is as under:

• Sign in to your Adwords account at https://Adwords. google.com click the ***Campaigns*** tab, and then click the name of the display campaign you want to work on.

• On the "+ AD" menu", click ***Image ad.***

• In the "Choose how to create your image ad" dialog, click ***Upload an ad.***

• "Upload image ad" form, click ***Select an ad group,*** search for the ad group you want, and then click that ad group to add it.

• Drag images, Flash files, or HTML5 ad files into the gray box or click ***Browse files.***

• Enter a ***display URL*** and a landing page.

• Ensure that the Ad complies with all Adwords program policies

• Preview your uploaded ad.

• If you want the ad to show on mobile devices, select the ***Mobile*** checkbox.

• Click ***Save.***

• To edit your image ad, find your ad on the "Ads" tab and click the pencil icon next to the ad that you want to edit.

• Change the ad name, display URL, or landing page, and then select whether you want the ad to show on mobile devices.

• Click ***Save.***

All the aforesaid steps are carried out by the advertiser or if it so desires it could take assistance of a Google certified partner to assist him in the process to whom the advertiser pays a separate fee pursuant to an independent contract.

5. What happens to the Ad once it's uploaded on the Google Adwords Account?

After advertisement is created or edited by the advertiser and uploaded on data centers outside India, the review process begins automatically by Google Ireland Limited. All aspects of the ad are reviewed, including the headline, description, keywords, and website. These aspects are reviewed according the Adwords advertising policies. Most ads are reviewed within one business day, and some ads are eligible to run while in review.

If advertiser ad has any issues, it will stop running. To help get ad running again, advertiser is notified of the policy by Google Ireland Limited and informed what the advertiser can next do to get it running again.

Once an advertiser registers for Adwords through the online process and places his advertisement for display, the advertisement (i.e. the data) is reviewed through an automated system. An advertisement which is not processed through the automated system is sent to service providers in different jurisdictions (ITES team) for review/ conformity with the Google Editorial Guidelines. The purpose of the ITES outsourcing service engagement is to review the Ads specified for manual review (originating from various countries) for conformance with Google's editorial policy/guidelines.

These Ads are reviewed in accordance with Google policies/ guidelines. It is submitted that appx 94% of the Ads are automatically reviewed by the automated system outside of

India. Appx 6% of the Ads come for manual review performed. The role simply involves reviewing the Ads sent for manual review and specifying whether Ads uploaded by the Advertiser is in accordance with the Google policies/ guidelines. The Ad review outsourcing function is carried out for all global customers including India. Ad review teams are based in various jurisdictions like India, Dublin, China, Japan, US, Korea etc. Ad review team consists of Google employees and third party vendor employees who are graduates from various colleges.

Google India performs outsourced ad review services under an ITES agreement with GIL for which Google India is separately compensated by GIL. These services mainly involve IT-enabled data processing work. The said data i.e. Ads is placed by the advertisers (originating from various countries) and routed to Google India through a workflow based on language and time zone from GIL.

Process flow chart in relation to Ad review is enclosed as ***Exhibit 1.***

6. How are Ads placed on Google website

Ads are transmitted through internet from advertiser to data centers outside India. Where a user enters a query on search engine, search Engine shows various search results in response to the user's search query. Google algorithm based on system stored on data centers outside India alongwith ranks and displays search results, and separate algorithm that are similarly based on systems outside India ranks and displays puts in the most relevant ads based on user query. Ads are placed on Google search website basis the Adwords auction process detailed hereinabove.

7. What are Google Data centers & algorithms and how are they used for Adwords program?

Google provides its products and services using its proprietary software (algorithm) and hardware infrastructure housed in data centers outside India. These data centers and algorithm forms core of Google products/services. Google India has no role whatsoever in owning and operating the data centers and algorithm.

Google's infrastructure simplifies storage and processing of large amounts of data, eases deployment of global products and services, and automates much of the administration of large-scale clusters of computers.

This infrastructure also shortens the product development cycle and lets Google pursue R&D initiatives more cost-effectively.

Although most of this infrastructure is not directly visible to users, it is a part of providing a high-quality user experience and enabling significant improvements in the relevance of the search and advertising results

Algorithms

One of the key drivers of Google's success is the technology behind its algorithm: the PageRank technology. Historically, search engines relied heavily on how many times a word appeared on a web page to determine relevance of that page to a user's query. Google's searches, however, used the PageRank algorithm to examine the entire link structure of the web and determine which pages are most important, creating greater accuracy and relevance.

8. How can advertiser manage its Adwords account?

Advertiser needs to manage Adwords account on its own or it can seek services of Google certified Partners/ marketing agencies.

Google certified Partners/ marketing agencies help with a range of services, including managing advertisers Adwords account or developing website, help save time and maximize return on investment. Google Certified Partners are agencies, marketing professionals, and online experts who have been certified by Google to manage Adwords accounts. Companies who qualify for Partner status earn the Google Partner or Premier Google Partner badge. The badge shows that a company has demonstrated Adwords skill and expertise, met Adwords spend requirements, delivered agency and client revenue growth, and sustained and grown their client base.

38. Beside filling these written submissions, no other literature or books or documents were filed by the assessee or by the Revenue for the benefit of the Bench so that the Bench can appreciate the working of Google Adword and Google analytics, as the parties have failed to bring any tangible material except in the form of written note mentioned herein above, the Bench, had gone through the books available in public domain on Google Adword and Google analytics and also gone through the website of the Google and the Adword links therein. On the basis of the above, our understanding of how the Google Adword functions is as under:

i. The Google Adword gives an opportunity to the advertiser to reach its target audience with the advertising messages. The text based ads are displayed on Google search results

however the Google Adwords can also be used to message out in other forms including image, audio and videos. Another way of advertisement is displaying the advertisement as people browse and engaged with the content online.

ii. The online advertising is different from the traditional advertising like advertisement in magazine, newspaper and Television as the online advertising is measurable on cost per click basis (CPC) and also gives the advantage to the advertiser to target the particular class into age, sex, language, religion, region etc,.

iii. The online advertising (Adwords) is a patent tool used by the advertiser in conjecture with the various sophisticated tools and IPR's of Google. Google gives the platform, techniques, data based, the IPR, I.P. address and also suggest potential user/client of the advertiser.

iv. The search advertising with the help of search engine, allows the advertiser to target the people as they search for key words. This technique is being used in the search engine, enable the advertisement pop up if the key words are searched by the people . Advertisement would be shown to the target consumer advertisement with the help of various tools, which include showing of advertisement with keywords, phrase, and broad words with generic or same meaning.

v. The Google search engine or search based campaign gives high conversion rate and better return of investment then display of advertisement on television rate, newspaper and magazine.

39. As one can experience whenever he/she is searching on a search engine the hotels in Bangalore then various advertisement would

display in the search results. In this process of display of advertisement search is focused on key words that people may be entering into search engine. Thus for displaying advertisement, the algorithm the PageRank technology is used in Adwords program to target content, things on display sides, based on behavioral targeting of servers along with website surfers . Another mode of advertisement by the Google Adword program is a social advertising program where the advertisements pop up at Face book, Twitter and other social media with the help of keywords or user profile. In the case of the social advertisement, the advertisement campaign is targeted based on the geography, category of people, area of interest etc.

40. The Google Adword has various benefits namely it shows (a) relevant ads to the people (b) target to the select audience. (c) It causes minimum advertising expenses and (d) it is only payable when people are engaged. It gives the access to the advertiser the tools of the Adword program which can be **accessed** through the gateway of Google India / appellant. Through the use of patented technology with the help of appellant gate way, Adword platform gives the advertiser to choose the preferred time, season of the year when the ads are to be shown.. In fact after advertiser accept the terms, thereafter assessee gives the advertiser accesses to the various tools of Adwards program. The assessee in its written submissions had accepted this in the following manner :

> *When contract is entered into by Google India Private Limited, advertiser is bound by all Adwords program terms & conditions and Google Ireland Limited is bound to place the advertisement Subject to ad review process, pursuant to the obligation cast on Google Ireland Limited under the Amended and Restated Google Adwords Program Distribution Agreement dated 12 December 2005 (referred to as 'Distribution Agreement'). When the Advertiser accepts the Advertising Program Terms, the said terms bind both the Advertiser as well as Google India Private Limited into a contract. …….*

41. The time zone and display time of advertisement is identified and allocated by Appellant to the advertiser with the help of the assistance of the Google Adword program. Adwords program is more focused and targeted in advertisement campaign which results into more attention, engagement, delivery and conversion. which is only possible on the Google network with the access of tools of search engine and Google analytics.

42. Appellant / Google is having the access to the I.P. address of the desktop or laptop or I.P. address of the tablet, photographs , time spent on a web site, eating habits wearing preferences etc. With the help of I.P. address, Google search engine is having the access to various information and data pertaining to the user of the website in the form of name, sex, city, state, country, phone number, religion etc,. Besides the above basic information, the Google is also having the access of the history of the users as well as to the behavior of the persons searching Google search engine.

43. Based on various inputs mentioned above and contents of more than two million websites the appellant / Google was able to provide the effective focused ad campaign to the advertisers. The Adword programs and tools therein give the advertiser to pick up the key words, phrases which are similar in nature and germane, which are in a digitalised tabulated form / grouped together. The advertiser is having the access to this Google analytics programme (patented and specialized software) through the appellant. Whenever one particular key word is searched, the targeted consumers will be shown the ad and by clicking on the ad, the consumers will be landed on a web page. The selection and the display of the key word, play a pivotal role in the advertising campaign and for the purpose, Appellant / Google has provided the optimization and technique to the advertiser. Google (appellant as service provider under the agreement) uses its expertise and the information within its domain and control, to suggest the key words based on the recent marketing material and need of the advertiser. The appellant also suggests periodical review of the website home page, product and services which can be bundled together. The key word planner is a part of the appellant / Google technology tool. It also suggests the traffic forecast of the list of key words, multiple key word placed to get new key word ideas. Thus, the key words or planner which will display a list of additional key word suggestion. Based on initial key words, the advertiser enters and the tools shows various key word suggestions automatically grouped into different ad groups. This is only possible as Appellant permits the use

of information, data and key planner to the advertisers which is patent and protected software of the Google. The key word planner also suggests the suitability of the key words which are useful in the particular month of the year. The advertiser is able to plan its campaign for optimization or for the purpose of getting more impression and conversion based on keyword planner. Based on this impression and forecast, the advertiser is able to bid on the key words.

44. The display of the advertisement based on the key words, is dependent upon the auction price paid by the advertiser. The key word bid at highest rate by the advertiser would be shown at the top of the search results and therefore, is likely to fetch more visibility and attention.. With the help of tools of Google, the advertiser as well as the appellant have an access to the impact of change of key words on the likely impressions of the advertisement i.e. how the change in key words would affect the trafficking of the impression or the visitor to website of the advertiser.

45. With the help of key word matching, various approaches are being adopted by the Google Adword program i.e. broad match, phrase match and exact match. The exact match for example allows the advertiser to focus on the optimization phrase on the individual key words and it yield the best result possible. Whereas the phrase

match is more processing than the broad match and the broad match provides the greatest possibility of coverage of the advertisement.

46. The Appellant facilitate the advertisers to start the campaign of advertising initially with the help broad match thereafter with phrase match and thereafter with exact match. Now with the help of the key word management, the Google Adword program takes care of the miss spelling, singular plural, abbreviation, acronyms (short word) stemming. For example, if the advertisement shows the formal shoes, then the key words are formal plus shoes. if it is broad match key words then the advertisement will show formal shoe, sport shoe, black dress shoe, party shoes etc. However if the advertiser had only opted for exact word match, then search result would only show a formal shoe.

47. Appellant helps the advertiser with the help of tools of Adwards program to include or delete various variation of the key words in the realm of advertisement campaign and similarly the advertiser may with the help of Google tool can avoid the unnecessary traffic on its website. For example, if an advertiser does not want the visit of the a surfer who is searching the service apartment on rent basis and only wants that the person surfing and the person who is surfing to buy the apartment, then the appellant can help him by putting negative words of rent in the key-word search. therefore the only person who is searching for service apartment would be landing on to the

advertiser's web site and the person who is searching on rented service apartment would not be visiting the web site of advertiser i.e advertisement would not be displayed to him in the searched results . Thus with the help of this technique of not showing the particular key word there would be effective improvement in CTR (Click Through Rate) i.e. the website would be saved from unnecessary visit of the non-convertible or non-interested visitors. Similarly the same *modus operandi* can be used for negative phrase and negative exact match.

48. Likewise if the advertiser is selling in leather cover for iphone then the advertiser may not like that the person who is looking for leather cover for another brand may visit the website of the advertiser. Therefore, the negative words can be used to avoid to improve the CTR, with the help of these tools. By using these tools, Appellant had been giving various suggestions to the advertiser to include various key words.

49. The Google Adword program is also having Google analytics which is connected with the Google Adword programme and which is a potential patented tool to target the key words and the negative key words. This is the USP of the Google Adword program, which is maintaining thousands of different key words used by the people to search the website and based on this user behavior, the Google analytics suggests the appropriate key words to be used by the advertiser for encouraging the traffic on the website. Similarly the Google analytics also uses the same data to filter out the negative key

word on the basis of which an unattended or unwarranted persons have landed on the website of the advertiser. Appellant is using all these tools in conjectures with advertisers at the time of granting the back hand services to the advertisers, as the Appellant is having access to all these data, information etc.

50. Appellant suggests the various strategies namely advertisement campaign to create awareness about the product and services. There are different advertisement campaigns for engagement, conversion and retention. In all the advertisement campaigns i.e. for awareness, engagement, conversion and retention, different strategies tools and suggestions are suggested by Appellant and those strategies are focused depending upon requirement of the advertiser. For example, if a new product is to be launched, then the advertiser would like to go for awareness program to display the features of its new upcoming products. However if it is for engagement, then a different strategy and different advertisement content is provided, if its for conversion, then different strategies are provided and if it is for retention of the old customer, then refer a friend suggest a friend etc., are being suggested.

51. For all these strategies, the Google is having a targeted geography wise, region wise, gener wise, class wise data base tools. With the use of these tools there will be an increase of the CTR (Click Through Rate). For that purposes the expertise and the data base of the Google is essential. With the help of these strategies, the targets can

be fixed by the advertiser with the help of Google Adword and the target can be fixed like where it is to be displayed (tablet, desktop, mobile, ipad etc.,) search network country, state, city, postal code ad schedule of the day, hour and the day of display. . Like for example, if a doctor is free during the noon time of every Friday, then the ad company can be strategized for showing his ability during the morning / noon time of Friday or on the evening time of Thursday. Assessee with the help of Google analytics gives the accurate impression of persons visiting the advertisement and also provide how many are converted. The Google analytics optimize the impression, based on the user behavior and this needs to be a major conversation and campaign, which results into return for investment. There are various other features of the Adword program which shows that the program is having embedded tools to display the advertisement of the advertiser to the targeted consumers.

52. On the basis of above, in our view the agreement between the assessee and the Google Ireland was not in the nature of providing the space for advertisement and display the advertisement to the consumers. As per our understanding if the agreement was merely for sale and marketing for providing the space for advertisement, then in that eventuality, it should be treated as an agreement akin to an agreement for advertisement in newspaper / television.

53. If we look into the advertisement module of Adword program stated herein above, then we will come to an irresistible conclusion that it is not merely an agreement to provide the advertisement space but is an agreement for facilitating the display and publishing of an advertisement to the targeted customer. If we look into the submission made by the learned AR, it is clear that the advertiser, selects some key words and on the basis of key words, the advertisement is displayed on the website or along with the search result as and when the customer selects the key words relatable to the advertisement. The module as suggested does not merely work by providing the space in the Google search engine, but it works only with the help of various patented tools and software. As we have analyzed detailed functioning of Adword program, it is clear that with the help of the search tool/software / data base, the Google is able to identify the targeted consumer/person as per the requirement of the advertiser. If only service rendered by the assessee was for providing the space then there is no occasion of either directing/ channelizing the targeted consumers to the advertisement of the advertiser. In our view truncated search results are displayed keeping in mind the commercial needs of the advertisers.

The Assessee / Google, is having the access to various data with respect to the age, gender, region, language, taste habits, food habits, cloth preference, the behavior on the website etc. and it uses this information for the purposes of selecting the ad campaign and for maximizing the impression and conversion of the customers to the ads of the advertisers. Thus the activities of the assessee are not merely restricting to display of advertisement but is extended to various other facets as mentioned herein above. In other words, by using the patented algorithm, appellant decides which advertisement is to be shown to which consumer visiting millions of website / search engine. Therefore, in our view, it is not the advertisement or selling of the space rather it is focused targeted marketing for the product/ services of the advertiser by the Assessee/Google with the help of technology for reaching the targeted persons based on the various parameters information etc,. Had it been merely providing the space then the other features as deliberated and discussed hereinabove would not be required. Moreover in our view, the space on search engines / websites are readily available and therefore there was no occasion to market and sell it. Any person with the help of buying the static IP addresses can upload the data/ advertisement in the endless web world. Therefore, in our view, the agreement entered between the assessee and the Google India is not merely for providing the advertisement space but was in the nature of providing the services for displaying and promoting of the advertisement to the targeted consumers.

54. As recorded herein above the Google is working on various platforms and the said platforms uses various customer data for targeted ads campaign. The files of these customer data are shared for running the campaign by the Appellant with the advertisers. The popular ad campaigns of Google is “like- alike ad”, “customer-audience ads”, etc where details of like-set of users are provided by the Appellant for running the targeted campaign. Similarly target marketing campaigns are done with the help of customer audience (where the client of advertiser is having its own data and wish to advertise to them). Like, if ice cream vendor wanted to go for launching of new ice cream product, it may approach Appellant /Google to share data with similar user profile or liking for ice-cream, the Appellant in possession of such data shares this data with the advertiser – ice-cream produce manufacturer. Based on this ice cream manufacturer formulates its marketing campaign with the help of Appellant and other channel partners .

55. In our view IP of Google vests in the search engine technology, associated software and other features, and hence use of these tools for performing various activities mentioned herein above, including accepting advertisements, providing before or after sale services, clearly fall within the ambit of "Royalty". Therefore, contention of the assessee is not correct when the assessee is alleging that the user of the search engine is end user

and not the Appellant or the advertisers and therefore it will not fall within the ambit of "Royalty".

56. Further from the reading of agreement dated 12/12/2005 it is clear that :

- As per clause 2.6 Appellant will provide after sales services to advertisers in accordance with the broad instructions, training and standards of Google.

- As per Clause 3.1, Appellant is provided by the Google Ireland to utiliz space through the Adwords program for distribution to advertisers .

- As per Clause 3.4, provides for minimum level of service as specified in Exhibit –C, Appellant shall be solely responsible for providing all customer services to advertisers, according to procedures, and in compliance with standards, provided by Google. All advertisers shall be instructed by Appellant to contact it for support, and not to communicate directly with Google.

- Clause 7 providefor mutual non-disclosure agreement (Exhibit – B) to the Adword agreement.

- As per clause 8, GIL owns all right, title and interest in and to all information data including the user data, collected by Google related to advertisers in connection with the provisions of Adword programme. Further it is the duty of the appellant to maintain all user data in accordance with local laws and regulations.

57. Assessee has been providing after sales support to the advertisers. It is not the case of Appellant that it is not providing after

or before sale services to the advertisers. It is the case of the Appellant that ITEs segment of the Appellant provids services to Google Ireland to meet the queries of various clients of Google Ireland worldwide and for that purposes the access to IPRS, confidential information and NDAs are there.

58. However as per the agreement dt.12.12.2005, the primary responsibility is on the Appellant to provide after or before sale services, after having access to user data, IPRS, secret formula, process, software and confidential information of Google Ireland, in its own capacity under the agreement dt.12.12.2005 and not under the agreement dt.01.04.2004. The appellant, for the purposes of managing its own affairs can afford to provide these services to the advertiser through the route of agreement dt.01.04.2004, but the rendition of services by the appellant to the advertisers in India are obligations under the agreement dt.12.12.2005 and not under the agreement dt.01.04.2004. The substance of the agreements is to be given precedence over the form of the agreements.

Clause 6 of the service agreement dt.01/4/2004 provides for confidential information, access and use of confidential information and further provides not to disclose confidential information, ownership and return of confidential information and injunctive relief.

59. In our view without exercising its right under this agreement, (1.4.2004) the obligation of the Appellant under the agreement dated

12/12/2005 and under the appellant-advertiser agreements cannot be discharged. Therefore the AO was right in relying on this agreement dated 1/4/2004 for the purposes of bringing the case under Royalty, as per the provisions of section 9(1)(vi) of the Act read with DTAA.

As per clause 8 of the agreement dt.12.12.2005 mentioned herein above, the distributor is under an obligation to maintain the user data and therefore is having access to such data. The said user data is being used by the appellant for discharging its obligation towards the advertisers and the claim of the assessee is wrong that it does not have the access to the user data.

60. Now coming to the next argument that space of advertisement is being sold by the assessee to the advertiser, Adword program, is working on various parameters, variables, dynamics and using various permutation and combination to show the advertisement to targeted consumers. The advertisements on Adword program are changing on day to day, week to week or month to month basis. The online bids are required to be placed by the various competitors on dynamic basis. If we assume that the space is sold by the assessee to the advertiser, then there is no question of bidding or out- bidding for running or displaying of the advertisements. The inter-se bidding among the advertisers for displaying the advertisement in real-time basis, clearly shows that the space is not sold by the assessee, rather the placement of the advertisement to a particular targeted consumer at a particular

time is bided among the advertisers and for that, services were rendered by the appellant with the help of patented Adword program . If one advertiser bid for the particular key word like sport shoes higher than the other competitor, then the advertisement of that sport shoes would be displayed first in comparison to other competitors. However if in the next week there is sale for the product of the second bidder pertaining to sport shoes, the second bidder may bid higher in comparison with the first bidder, In that eventuality, the advertisement of the second bidder would be displayed first on the search result, in comparison to the first advertiser. Thus there was no sale of ad space on the web for displaying of advertisement on a particular place / site. Even otherwise, if we consider that the appellant is selling advertisement space then, at which location/ web place, the said ad- space was sold by the appellant to the advertiser,. It is the case of the assessee that the ads are stored in the servers situated outside India. In our view, the appellant has not sold the storage space on the server outside India nor it has sold the identified / demarcated ad on the web site / search engine. Further if the ad-space is sold, then the Adword program would be incapable of functioning as the advertisement would be shown to various locations, persons and targeted consumers. In our view, there is no sale of space, as concluded hereinabove rather it is a continuous targeted advertisement campaign to the targeted and focused consumer in a particular language to a particular region with the help of digital data and other information with respect to the person browsing the search engine or

visiting the website. Further, the argument of selling the space is not available to the assessee and we are of the opinion that it is not merely selling the space but it is rendering the services by making available the technology permitted by the Google to the appellant and permitting the same to be used by advertiser. For purpose of targeted focused advertisement campaign by using the gateway of Google India / assessee. Thus the activities clearly fall within the ambit of 'Royalty' as mentioned in Income Tax Act and under DTAA.

61. In our view though Appellant claimed to be separately earning revenue from ITES segment, under a separate outsourcing service agreement with Google Ireland which is independent of the distribution of advertising space to the advertisers in India, we are not in agreement with the same.

62. Under the advertisement distribution agreement, it is the prime responsibility of the Appellant to give post and prior sales service for resolving the issues of the advertisers, and to ensure due compliances of applicable laws. All these functions are to be discharged by the Appellant through it ITES segment. Further inputs from ITES are always required in the business model of Appellant, without which there cannot be any targeted marketing for advertisements and promotion of sales of advertisers.

63. Therefore, the services rendered under ITES agreement cannot be divorced with the activities undertaken by the assessee under the distribution agreement. Both the agreements are connected with naval chord with each other. The assessee was duty-bound to provide as per the distribution agreement various ITES services, which the assessee had wrongly claimed to have been provided not under the distribution agreement, but under the service agreement. This is only a design / structure prepared by the assessee to avoid the payment of taxes.

64. The appellant cannot be compensated by the GIL for rendering the services to itself or for rendering the services which the appellant is required to render under the distribution agreement. The use of intellectual property is embedded in the Google Adwords programme which is necessary to be used by the appellant for rendering the services prior or post sales of the advisement space under the distribution agreement or service agreement.

65. As is clear from the above, the appellant was using the customer data not only for rendering the services under ITES but also for promoting marketing and distributing the ad space on the search engine and websites. The customer data is a confidential data which is in control of the Google, which is maintained by the appellant as well and the entire Adwords Programme works around customer data, users profile etc. It is inconceivable to run the Google / appellant marketing programme without having access to the customer data.

Therefore the argument of the assessee that it was only using customer data, IPR etc., for rendering the services relating to ITES is incorrect. In our view, the conclusion of the authorities below that the use of the confidential clause and confidential data by the appellant was correct. Therefore in our view amount was being paid by the Assessee to Google Ireland for the use of patent invention, model, design, secret formula, process, etc .

66. It was further contended by the learned AR that there is no transfer of the trademark or copy right of Google to the assessee and therefore it will not fall within the purview of the royalty. It was submitted by the learned AR that there is no specific transfer of any patent trademark to the appellant and the use of Google trademark and other brand features referred in the distribution agreement are merely incidental to unable the appellant to distribute the ad space in India.

67. It was submitted by Assessee that mere use of name of brand for procuring ad contracts would not amount to use of trademark and, hence, even assuming that a part of the price paid by the Appellant to Google Ireland can be characterized as a payment for the alleged use for trade mark such income would not be liable to tax as royalty under the provisions of the Act . For this purposes the Appellant relied upon financial and submitted that no part of the said sum of Rs. 119.82 crores was the payment for use of trademark, as the Appellant was only having a right to use the trademark for distribution purpose. Assessee submitted that no right to

commercially exploit its trademark was given by the GIL and therefore, having regard to the following decisions of the Hon'ble Delhi High Court, the payment cannot be characterized as a payment by way of royalty. In any event, no payment as such is made for the use of the trademark.

Sheraton International Inc v DDIT [2009) 313 ITR 267 (Delhi HC)

"In view of the aforesaid findings of the Tribunal that the main service rendered by the assessee to its clients-hotels was advertisement, publicity and sales promotion keeping in mind their mutual interest and, in that context, the use of trademark, trade name or the stylized 'S' or other enumerated services referred to in the agreement with the assessee were incidental to the said main service, it rightly concluded, in our view, that the payments received were neither in the nature of royalty under section 9(1)(vi) read with Explanation 2 or in the nature of fee for technical services under section 9(1) (vii) read with Explanation 2 or taxable under article 12 of the DTAA. The payments received were thus, rightly held by the Tribunal, to be in the nature of business income. And since the assessee admittedly does not have a permanent establishment under the article 7 of the DTAA 'business income' received by the assessee cannot be brought to tax in India. The findings of the Tribunal on this account cannot be/aulted. The Tribunal pointedly observed that there was no evidence brought on record by the revenue to enable them to hold that the agreement was a colourable device, in particular, that the payments received were for ***use*** *of trade mark, brand name and stylized mark 'SY'*

Formula One World Championship Ltd. v CIT [20161 76 taxmann.com 6 (Delhi HC):

> *"There is no doubt that the main object of* ***the RPC*** *and the relevant provisions of the ALA* ***was not the permission to use the trademarks, but granting and designating Jaypee as the promoter*** *of the event and laying out the rights of the parties, particularly FO WC as regards the event, the spaces to be made available to it exclusively, the sole and exclusive rights over all event related activities, the right to exploit them commercially, etc.* ***The use*** *of* ***the mark on the tickets sold by Jaypee was only incidental.*** *The AAR's findings that the use of the mark and intellectual property rights benefitted Jaypee, which paid for them, is entirely erroneous. Jaypee permitted use, as it were, was for a limited duration and of an extremely restricted manner; this is contained in the definition of emitted use' in the ALA.As event promoter and host Jaypee had to publicize the F] Grand Prix Championship. Therefore, it was bound to use the F] marks, logos and devices; however, it was not authorized to use the marks on any merchandise or service offered by it. This condition, in the opinion of the court, places the matter beyond the pale of controversy; the use of the trademarks were purely incidental. The conclusion of the AAR is therefore, incorrect. The answer to the question is that the amounts paid to FOWC by Jaypee were not 'royalty' within the meaning of article 13 of the DTAA, as they were business income and could not be brought to tax under the head of 'royalty.'*

68. On the other hand ld Counsel for revenue had submitted that contention of the assessee is not correct, as the use of trade mark is not incidental and hence amount to royalty. The assessee has acquired a right under the distribution agreement to sell the advertisement space in the search engine which is an IPR including the trademarked. The assessee is using the distribution agreement coupled with IPR as tool of the trade and hence the

payment towards use of trademarked is also in the nature of royalty and liable to tax under the Act as well as under DTAA.

69. The reliance on the judgment of the Delhi High Court in the case of Sheraton International 313 ITR 267 and Formula One World Championship Delhi High Court (2016) 76 taxman.com is not relevant for the issue under consideration. In all the judgments relied on by the assessee and referred to above, the main service provided was not the advertisement and providing of any license to use the IPR was not involved. Whereas in the present case the use of IPR is involved. In the facts and circumstances of the above cases the Hon'ble Courts have held that use of trademark were incidental to the main purpose of the agreement. The main purpose of the agreement is referred to as carrying out advertisement, publicity and sales promotion. The main purpose/ business do not involve providing license to use any IPR and IPR was not used as a tool of the trade.

70. We have heard the rival contentions of the parties and perused the record. Clause 1.5 of the agreement dt.12.12.2005 provides Google Brand features. As per the said clause, the appellant was permitted to use tradename trademarks, service marks, domains or other distinctive brand features of Google solely for the use under the distribution agreement. Further, clause 6 of the agreement provides the brand feature like IPRs relating to brand features, the said IPRs

were granted by the Google to the appellant on a non-exclusive and non-sub-licenceable basis for the purposes of marketing and distribution of Adword programme, subject to the condition mentioned therein.

If we look into the activities of the assessee, for the purpose marketing and distribution of Adword programme, then, it is not possible for the appellant to undertake these activities, without the use of the Google, trademark and other brand features. Further, for marketing and distribution of Google Adword programme, the use of the Google trademark is essential and pivotal for doing the business of the advertisement on the search engine and the websites. In the absence of the Google trademark, it is difficult to comprehend that Assessee would attract lot of advertisers for its advertisement space on search engine and web site . Appellant was getting lot of engagement and clientage only on account of Google trademark . It may not be possible to have this kind of business inflow of advertisements without using the trade mark of Google . The distribution agreement had not made any provision for making the payment for the Google brand features and had only made provision for making the lumpsum payment under the agreement. As per Exhibit- A. Therefore in our view, the payments made by the assessee under the agreement was not only for marking and promoting the Adword programmes but was also for the use of Google brand features.. Needless to add that the said Google brand features were used by the appellant as marketing tool

for promoting and advertising the advertisement space, which is main activity of Assessee and is not incidental activities .The use of trademark for advertising marketing and booking in the case of **Hotel Shereton (Supra)** as well as in the case of **Formula 1** were incidental activities of the assessee therein as the main activities in the cases were providing Hotel Rooms and organizing Car Racing respectively whereas in the present case the main activity of the assessee is to do marketing of advertisement space for Google Adwords Programme. Therefore, these two judgments are not applicable to the facts of the present case. Hence for this reason also the payment made by the Appellant to GIL also falls within the four corners of royalty as defined under the provisions of ACT as well as under the DTAA.

Grant of distribution rights involves transfer of rights in process

71. Assessee before us had submitted that AO, wrongly drawn reference to the activities undertaken by the ITES division, observed that the Appellant has to perform functions which involve approving and administering advertisements to conform to the Google editorial guidelines and responding to customer queries. Further Appellant submitted AO also observed that the front-end portion is what the Advertiser or the end-user sees while the back-end portion is accessible only by Google Ireland and Google India and it was wrongly observed that without access to the back-end, the Assessee cannot perform its activities of marketing and distribution.

72. Assessee in this regard, has submitted that the Assessee does not have access to any back-end portion as referred by the AO as databases, software tools, etc under the Distribution Agreement. Therefore, the conclusion of AO that the Appellant has been granted the use of or the right to use the process in the Ad Words platform, especially for the purpose of marketing and distribution is factually incorrect and is based on surmise and conjecture.

73. Further Appellant submitted that the Adwords, though a program, cannot be considered as a "process" within the meaning under Explanation 2(i) to section 9(1)(vi) of the Act. Further Adwords Programme cannot be equated to a secret process since information relating to the program is freely available to the public on Google's website along with explanatory videos regarding the same. Hence, Google Ad Words program cannot be considered a secret process and hence, it does not constitute "process" within the meaning of the term as defined in Clause (i).

74. On the other hand ld Counsel for revenue had submitted that contention of the assessee is not correct as the appellant is using the secret formula/ process for marketing and advertising the advertising programme of the advertisers .

75. In this regard it will suffice to say that we had already concluded in the foregoing paragraphs that though Adwords Programme along with associated videos are available in public

domain but how this programme functions, for targeted marketing campaign, promoting advertisements are only possible with the use of secret formula, confidential customer data only . This secret process of targeting the customers, is not in public domain therefore in our view also the assessing officer was right when it concluded that the appellant was using the secret process for marketing promoting displaying of the advertisement.

76. It was submitted by ld AR that revenue earned from advertisement is not liable to be taxed as royalty or fees for technical services and is required to be taxed as business profit and in absence of any PE, remittance made by GI to assessee cannot be taxed in India. In this regard it was submitted OECD had set up a Technical Advisory Group ('TAG') to examine the issues arising in characterization of ecommerce payments. The TAG has categorized e-commerce transactions into 28 types including internet Advertising. The TAG has concluded that the payments arising from advertisements would constitute business profits falling under Article 7 rather than royalties. The relevant extract of the TAG report is reproduced:

> ***"Category** 17: **Advertising***
>
> ***Definitions***
> *Advertisers pay to have their advertisements disseminated to users of a given website. So-called "banner ads" are small graphical images embedded in a web page, which when*

clicked by the user will load the web page specified by the advertiser. Advertising rates are most commonly specified in terms of a cost per thousand "impressions" (number of times the ad is displayed to a user), though rates might also be on the number of "click-throughs" (number of times the ad is clicked by a user).

Analysis and conclusions

30. All members of the Group agreed that the payments arising from these transactions would constitute business profits under Article 7 rather than royalties, even under alternative definitions of royalties that cover payments 'for use, or the right to use, industrial, commercial or scientific equipment."

77. Further it was submitted that Central Board of Direct Taxes vide F No 5001 122/ 99 dated December 16, 1999 has constituted a High Power Committee on 'Electronic Commerce and Taxation'. The committee has held that payments arising from advertisements would constitute profits and gains from business or profession. It was submitted that Technical Advisory Group report and the High powered Committee report are binding in nature. In this regard, ld AR submitted that India had a representative as part of the Technical Advisory Group constituted by the OECD which representative did not express any dissent to the view expressed and High Powered Committee was constituted by the CBDT itself and all the members of the Committee have agreed with the view taken, including members from the CBDT .Further it was submitted that coordinate bench in the matter of Right Florist *(supra)* has agreed with the views of the High

Powered Committee and stated as under:

> *"13.1n the light of the above discussions, even as per the High Power Committee, a website per Se, which is the only form of Google's presence in India - so far as test of primary meaning i.e. basic rule PE is concerned, cannot be a permanent establishment under the domestic law. We are I considered agreement with the views of the HPC on this issue"*

78. Further coordinate Mumbai bench of the ITAT in the case of eBay International AG (140 ITD 20) has upheld the reliance placed on the aforesaid reports while holding that the income received by the assessee in the said case towards operation of its website is business income. Relevant extracts are reproduced below for your reference:

> *"13. The ld. CIT(A) has also referred to High Powered Committee (HPC) on "Electronic Commerce Taxation" constituted by the Central Board of Direct Taxes, which has stated in its report that such amount would be in the nature of payment for business activities. He also referred to The Technical Advisory Group (TAG) formed by OECD, which, vide its report on Tax Treaty Characterized Issues Arising From E-Commerce issued in February, 2001, has also opined that revenue earned by operating online facility are in the nature of business profits falling under Article 7 of the Treaty. These findings recorded by the id. CIT(A) have remained uncontroverted by the id. DR.*
>
> *14. In view of the above discussion, there remains no doubt whatsoever that the fee received by the assessee can't be described as 'Fee for technical services', but is in the nature of 'Business profits'. In our considered opinion the Id. CIT(A) was fully justified in holding accordingly. The grounds raised by Revenue in support of this solitary issue in its appeal, are thus not allowed"*

79. Per contra it was submitted by DR that reference made by the assessee to High-Power Committee dated 16/12/1999 and Tax Treaty dated 1/2/2001 was misplaced. The facts in the present case are altogether different and the same has no relevance for the dispute in the present case.

80. The reading of the decision in Right Florist P. Ltd (supra), it is clear that the coordinate bench relied upon the decision of High-Power Committee on the premises that the *Advertisers paying to website for advertisements disseminated to users of a given website* and had concluded that the payment would be a business profit and is not taxable in India in the absence of PE.

81. We have in detail examined the working of Adwords Programme herein above and come to the conclusion that Appellant makes use of the user data /customer data (personal information, general information like user profile, age sex, language, type of mobile, time when customer is visiting particular web site/ searching on search engine , how much time is spent on internet and on which web site etc for the purposes of targeted/ focus marketing campaign for the advertisers) and the patented technology , with algorithm to advertise/ disseminate ads, which was not the case either before the High Powered Committee or in the matter of Right Florist P. Ltd (supra). Present case is not a case of merely displaying or exhibiting of

advertisement by the advertiser on the website, case in hand is a case of use of patented technology, secret process, use of trade mark by the appellant, therefore decision of coordinate bench in the case of Right Florist Private Limited is not applicable to the facts and circumstances of the present case. In the present case the Google India has been provided access to the IPR, Google Brand features, secret process embedded in Adwords Programme as tool of the trade for generation of income. Therefore the payment made by the appellant to Google Ireland is royalty and not the business profit and therefore chargeable to tax in India.

82. Ld. AR further relied upon para 21 of the decision of the coordinate bench in Right Florist Private Limited, (supra),Para 6 of Pinstorm Technologies P. Ltd (supra) and para 8 of Yahoo India P. Ltd, (supra) to prove that the issue of online advertisement had been considered in all the decisions and it was held that the payment made by the advertiser to the website owner was business profit and in the absence of any business connection and PE in India and not the Royalty. Therefore, the said payment made to the service provider were not chargeable in India.

82.1 Per contra, the Ld. DR sought to distinguish the facts of the present case and of the decisions referred in the preceding paragraph.

82.2 We have gone through the above said decisions. In para 8 of Yahoo India (supra), coordinate bench held as under :

> **"8.** As already noted by us, the payment made by assessee in the present case to Yahoo Holdings (Hong Kong) Ltd., was for services rendered for uploading and display of the banner advertisement of the Department of Tourism of India on its portal. The banner advertisement hosting services did not involve use or right to use by the assessee any industrial, commercial or scientific equipment and no such use was actually granted by Yahoo Holdings (Hong Kong) Ltd., to assessee company. Uploading and display of banner advertisement on its portal was entirely the responsibility of Yahoo Holdings (Hong Kong) Ltd. and assessee company was only required to provide the banner Ad to Yahoo Holdings (Hong Kong) Ltd., for uploading the same on its portal. Assessee thus had no right to access the portal of Yahoo Holdings (Hong Kong) Ltd. and there is nothing to show any positive act of utilization or employment of the portal of Yahoo Holdings (Hong Kong) Ltd., by the assessee company. Having regard to all these facts of the case and keeping in view the decision of the Authority of Advance Rulings in the case of *Isro Satellite Centre* (*supra*) and *Dell International Services (India) (P.) Ltd.* case (*supra*), we are of the view that the payment made by assessee to Yahoo Holdings (Hong Kong) Ltd., for the services rendered for uploading and display of the banner advertisement of the Department of Tourism of India on its portal was not in the nature of royalty but the same was in the nature of business profit and in the absence of any PE of Yahoo Holdings (Hong Kong) Ltd., in India, it was not chargeable to tax in India. Assessee thus was not liable to deduct tax at source from the payment made to Yahoo Holdings (Hong Kong) Ltd., for such services and in our opinion, the payment so made cannot be disallowed by invoking the provisions of section 40(*a*) for non-deduction of tax. In that view of the matter we delete the disallowance made by the Assessing Officer and confirmed by the learned CIT(A) under section 40(*a*) and allow the appeal of the assessee."

Relying upon para 8 of Yahoo India (supra), the coordinate in para 6 of the decision in Pinstorm (supra) held as under :

6. We have heard arguments of both the sides and also perused the relevant material on record. It is observed that a similar issue had come up for consideration before the Tribunal in the case of *Yahoo India (P.) Ltd.* v. *Dy. CIT* [2011] 46 SOT 105 / 11 taxmann.com 431 (Mum.)(URO), the Tribunal decided the same in favour of the assessee for the following reasons given in paragraph No.8 of its order:

> "8. As already noted by us, the payment made by assessee in the present case to Yahoo Holdings (Hong Kong) Ltd. was for services rendered for uploading and display of the banner advertisement of the Department of Tourism of India on its portal. The banner advertisement hosting services did not involve use or right to use by the assessee any industrial, commercial or scientific equipment and no such use was actually granted by Yahoo Holdings (Hong Kong) Ltd. to assessee company. Uploading and display of banner advertisement on its portal was entirely the responsibility of Yahoo Holdings (Hong Kong) Ltd. and assessee company was only required to provide the banner Ad to Yahoo Holdings (Hong Kong) Ltd. for uploading the same on its portal. Assessee thus had no right to access the portal of

> Yahoo Holdings (Hong Kong) Ltd. and there is nothing to show any positive act of utilization or employment of the portal of Yahoo Holdings (Hong Kong) Ltd. by the assessee company. Having regard to all these facts of the case and keeping in view the decision of the Authority of Advance Rulings in the case of *Isro Satellite Centre* 307 ITR 59 and *Dell International Services (India) (P.) Ltd.* 305 ITR 37, we are of the view that the payment made by assessee to Yahoo Holdings (Hong Kong) Ltd. for the services rendered for uploading and display of the banner advertisement of the Department of Tourism of India on its portal was not in the nature of royalty but the same was in the nature of business profit and in the absence of any PE of Yahoo Holdings (Hong Kong) Ltd. in India, it was not chargeable to tax in India. Assessee thus was not liable to deduct tax at source from the payment made to Yahoo Holdings (Hong Kong) Ltd. for such services and in our opinion, the payment so made cannot be disallowed by invoking the provisions of section 40(a) for non-deduction of tax. In that view of the matter we delete the disallowance made by the A.O. and confirmed by the learned CIT (A) u/s 40(a) and allow the appeal of the assessee."

Similarly, in para 21 of the decision in Right Florist (supra), it was held as under :

21. That takes us to the question whether second limb of Section 5(2)(b), i.e. income 'deemed to accrue or arise in India', can be invoked in this case. So far as this deeming fiction is concerned, it is set out, as a complete code of this deeming fiction, in Section 9 of the Income Tax Act, 1961, and Section 9(1) specifies the incomes which shall be deemed to accrue or arise in India. In the *Pinstorm Technologies (P.) Ltd.'s* case (*supra*) and in *Yahoo India (P.) Ltd's* case (*supra*), the coordinate benches have dealt with only one segment of this provision i.e. Section 9(1)(vi), but there is certainly much more to this deeming fiction. Clause (i) of section 9(1) of the Act provides that all income accruing or arising whether directly or indirectly through or from any 'business connection' in India, or through or from any property in India or through or from any asset or source of income in India, etc shall be deemed to accrue or arise in India. However, as far as the impugned receipts are concerned, neither it is the case of the Assessing Officer nor has it been pointed out to us as to how these receipts have arise on account of any business connection in India. There is nothing on record do demonstrate or suggest that the online advertising revenues generated in India were supported by, serviced by or connected with any entity based in India. On these facts, Section 9(1)(i) cannot have any application in the matter. Section 9(1)(ii), (iii), (iv) and (v) deal with the incomes in the nature of salaries, dividend and interest etc, and therefore, these deeming fictions are not applicable on the facts of the case before us. **As far as**

applicability of Section 9(1)(vi) is concerned, coordinate benches, in the cases of *Pinstorm Technologies (P.) Ltd.* (*supra*) and *Yahoo India (P.) Ltd.* (*supra*), have dealt with the same and, for the detailed reasons set out in these erudite orders - extracts from which have been reproduced earlier in this order, concluded that the provisions of Section 9(1)(vi) cannot be invoked. We are in considered and respectful agreement with the views so expressed by our distinguished colleagues.

……

(emphasis supplied by us)

82.3. After going through all the above cited decisions of the coordinate bench, we are unable to persuade ourselves to agree with the reasoning for treating the payment made by the advertisers as a business profit and not as a royalty. As in our opinion, the detailed working of the Adword programme of the appellant and GIL clearly shows that the appellant is having the right to access not only to the patented technology but also to the customer data, information (like telephone number, user behaviors, region, gender , language, colour, photographs, place of visit, mobile device used, time spent etc.,) and which was not the case in the the decisions in Yahoo India, Pinstorm and Right Florist (supra). As clear from the distribution agreement, the assessee is also having right, title and interest over the intellectual property right of Google. Further, as per the standard advertisement with the advertiser, which specifically empowers the appellant to delete / remove / withdraw the advertisement. The relevant portion of the agreement reads as under :

"Google India P. Ltd, Advertising Program Terms :

1……..

2. The Program :…….Customer grants Google permission to utilize an automated software program to retrieve and analyse websites associated with the services for ad quality and serviing purposes, unless Customer specifically opts out of the evaluation in a manner specified by Google. Google or Partners may reject or remove any ad or Target any time for any or no reason. Google may modify the Program or these Terms at any time without liability and your use of the Program after notice that Terms have changed indicates acceptance of the Terms."

This vesting of power in the appellant, clearly demonstrate give the appellant in India right to access the portal / Google Adword program at any point of time. In view of the above, the decisions relied upon by the Ld. AR are not applicable to the facts of the case. Accordingly, all the ground nos.1 to 11 of the appeals of the assessee are dismissed.

GROUND NO.12

83. We will deal with ground No.12 which is common only in asst. year 2007-08 and 2008-09.

84. Learned counsel for the assessee has brought to our notice the following dates and events:

<table>
<tr><td>20/11/2012</td><td>AO issued notice under section 201 as under:
3. The fees paid by GIPL to Google Ireland is covered by the definition of Royalty as per Explanation 2 to Section 9(1)(vi) of the Income Tax Act. Therefore you are required to show cause as to why the payments made to Google Ireland should not be treated as Royalty under the Income Tax Act, 1961.
4. The following information should also be furnished for the FYs 2005-06 to 2010-11:
Financial Year:____
<table><tr><th>Sl. No.</th><th>Name and address of the non-resident entity</th><th>Amount remitted</th><th>Detailed note on nature of remittance</th><th>Amount of tax deducted at source</th><th>Reasons for non-deduction of tax at source</th></tr><tr><td></td><td></td><td></td><td></td><td></td><td></td></tr><tr><td></td><td></td><td></td><td></td><td></td><td></td></tr><tr><td></td><td></td><td></td><td></td><td></td><td></td></tr><tr><td></td><td></td><td></td><td></td><td></td><td></td></tr></table></td></tr>
<tr><td>20/11/2012</td><td>The assessee filed a reply to the notice issued by the AO and submitted that fee paid by the assessee to GI is covered under the definition of ‘royalty’ as per Explanation to Section 9(1)(vi) of the Act and further it was submitted that the assessee is a mere non-exclusive distributor of Adworbs in India. Distribution fee is payable to GI on distribution of Adwords in India and is not in relation to any transfer of any right or use any patent, public invention. Further it was mentioned that all rights, title and interest in relation to information on data including user data provided by the user are owned by the GI. Further, the assessee relied upon the report of TAG set up by the OECD and the report of the High Power committee constituted by the CBDT vide order dated 16/12/1999 on Electronic communication taxation wherein it was held that payments arising from advertisements would constitute profits and gains from business or profession other than royalty. It was also submitted that no remittance has been made by the assessee to GI in relation to remittance of distribution fee to GI for financial years 2005-06 to 2010-11.</td></tr>
<tr><td>18/01/2013</td><td>Show cause notice was issued asking the assessee to confirm whether any sum has actually been credited to the account of GI during the FYs 2005-06 to 2010-11.</td></tr>
<tr><td>29/01/2013</td><td>The assessee replied to show cause notice dated 18/1/2013 and it</td></tr>
</table>

	was mentioned as under 1 The following are the amounts payable by the Company to Google Ireland towards distribution fees for FY 2005-06 to FY 2010-11, as per the books of accounts: [illegible]

Financial Year	Distribution fee payable (in ₹)
2005-06	Nil
2006-07	42,57,53,347
2007-08	1,19,82,61,982
2008-09	1,66,58,00,133
2009-10	1,85,68,92,343
2010-11	3,72,01,00,047

2 In relation to the non deduction of tax at source on the distribution fees recorded as payable by the Company, we wish to reiterate our submissions made vide letter dated November 29, 2012 and submit that as per the provisions of the Act and the Double Tax Avoidance Agreement between India and Ireland ('India-Ireland DTAA'), the distribution fee payable by the Company to Google Ireland are not in the nature of royalty, warranting deduction of tax at source u/s 195 of the Act. Reliance in this regard can be placed on the

[illegible]

Further, it was mentioned in para.3 (at page 129 of paper book) that as per Article 12 of the India-Ireland Double Taxation Avoidance Agreement, income in nature of royalty is chargeable to tax in hands of non-resident only on receipt basis and there is no obligation on the assessee to withhold tax only when the same is chargeable to tax in India. Further fees, if any, would be required only at the time of actual remittance and not on credit of books of account.

15/02/2013	The assessee replied to the questionnaire dated 31/1/2013 and in the said reply in para.3, 5, 6, 7, 9, 10 and 11 mentioned as under: **3. AdWords sales process** AdWords program is an advertising product that specifically relates to a search engine query. For instance, if a user searches the word 'flower', the Google search engine will return the most relevant links to that term. The AdWords program recognizes that a user searching the word "flower" may be interested in purchasing flowers. AdWords provides a mechanism for advertisers to provide search-specific advertising to that user. On the Google website, AdWords ads are located on top and to the right side of the search results. **5. Please confirm whether AdWords Program is run on servers of Google either owned/hired/leased in India.** AdWords Program is operated on the servers located outside India, which are not owned and controlled by GIPL. **6. What are the customer services provided by Distributors to advertisers which are in accordance with the procedure and standards of Google Ireland?** Please refer our response in point 2 & 3 above.

	9. Google India markets and promotes AdWords Program. Who develops the contents of the promotion? As discussed above, GIPL is responsible for advertising and marketing activities in relation to the distribution of the AdWords program in India. GIPL leverages marketing materials prepared by Google Ireland, and localizes the materials, if required, for the Indian market. **10. As per the agreement clause-Para 3.1, Google Ireland provides advertising space to Google India for distribution. How is the space measured?** As mentioned in the above paragraphs, AdWords program is an advertising product that specifically relates to a search engine query and is an automated, self-serve system through which advertisers independently develop a set of keywords that relate to their business and manage their own account online from the Google website. The term referred in the Agreement is space on a Google or partner webpage provided by Google Ireland to GIPL for the distribution of AdWords to the advertisers in India. **11. As per non disclosure agreement, what is the information shared by Google India and Google Ireland and vice versa.** As per the Agreement, the information may include (but not limited to) tangible, intangible, visual, electronic information such as (a) trade secrets; (b) financial information; (c) technical information including the research, development, procedures, algorithms, etc. (d) business information including operations, planning, marketing, etc.
8/02/2013	The Revenue issued another show cause notice asking the assessee to furnish following information a) Whether any service tax/sales tax was paid by Google Ireland or by Google India on behalf of Google Ireland for marketing and distribution of Adwords Program. b) Details of service rendered by the ITES division of GIPL to Google Ireland. c) Also clarify whether the service rendered by ITES division of GIPL is in any way related to Adwords program. If so furnish in detail with documentary evidence (reports, email etc: the nature of service rendered) the nature of service rendered with regard to Google Adwords Program. d) Complete details of training given to GIPL for distribution of Adwords Program as per Clause 2.2 of the Distribution Agreement.
15/2/2013	Assessee filed reply *page 139*
22/2/2013	The AO passed order u/s 201(1) and 201(1A) of the IT Act for assessment years 2006-07 to 2012-13.

85. After giving details of the proceedings which took place before the AO, in respect of ground NO.12 for assessment years 2007-08 and 2008-09, it was contended by the learned counsel for the assessee that

the notice issued for declaring assessee in default was barred by limitation as held by the Hon'ble Delhi High Court in *CIT vs. NHK Japan Broadcasting Corporation* (305 ITR 137) wherein it was held that initiation of proceedings u/s 201 against the assessee in respect of assessment year 1990-91 was barred by limitation having been initiated beyond reasonable period of 4 years. In paras.18, 19, 20 of the judgment, it has been held as under:

> **"18.** Insofar as the Income-tax Act is concerned, our attention has been drawn to section 153(1)(*a*) thereof which prescribes the time-limit for completing the assessment, which is two years from the end of the assessment year in which the income was first assessable. It is well-known that the assessment year follows the previous year and, therefore, the time-limit would be three years from the end of the financial year. This seems to be a reasonable period as accepted under section 153 of the Act, though for completion of assessment proceedings. The provisions of re-assessment are under sections 147 and 148 of the Act and they are on a completely different footing and, therefore, do not merit consideration for the purposes of this case.
>
> **19.** Even though the period of three years would be a reasonable period as prescribed by section 153 of the Act for completion of proceedings, we have been told that the Income-tax Appellate Tribunal has, in a series of decisions, some of which have been mentioned in the order which is under challenge before us, taken the view that four years would be a reasonable period of time for initiating action, in a case where no limitation is prescribed.

> **20.** The rationale for this seems to be quite clear - if there is a time-limit for completing the assessment then the time-limit for initiating the proceedings must be the same if not less. Nevertheless, the Tribunal has given a greater period for commencement or initiation of proceedings."

86. Further our attention was drawn to the decision in the case of *CIT vs. Bharat Hotels Ltd.* (384 ITR 77) wherein the jurisdictional High Court in paras.10, 26, and 27 held as under:

> **"10.** Admittedly, at the relevant time relating to assessment year 2002-03, there was no limitation provided for initiating proceedings under Section 201. The Tribunal has, after considering the various decisions of the Apex Court, as well as the Delhi, Kerala, Punjab & Haryana High Courts, held that the proceedings having been initiated by the Revenue beyond the period of four years from the end of the relevant financial year, would be barred by limitation. Challenging the same, Sri K V Aravind, learned counsel for the Revenue has vehemently argued that when there is no limitation provided under the Act, proceedings can be initiated at any stage and at any time. In the alternative, he submitted that even if it is held that proceedings are to be initiated within a reasonable time, then too, the period of seven years from the end of the financial year, as has been provided for by the Finance Act, 2014, would be the reasonable time. He has submitted that Section 153 of the Act provides for time for completion of assessments and reassessments. Sub-section (1) of the said Section provides for assessment to be completed within two years from the end of the assessment year and one year from the end of the financial year in

which the return was filed. He relies on sub-section (2) of Section 153 which provides that no order of assessment, reassessment or recomputation shall be made under Section 147 after expiry of one year from the end of the financial year in which notice under Section 148 was served. According to him, Section 147 of the Act would apply for computing the reasonable period and not Section 153(1) of the Act, and since notice under Section 148 could be served up to six years from the end of the relevant assessment year (in cases where the amount involved is more than Rs.1 lakh) coupled with Section 153(2) of the Act providing one year time for passing the order of assessment, reassessement or recomputation in which the notice under Section 148 was served, the same would amount to seven years from the end of the financial year and he thus contends that reasonable period of limitation under Section 201 of the Act should also be seven years from the end of the relevant financial year.

26. Sri K V Aravind, learned counsel for the Revenue has submitted that sub-section (1A) of Section 201 of the Act provides for payment of interest. The sub-section, as it stood at the relevant time, prior to 1.7.2010, reads as under:

> "(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at 'one per cent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid and such interest shall be paid

> before furnishing the statement in accordance with the provisions of sub-section (3) of Section 200."
>
> The said sub-section clearly provides that interest would be payable from the date on which such tax was deductible, i.e., the date when payment was made by the assessee to the Recipient; till the date on which such tax was actually paid, i.e., tax was deposited by the Recipient.
>
> **27.** The provision for tax deduction at source is only a mechanism for collection of tax by the payer, even though the liability to pay tax is that of the Recipient. The provision for payment of interest under sub-section (1A) of Section 201 of the Act is only of compensatory nature. It cannot be a means to penalise the payer. The provision for payment of interest would arise from the date when it ought to have been deducted i.e., from the date of payment by the payer to the Recipient. The liability to pay interest would end on the date when such tax has been deposited by the Recipient, either by way of advance tax or along with the return of income. Interest, herein, being compensatory in nature, cannot be thus charged for the period beyond the date when such tax has already been deposited by the Recipient. If the Revenue is permitted to charge interest even after the Recipient has deposited the tax, the same would amount to undue enrichment of the Revenue, as even after receiving the tax, it would continue to get interest on the amount which has already been paid or deposited with it. As such, the liability of the assessee herein would not be for payment of interest after the period of deposit of tax by the Recipient.

87. Our attention was also drawn to the judgment of the Special Bench of Tribunal in the case of *Mahindra & Mahindra Ltd., vs.*

DCIT (30 SOT 374) Our attention was drawn to paras.14.1, 14.2, 17.1, 17.5, 17.10, 17.10 and 17.14. Further Our attention was also drawn to the judgment passed by the Hon'ble AP High Court in the case of CIT vs. Electronic Instruments Ltd. (371 ITR 314).

88. On the basis of the judgments referred to above, it was submitted by the AR for the assessee that initiation of proceedings commenced from the issue of show cause notice dated 20/11/2012 for the assessment years 2007-08 and 2008-09. However, in light of law laid down by the aforesaid judgments, notice should have been issued by the AO within 4 years from the end of the financial year i.e. for the assessment year 2007-08, notice should have been issued by the AO on or before 31/03/2011 and for the assessment year 2008-09 by 31/03/2012. As the notices were not issued by the AO before the said date and were admittedly issued on 20/11/2012, initiation of proceedings by the AO was beyond the period of limitation and therefore, the notice was barred by limitation and therefore, proceedings initiated on the basis of the above said notices were require to be dropped.

89. Per contra, learned Standing Counsel has drawn our attention to the provisions of section 201 as on the date of issuance of notice i.e. 20/11/2012. It was submitted that section 201(3) was available on the statute book as on 20/11/2012 to the following effect:

> "201(3) No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of—
>
> *(i)* two years from the end of the financial year in which the statement is filed in a case where the statement referred to in section 200 has been filed;
>
> *(ii)* *six* years from the end of the financial year in which payment is made or credit is given, in any other case :
>
> **Provided** that such order for a financial year commencing on or before the 1st day of April, 2007 may be passed at any time on or before the 31st day of March, 2011."

90. On the basis of the above, it was submitted that proceedings initiated by the AO was within the period of limitation as it was commenced within 6 years from the end of the financial year in which payment is made or credited as in any other case. It was further submitted that though in the amended provision mentioned hereinabove, the Legislature has only mentioned period of limitation for initiation of proceedings u/s 201(3) against the resident in India but in absence of any provision for limitation for initiation of proceedings u/s 201, same period should be applicable for initiation of proceedings for non- resident as well.

91. For the purpose of above, it was submitted that the reasoning which was given by courts/Tribunal referred by the assessee are not

available as all the judgments referred by the learned counsel for the assessee were for the period prior to introduction of amendment in section 201(1) of the Act. It was submitted that on the analogy and reasoning given by the Special Bench in the case of *Mahindra & Mahindra* (supra) in paras.14.2, 17.10 and 17.11 are no more available to the assessee as the said reasoning were given by the Special Bench in the case of *Mahendra & Mahendra* (supra) in the absence of limitation for initiation of proceedings or passing of order u/s 201 of the Act as applicable on said date and therefore, the Special Bench has applied the limitation as provided u/s 143(2), 149, 153, 154 and 263 to the proceedings under section 201 of the Act. The special bench after detailed examination in para.14.2, in the case Mahindra & Mahindra has came to the conclusion that, as there is no limitation provided under un-amended section 201, therefore, period of 4 years will be the reasonable period for initiation of proceedings. Further it was held that the period of completion of proceedings shall be one year form the end of the relevant financial year.

92. On the basis of above it was submitted by the learned Standing Counsel that the reasoning as given by the Special Bench, Hon'ble jurisdictional High Court as well as by other High Courts is no more available for initiation of proceedings against non-resident for period of 4 years, in view of the fact that same logic and reasoning is required to be followed by the Tribunal by laying down the reasonable period of limitation for initiation of proceedings against non-resident

entity. In the written submissions it was submitted by the DR as under:

> *"1. Section 201(3) of the Act has been amended by providing Limitation only in respect of payments made to the resident in India. In the Circular Explaining the Finance Act, it has been specifically referred that the payments made to the nonresidents, no limitation is applicable. In view of the specific provision providing Limitation only to the payments made to the resident in India and not providing any limitation to the payments made to the non-resident, no limitation can be prescribed or read into the section.*
>
> *2) Without prejudice to the above contention if the contention of the assessee is to be accepted that in the absence of any limitation being provided under the Act, reasonable time limit has to be read into the section as held by various high courts in the case of NHK Japan, Bharath Hotels, the limitation provided for payments to residents has to be applied(six years). Otherwise it amount to discrimination between the payments made to the resident and the non-resident.*
>
> *3)Insofar as the judgements relied on by the assessee, all the judgements were rendered in respect of the orders passed prior to amendment to section 201(3) of the Act and period of four years has been arrived at on the analogy of various other provisions under the Act. Even in the absence of any limitation being provided under section 201(3) of the Act for payments to the nonresident's, even certain limitation is to be provided, applying the same analogy as held by the various courts in the judgements relied on by the assessee, period of six years has to be read/considered in view of the legislative interference by introduction of section 201(3) of the Act. In the*

absence of such an analogy and any other Limitation other than period of six years would amount to discrimination in the limitation between the payment to resident and non-resident.

4) The assessee has relied on the judgement of the Delhi High Court in the case of Bharathi Hotels Ltd (2016) 76 taxman.com 256 (Delhi) to contend that even after introduction of section 201(3) of the Act and in the absence of any limitation provided by the Act in respect of payments to the nonresident's, the reasonable limitation has to be read into. With great respect, the Delhi High Court has not provided any limitation with respect to payments to non-resident's. Without prejudice to the above contention even if the contention of the assessee that in the absence of any limitation, reasonable time limit has to be read into the section is to be accepted, applying the same analogy as held by the various courts relied upon by the assessee and considered by the Delhi High Court, the period of six years provided by the statute to the payments ma1e to resident in India under section 201(3) of the Act would be equally applicable to the payments made to the nonresident's. If any limitation other than six years is read into the section in respect of payments to non-resident, it would amount to discrimination among the payments to residents and the nonresident.

93. In rebuttal, learned counsel for the assessee submitted that prior to amendment, there was no statutory period for initiation of proceedings against the non-resident. Once the amendment came into force for resident only, it should not implicitly apply to non-resident as it was only restricted to resident. It was submitted that principle of

literal interpretation is required to be invoked for the purpose of interpreting this kind of provisions and this tribunal cannot supply the word which is not intended to be supplied by the legislature. Lastly, our attention was drawn to the judgment passed by the Hon'ble Delhi High Court in the case of *Bharti Airtel vs. Union of India* (76 taxman.com.256) and special attention was drawn to paras.11,12, 13, 14 & 17.

94. We heard rival submissions and perused material on record available. In our view, before we deal with issue of limitation, it would be relevant to reproduce the reasoning given by the Special Bench in the case of *Mahindra & Mahindra* (supra) which is as under:

> ***14.2*** *After considering the rival submissions in the light of the material placed before us and the precedents relied upon it is obvious that sub-sections (1) and (1A) of section 201 do not prescribe any time limit for the initiation of the proceedings or the passing of the order. We find that for the most of the actions under the Act, the particular time limit has been given for the commencement and completion of the proceedings. For example time limit for issuing of notice for the purposes of making assessment is laid down in section 143(2). Similarly time for issuing notice of reassessment has been set in section 149. Section 153 deals with the time provided for the completion of assessment and reassessments. Similarly time limit for rectification of order is given in section 154; for passing revising order under section 263 etc. etc. In such a scenario the question arises that if no time limit is provided, then can any time limit be artificially imported by the authorities. The ld. DR has contended that the Tribunal is not competent to lay down any time limit. If*

this contention is brought to the logical conclusion it will mean that the unlimited time will be available to the Departmental authorities at their sweet-will for taking action under this section. In our considered opinion this contention raised on behalf of the revenue is bereft of any force for the simple reason that certainty is the hallmark of any proceedings. It is beyond our comprehension that how, in the absence of any time limitation provided in the section, the action can be taken in indefinite period. It is wholly impermissible to argue that unlimited time limit be granted to the revenue for taking action under this section. The sword of taxing authorities cannot be allowed to hang, forever, over the head of the tax payers. If this proposition of the learned D.R. is accepted that will give license to the authorities to take action even after 30, 40 or 50 years. The canons of limitation are ordinarily provided expressly in the Act and in their absence, they are to be impliedly inferred by taking into consideration the scheme of the relevant provisions. The ld. DR has relied on some cases for suggesting that no time limit be laid down by the Tribunal for the purposes of passing order under section 201(1) or (1A). In our opinion before applying the ratio of any judgment, it is imperative to look into text and the context in which it is rendered. It is equally important to bear in mind the relevant provision in the background of which such judgment was rendered. It is not permissible to pick up a case from one enactment and insist for the application of the ratiodecidendi of that case to an altogether different legislation, which has no resemblance with the former. The Hon'ble Rajasthan High Court in Arihant Tiles & Marbles (P.) Ltd. v. ITO [2007] 295 ITR 148/166 Taxman 274 has held that the interpretation of any expression used in the context of one statute is not be automatically imported while interpreting similar expression in another statute. Similar view has been earlier expressed by the Hon'ble Supreme Court

in CIT v. Venkateswara Hatcheries (P.) Ltd. [1999] 237 ITR 174/103 Taxman 503.

95. In para.14.2 (supra in Mahindra and Mahindra) it has been held by the Special Bench that in sub-section (1) and (1A) of section 201, no limit for initiation of proceeding or passing of the order is prescribed. Thereafter, the Special Bench noticed the period of limitation provided for issuance of notice u/s 143(2), 149, 153, 154, 263 and thereafter it was held that certainty in taxing provision is hall-mark of any proceeding and it was noticed that "it is beyond our apprehension that how in absence of time limit provided in the section, action can be taken in indefinite period. It is impermissible to argue that no time limit be granted to revenue."

96. Thus it is clear from reading of the abovementioned paragraph that the logic and reasoning given by the Special Bench for coming to reasonable period of 4 years was based on analysis of the provisions viz., 143, 147, 148, 149 and 153 and absence of time limit u/s 201(1) of the Act. In our view, there is a change in the position after passing of judgment by the Special Bench as the section 201 has been amended by the legislature and now specific provision is incorporated by the Legislature to deal with limitation or initiation of proceedings u/s 201 of the Act in the case of resident , however no period of limitation is provided in the case of non-resident.

97. Recently Allahabad high court in the matter of Mass Awash (P.) Ltd. [2017] 83 taxmann.com 306 (Allahabad) had occasion to

deal with all judgments referred before us and thereafter it was held as under

> ***"71.*** *In the entirety of the discussion, we find it difficult to hold that period consumed by Revenue in prosecuting matter against main payee would have resulted in accrual of a right upon Assessee so as to deprive Revenue from proceeding under Section 201(1) and 201(1A), though, admittedly, Assessee-petitioner has committed default by not complying Section 195 by non-deduction of TDS on the amount paid to Smt. Nidhi Raman. Defence of petitioner that it was misrepresented by seller by not disclosing by any of them that she was an N.R.I. would equally be available to Revenue also for explaining delay and also their bonafide is fortified that they make all possible efforts to recover entire amount of tax from person liable to pay tax and as a last resort they have sought to exercise power under Section 201(1) and 201(1A) against Assessee.*
>
> ***72.*** *The view taken by Delhi High Court that period of limitation of four years, as applicable for making Assessment under Section 147, should be made applicable for exercising power under Section 201(1) and 201(1A), we find it difficult to subscribe inasmuch as we do not impose a fixed time and prescribe a period of limitation, which has not been prescribed by Legislature in its wisdom. Such legislative action, by way of judicial precedent, in our view, would not be appropriate exercise of judicial review under Article 226 of Constitution. As we have already discussed above, even Supreme Court says that if time period is not prescribed for exercise of power, a reasonable time would depend upon the facts of each case and cannot be quantified or prescribed like a period of limitation.*
>
> ***73.*** *In Uttam Namdeo Mahale (supra), the judgment delivered by Three Judge Bench, Court has said as under:*

"Mr. Bhasme, learned counsel for the appellant, contends that in the absence of fixation of the rule of limitation, the power can be exercised within a reasonable time and in the absence of such prescription of limitation, the power to enforce the order is vitiated by error of law. He places reliance on the decisions in State of Gujarat v. Patil Raghav Natha; Ram Chand v. Union of India and Mohd. Kavi Mohamad Amin v. Fatmabai Ibrahim. We find no force in the contention. It is seen that the order of rejectment against the applicant has become final. Section 21 of the Mamlatdar's Court Act does not prescribe any limitation within which the order needs to be executed. In the absence of any specific limitation provided there under, necessary implication is that the general law of limitation provided in the Limitation Act (Act 2 of 1963) stands excluded. The Division Bench, therefore, has rightly held that no limitation has been prescribed and it can be executed at any time, especially when the law of limitation for the purpose of this appeal is not there. Where there is statutory rule operating in the field, the implied power of exercise of the right within reasonable limitation does not arise. The cited decisions deal with that area and bear no relevance of the facts."

(Emphasis added)

74. *We also find that Bombay High Court has taken a different view in the matter of prescribing limitation and Calcutta High Court has declined to prescribe any such limitation.*

75. *In our view, the dictum laid down by Apex Court in the cases referred above is very clear. While exercising power of judicial review in the case like present one, it would be appropriate to consider whether power has been exercised by competent authority within a reasonable period and whether delay is unjust, arbitrary, whimsical or it is for valid reasons. If Court finds that delay in exercise of power is for valid and bonafide reasons, alleged delayed exercise of power cannot be held invalid."*

98. The contrary judgment of Hon'ble Delhi High Court in the matter of Bharti Airtel Ltd v. Union of India [(2016) 76 taxmann.com 256] was relied upon by the Ld. AR. The DR relied upon **Bhura Exports Ltd [2011] 13 taxmann.com 162 (Calcutta) and** Mass Awash (P.) Ltd. [2017] 83 taxmann.com 306 (Allahabad)

In our view the decision of the Special Bench and other judgments apply with equal force in favour of both i.e resident as well as non-resident providing period of limitation of four years from the end of the financial year for initiation of proceedings on the analogy and principle mentioned in section 147, 148, 153 etc prior to amendment in law. However there are contrary judgments in favour of the revenue post amendment which does not provide any limitation for initiation of proceedings u/s.201 of the Act.

99. In view thereof, there is conflict of judgments of various courts. One set of judgment are in favour of the assessee and the other set of judgments are in favour of the Revenue. There is no direct judgment after the amendment of Section 201, by the jurisdictional High Court which deals with the issue of initiation of proceedings under the amended provision of 201. In the absence of any binding judgment by the Hon'ble jurisdictional High Court, we are bound to adopt the same logic as upheld by the jurisdictional High Court, by treating the resident and the non-resident at par after relying upon the decision of Special Bench in the matter of Mahindra and Mahindra (supra), in case relating to pre amendment assessment year. In our opinion, after

the amendment of law same logic and limitation is required to be applied for non-resident well as resident thus treating non-resident at par with resident. In other words, period of imitation for initiation of proceedings for resident as well as non-resident u/s 201 should be 6 years from the end of the financial year. Further the payer is required to maintain books of account and deduct TDS for both resident as well as non-resident. No Separate treatment had been envisaged under the Act, for the payer paying to a non-resident.

100. Further, the non–resident payee cannot be worse off than resident payee under the Income Tax Act and under the provisions of DTAA. Law provides non-discrimination of non- resident with resident and requires equal treatment of non-resident with resident under the provisions of DTAA. It cannot be said that a non resident would be given special and beneficial treatment in comparison to the resident or treated unequally by providing unlimited time to initiate proceedings under section 201 of the Act. In our opinion, the Constitution of India provides equal treatment and equal protection of law within the territory of India. If the law requires initiation of proceedings within 6 years from the end of financial year for the resident, same treatment is required to be given to the non-resident. For this proposition, we may rely upon on the judgment of Hon'ble Supreme Court in *Dr. Subramanian Swamy* v. *Director, CBI* [2014] 8 SCC 682 (SC) in para 22 .

101. Keeping in mind the principles set out by the Hon'ble Supreme Court in Dr. Subramanyian Swamy (supra), if we examine the scheme

of Section 201 Act, the resident of India cannot be discriminated vis-à-vis. The non-resident under Income Tax Act and similarly under DTAA non-resident cannot be discriminated viz-a-viz resident. If we accept the argument of the Ld. AR that the limitation of 4 years, as held provided by the Special Bench would continue to apply to non-resident even after post amendment to section 201, in that eventuality, hostile discrimination towards the resident-payee will creep in i.e., the limitation for initiation under section 201 against the resident payee would be six years and against the non-resident payee it would be four years. This is neither the intention of the legislature nor the mandate of the Special Bench or the judgment referred herein above. On the contrary, if we accept the argument of the Ld. DR that there is no limitation for initiation of proceedings under 201, in view of Hon'ble Caltutta and Allahabad High Court judgments (supra), if the payee is non-resident then, it will amount to discrimination against the non-resident as the proceedings may be initiated against the resident within four years and there is no limitation for initiation of proceedings against the non-resident. Therefore, the arguments of both the assessee as well as the Revenue cannot be accepted. If we accept the argument of one it would tantamount to discriminating either the resident or the non-resident, which is not permissible in the eyes of law.

102. The assessee / payer in the eyes of law whether making payment to resident or non-resident under the provisions of section

201, constitutes one class only. Accordingly, the same period of limitation is required to be applied equally for payee i.e Resident or non-resident, Law abhor vacuum and uncertainty.

103. There is no classification given under section 201. Section 201(1) only talks about person who is required to deduct any sum for the payment made. Therefore, borrowing the same reasoning of the special bench, whereby it held that the same period of limitation should be applied to resident as well as non-resident, we are of the considered view that limitation for initiation of proceedings for non-resident payee should be 6 years instead of no-limitation.as is the limitation for resident-payee. In view of the above ground No.12 in assessment year 2007-08 deserves to be dismissed and accordingly we dismiss the same.

Ground no -13 -Without prejudice to the argument that the payments made by the Appellant to Google Ireland are not in the nature of Royalty as per Article 12 of India Ireland DTAA, the Learned Assessing Officer ("AO") / Learned Commissioner of Income-Tax (Appeals) erred in holding that the Appellant is liable to withhold tax on amounts payable to Google Ireland disregarding that 'Royalty' income in the hands of non-resident is taxable only on receipt basis under the said Article 12 of India-Ireland DTAA.

104. In this regard AO held that under Section 9(1)(vi) of the Act, royalty is charged on accrual basis and the actual receipt of the same by the recipient is immaterial for the purpose of deduction of taxes. AO relied upon following judgments Trishla Jain vs ITO (2009) 310

ITR 274 (PUNJAB & HARYANA), AEG KTIENGESSELSCHAFT v Inspecting Assistant Commissioner 48 ITD 359, Allied Chemical Corporation v Inspecting Assistant Commissioner 3 ITD 418 (Bombay) and Dana Corporation USA v Income Tax Officer 28 ITD 185. Further AO has support from Section 43(2) of the Act which define 'paid' as

> *(2) 'Paid" means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under the head "Profits and gains of business or profession";*

Accordingly, the AO has concluded that the meaning of the term "paid" includes amount incurred i.e. where it becomes payable.

105. On appeal to CIT(A), the first appellate authority has not agreed to the submissions of the assessee and held that the amount payable by the Assessee to Google Ireland is royalty under the provisions of the Act, without adjudicating on the specific ground raised by the Appellant in this regard.

106. Aggrieved by the order of the CIT(A) the Assessee has raised the following submissions before us :

Submissions of the assessee

107. In this regard the Ld. AR for the assessee has submitted that the amount payable by the Assessee is not in the nature of 'royalty'

under the Act and the India-Ireland DTAA. However, it was submitted that assuming amount payable to Google Ireland is in the nature of 'royalty', then in terms of Article 12 of the India-Ireland DTAA, income in the nature of royalty is chargeable to tax in the hands of the nonresident only on receipt basis.

108. Our attention is drawn to Article 12 of the India-Ireland DTAA:

> *"1. Royalties or fees for technical services **arising in** a Contracting State **and paid** to a resident of the other Contracting State may be taxed in that other State.*
>
> *2. However, **such royalties or** fees for technical services may also be taxed in the Contracting State in which they arise, and according to the laws of that State...*
>
> *3. (a) The term "royalties" as used **in** this Article **means payments** of **any kind received** as a consideration for the use of or the right to use, any copyright of literary, artistic or scientific work including cinematograph films or films or tapes for radio or television broadcasting any patent, trade mark, design or model plan, secret formula or process or for the use of or the right to use industrial, commercial or scientific equipment, other than an aircraft or for information concerning industrial, commercial or scientific experience."*

109. Accordingly it was submitted so far as taxability of Royalty is concerned, twin conditions of "arising in India" as also the "payment" are to be satisfied. The Ld. AR relies upon the order passed by the Mumbai ITAT in **National Organic Chemical Industries Lid (96 TTJ 765).**

110. Further, it was also submitted the term 'royalty' in Article 12(3a) of the India-Ireland DTAA is defined to mean **payment of any kind received** as a consideration for the use or right to use copyright, patent, trademark, etc. A plain reading of the above phrase means that an amount can be characterized as royalty under the DTAA only on payment and not mere[ly] on accrual. In other words, until the amount is paid, the amount accrued or due cannot partake the character of royalty.

111. If Article 12(1) is read in juxtaposition with Article 12(3)(a) which defines royalty, in the context of India as source country, provision would read as under:

> *"Royalties (being payment of any kind received as a consideration for the use of IPR .....) arising in India and paid to resident of Ireland may be taxed in India."*

112. Even if one were to state that the point of taxation is the "arising" of the income in India, the same can be finally taxed only on the basis of the amount "paid" to the nonresident. The Ld. AR relied upon Hon'ble Delhi Tribunal the case of ***Pizza Hut International LLC (33 CCH*** 95). Hence, mere "accrual" without "payment" would not crystallize the charge under the DTAA irrespective of the position under the Act and accordingly Royalty should not be taxable in India.

113. The Ld. AR sought to distinguish the finding of AO which was based on ruling of Supreme Court in the case of Standard Triumph Motors Co. Ltd. It was submitted the judgment is distinguishable.

a. The decision does not take into account the provisions of the DTAA as probably none existed at that time;

b. **CSC Technology Singapore Pte Ltd Vs ADI, New Delhi 12012-TII-35-ITAT-DEL-INTLJ,**

c. The decision of the Hon'ble Delhi ITAT in the case of Pizza Hut International LLC *(supra)* factors the observations of the Hon'ble Supreme Court in the case of Standard Triumph Motors while holding that the royalty can be considered as taxable in the hands of the recipient on a receipt basis.

114. Further, reliance is also placed on a recent decision of the Hon'ble Bombay High Court ruling in the case of ***Siemens Aktiengesellschaft ITA No.*** *124 of 2010.* The Hon'ble High Court was dealing with Article 12 of India Germany DTAA and held that the assessment of Royalty or fees for technical services should be made in the year in which the amounts are "received" and not otherwise.

115. The Ld. AR submits in the case of **Booz. Allen** & **Hamilton (India) Ltd (ITA No. 4505/Mum/2003)** is also relevant in the present context. The Hon'ble ITAT, relying on the case of Siemens Aktiengesellschaft *(supra)* ,and keeping in view the language employed in DTAA, held that the amounts receivable by the non-resident from its agent in India could not be brought to tax in India

during the year of credit since the same had not been paid by the agent to the said entities.

116. The Ld. AR further relies upon Johnson & Johnson (ITA No. 7865/Mum/2010) and CSC Technology Singapore Pte Ltd *(supra).*

117. The Ld. AR submitted that the Liability to withhold taxes in the hands of the payer on payment basis and not on accrual basis. For that purposes our attention was drawn to Section 195(1) to the following effect :

> *"Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest under referred to in section 194LB or section 194LC) or section 194LD or* ***any sum chargeable*** *under the provisions of this Act (not being income chargeable under the head "Salaries') shall,* ***at the time*** *of* ***credit*** *of such income to the account of the payee* ***or at the time of payment thereof in*** *cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate in force:"*

118. It is submitted that for the purpose of determining whether an amount is chargeable to tax in the hands of a non-resident, the provisions of the relevant DTAA would also need to be factored. It is submitted that the charge under the DTAA on royalty is triggered only when the amount is paid and not when the amount is accrued or even due. Accordingly, royalty receivable by Google Ireland would be chargeable to tax under the India – Ireland DTAA only when actually received and accordingly, the liability to withhold

under section 195 would arise only when the sum becomes chargeable in the hands of Google Ireland i.e. when the amount is paid. *The Ld. AR relied upon the order of the Tribunal passed in the case of* **Saira Asia Interiors Pvt Ltd (ITA No.673/Ahd/2014).** The relevant extracts of the order are reproduced below your kind perusal:

> *"5. It is only elementary that the tax deduction source liability under Section 195 is a vicarious liability in the sense that its survival in the hands of tax-deductor is wholly dependent on existence of tax liability in the hands of recipient of income. When a credit afforded by, or a payment made by, an Indian resident, to a non-resident, does not trigger the taxability of that income in the hands of recipient, the tax deduction liability does not come into play at all. This scheme of the Act is implicit from the wordings of Section 195 (1) which* ***state that "Any person responsible for paying to a nonresident, not being a company, or to a foreign company, any interest (not being interest on securities) or any other sum chargeable under the provisions*** *of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash* ***or by the issue of a cheque*** *or draft or b*^{y} *any other mode, whichever is earlier, deduct income-tax thereon at the rates* ***in*** *force" (Emphasis, by underling supplied by us). When income embedded in a payment is not taxable under the Income Tax Act, 1961, the tax withholding liability does not get triggered at all.*
>
> *10. We may also a deal yet another argument in favour of the stand of the revenue to the effect that if tax liability of the non-resident is to computed on the basis of domestic law anyway, which permits taxation of royalties at the*

> *point of accrual, the tax withholding should have taken place at the point of time when royalties accrued i.e. when the account of the non-resident was credited. However, we are unable to see any legal merits in this plea because what is material is the tax liability of income embedded in the related payment as at the point of time when event triggering tax withholding liability takes place, i.e. crediting the amount or paying the* ***amount. When the income embedded in the payment is not liable to be taxed at the point of time when account of the non-resident was credited, in view*** *of the fact that, under the related* ***DTAA, tax*** *liability can only arise at the point of a* ***subsequent event i.e. payment.*** *When income embedded in the payment is not taxable at that point of time of crediting the amount, there cannot be any occasion for deduction of withholding the tax on such income. It is only at the point of time when payment takes place, that the income embedded in payment becomes taxable under the DTAA as also under the domestic law, but then rate of tax prescribed in domestic law being lower, vis-à-vis the rate prescribed in the domestic law, the assessee has the option of adopting the lower rate under the domestic law."*

119. Therefore, it was submitted withholding liability in the hands of the Appellant would arise only on payments made and not on the amounts payable to Google Ireland. Therefore, as section 195 of the Act casts an obligation on the payer to withhold tax, only when the same is chargeable to tax in India, withholding of tax, if any, would be required only at the time of actual remittance and not on the credit in the books of accounts. Hence in the instant case, there is no requirement for withholding of tax in the subject years as the amounts remained unpaid during the years under consideration i.e. up to 31 March 2012.

120. The Ld. DR also argued that when the withholding tax liability in the subject year is determined on payment basis under the DTAA, the Appellant may claim in the year of receipt that the taxability in the hands of the payee would arise on accrual basis and accordingly, liability to withhold would be the year of accrual.

Submissions of the revenue

121. The assessee by reading the language of definition of royalty in the DTAA has contended that the amount paid to Google Ireland is taxable in the year of receipt and hence no obligation to deduct tax at source on credit basis.

121.1 The section 195(1) imposes obligation on the assessee to deduct tax at source in respect of the payments made to non-resident if the sum is chargeable under the provisions of the Act. It is further held by various Supreme Court in the case of GE India and Ellie Lilly that the provisions of section 195 has to be read along with charging provisions i.e. section 4, 5,9 and 90 of the Act. On conjoint reading of the above provisions, it is clear that the amounts paid by the assessee to Google Ireland are chargeable under the Act on accrual basis. Hence contention of the assessee that amount is chargeable in the hands of the Google Ireland on receipt basis is misplaced.

121.2 If the language of definition of royalty under the DTAA is read Article 12(3)(a) with Ireland, the wordings "the term "royalties" as used in this article means payment of any kind received as consideration for the use-------" would clearly and unambiguously makes it clear that payment received as consideration for use would alone be considered as royalty. The words "payments of any kind received as a consideration for the use of' has to be read together and it would only mean the classification of the income and not the method of accounting. Hence the contention of the assessee is misplaced.

121.3 It is submitted that the assessee is providing IT services and IT enabled services to Google Ireland in addition to marketing and distribution services for the adverts program. The assessee will be receiving amounts from IT services and IT enabled services from Google Ireland. The assessee will pay Google Ireland in view of marketing and distribution services for Adword program. It is undisputed fact that the assessee is wholly-owned subsidiary of Google. In view of the close connection between the Google India and the Google Ireland, the payments to be received by the assessee provides IT servics and IT enabled services can be adjusted towards payment towards marketing and distribution services for Adword program. The fact that the assessee has not reflected the amounts paid to Google Ireland in the P&L account would further justify the above aspect.

121.4 In the above context if the language employed in article 12 (3) (a) of the DTAA specifically with the words **"means payment of any kind received"** would mean the receipt of amount by virtue of adjustments/set off in the books of accounts of the assessee. Further **"payment of any kind received"** has to be read as any mode of payment either by book adjustment/ credit or actual payment. Any other meaning would read the language redundant in view of the provisions of section 4, 5, 9, 90 and 195 of the Act.

121.5 It is further submitted that the DTAA does not determine the method of accounting and the year of taxability in respect of parties to the agreement. What DTAA provides for is the extent of taxability of income and the percentage of the tax on the income liable for tax and the distribution of tax among the countries party to the DTAA. Hence the language employed in defining the meaning of royalty cannot be read to mean the method of accounting. The DTAA does not deal with the year of taxability or the method of accounting of either parties.

121.6 It is further submitted that only section which has imposed obligation on the assessee is section 195(1) of the Act. The section obligates the assessee to deduct tax at source in respect of the income chargeable under the Act. The section does not empower the payer to examine the applicability of the DTAA to the payee. Language of section 90(2) of the Act beyond doubt is clear and unambiguous that option to exercise the benefit of either the Act

or the DTAA is conferred on the nonresident. Hence at the stage of payment without there being any indication by the recipient, the payer cannot step into the shoes of recipient to exercise the option provided under section 90(2) and claim the benefit of DTAA.

121.7 It is further submitted that the application of DTAA is not automatic and it is the specific exercise of option by the recipient subject to fulfillment of certain conditions as contemplated under the DTAA. In the absence of any material or enquiry by the assessee, the assessee cannot jump to the conclusion that the amount is not chargeable under the DTAA.

121.8 The contention of the assessee that receipt in the hands of Google Ireland is liable to be taxed on cash basis is completely baseless for the reason that the Google Ireland itself has filed return of income for the Assessment Year 2007-08 and 2008-09 and has admitted the Mercantile system of accounting being followed. Copies enclosed for ready reference and consideration.

121.9 The coordinate bench of this Hon'ble Tribunal in the case of Vodafone South Ltd at para-36, 37 has examined the scope of applicability of the DTAA and has been held that applicability of the DTAA is not automatic. It is further held by this Hon'ble Tribunal that the only onus upon the assessee is to determine that the payments made by it did do not involve the element of income chargeable under the Act and the provisions of DTAA would not automatically attract in defence of the payer.

121.10. In view of the decision of this Hon'ble Tribunal in the case of Vodafone South Ltd, and the law laid down by the Supreme Court in the case of GE India explaining the scope of section 195(1) and applicability of other charging provisions like section 4, 5, 9 and 90 (2) of the Act, what is to be considered at the time of payment by the assessee is only regarding the chargeability under the Act and the assessee cannot be permitted to take shelter under the DTAA as the benefit of DTAA is conferred only on the nonresident recipient.

121.11. The various judgements relied on by the assessee in the case of Siemens, Booz Allen and Saira Asia are not applicable to the present case. Further the scope of section 90(2) of the Act and the effect of charging provisions under section 4, 5 and 9 have not been examined. Further the above judgements have not deal with the entitlement of the payer to claim protection under section 90(2) of the Act. Particularly and as admitted by the non-resident, the non-resident assessee is following Mercantile system of accounting and hence the word "received" in the DTAA cannot be read to mean the method of accounting. In contrary, the same has to read as classification of income.

121.12. If the contention of the assessee is to be tested in the context of the law laid down by the Supreme Court with respect to the scope of section 195(1) of the Act r.w.s 4, 5, 9 and 90(2) of the Act, if the assessee case is accepted that liability to deduct tax at source

would arise in the year of payment as the same is taxable on receipt basis in the hands of the non-resident, in the event of the non-resident exercising option under section 90(2) of the Act to claim benefit of the provisions of the Act, and specifically in view of the Mercantile system of accounting being followed by the nonresident, if the non-resident claims that the same is taxable on accrual basis under section 4, 5 and 9 of the Act, read with the specific language of section 195(1) of the Act, the contention is clearly illogical and contrary to the scheme of the Act. Undisputedly it is settled position of law that whether to claim benefit under the Act or under the DTAA is the option of the non-resident. In the absence of any authority in favour of the assessee, the assessee cannot presume that the nonresident would be claiming benefit under the DTAA. If such was the situation, the Act has provided mechanism for the non-resident to express that under section 195 of the Act before the concerned assessing officer. In the absence of any such exercise on behalf of the non-resident, the contention of the assessee is baseless and liable to be rejected.

121.13. If the terms of the payment as agreed between the parties is examined it is clear that on periodic intervals the amounts are liable to be paid. In view of the above, the contention contrary that amount is taxable in the hands of the nonresident on receipt basis is baseless.

121.14. The ld Counsel for revenue relid upon following judgments

a Transmission corporation of AX Ltd & ANR v Commissioner of Income-tax (239 ITR 587(SC)):

b. GE India Technology Centre (P) LTD. vs Commissioner of Income-tax & ANR (327 ITR 0456 (SC))

c. Commissioner of Income-tax v Eli Lilly & Co. (India) (P.) Ltd 223 CTR (SC) 20 . d.

d. Vodafone South Ltd. v. Deputy Director of Income-tax (International Taxation) (44 ITR(T) 330 (Bang ITAT)

e. Palam Gas Service v. CIT:

Rebuttal against the submissions of the DR

122. Ld AR that Section 4(1) is a charging provision and it lays down that the total income of the assessee should be taxed in the relevant assessment at the rates in force. The term 'total income' is defined in Section *5* to include all income which accrues or arises or deemed to accrue or arise or is received or deemed to be received. However, application of this provision is subject to other provisions of this Act including Section 90(2) of the Act. Section 90(2) provides that the provisions of the Act may be applied to the extent beneficial to the Assessee. Accordingly, for the purpose of applying Section *195(1),* the 'sum chargeable' under section 4 would need to be determined having regard to the provisions of the relevant DTAA.

122.1 It was submitted by Ld AR that DR reliance on the decisions of the Hon'ble Supreme Court in the cases of Transmission

Corporation of A.P Ltd *(supra)* and GE India Technologies (P) Ltd (supra) while submitting that the provisions of DTAA cannot be applied by the payer while determining the amounts chargeable to tax in India is incorrect. Ld AR submitted that applicability Section 195 of the Act may be evaluated in three different cases as illustrated below:

(i) Where the total of the sum paid to non-resident is chargeable to tax in India

(ii) Where part of the sum paid to non-resident is chargeable to tax in India

(iii) Where the total sum paid to non-resident is not chargeable to tax in India

122.2. Ld AR submitted that the Hon'ble Supreme Court in the case of Transmission Corporation *(supra)* has only dealt with the first two scenarios, and has not dealt with the third scenario i.e "Where the total sum paid to non-resident is not chargeable to tax in India"

122.3. Further Ld AR submitted that in the case of GE India Technologies (P) Ltd *(supra)* has held that the provisions of Section 195 are required be read with the provisions of Section 4, *5,* 9, and 90(2). The Hon'ble court had held as under :

"While deciding the scope of s. 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle of s. 195. Hence, apart from s. 9(1), ss.4, 5, 9, 90, 91 as well as the provisions of ***DTAA are also relevant, w****hile applying TDS provisions"*

122.4. Further Ld AR submitted that the case of Vodafone South *(supra)* is not applicable automatically. As per AR in the case of Vodafone South *(Supra)* has not factored the principle laid down by the Hon'ble Supreme Court in the case of GE India Technologies (P) Ltd *(supra).*Further Ld AR submitted that decision of the Supreme Court in *Palam Gas* is in a completely different context and cannot be relied on to submit that 'received' should be interpreted as 'receivable'.

122.5. Ld AR submitted that the AO proposed to apply the India – Ireland DTAA to determine the rate of withholding and has not disputed on the applicability of the treaty on this issue.

Discussion and Finding :

123**.** As per service agreement dated dt.01.04.2014, payment is required to be made by the GIL with 90 days after it receipt the invoice from the Assessee :

> *Payment :*
> *4.1 As sale compensation for the performance of the services, Google Ireland, or any of the affiliates, on behalf of Google Ireland, will pay Google India an amount calculated as specified in Exhibit A hereto ("Service Fees"). Google India will invoice Google Ireland on a periodic basis for the services Fee due with respect to services performed. Each invoice shall be accompanied by a report providing an accounting of all services provided by Google India during the payment period; such all information reasonably necessary for computation and / or confirmation of the payments due to Google India for such*

period. Google Ireland will pay each such invoice no later than ninety (90) days after its receipt. All payments due under this Agreement shall be paid in accordance with policies established by Google Ireland from time to time.

123.1. Similarly as per agreement date 12.12.2005. As per clause (4), payments received and taxes are required to be made in the following manner:

4. Billing, Payment, Receipt and Taxes. The payment terms contained in the Exhibit A shall govern the payment in connection with this Agreement. Parties will provide an invoice for all payments due under this Agreement. Distributor shall be responsible for complying with all foreign exchange procedures, including tax clearance, as necessary for Distributor to pay Google lawfully the payments under this Agreement. Distributor shall take the necessary steps to obtain the necessary tax exemptions lawfully for its payments to Google. Payments to Google shall be subject to applicable taxes. Distributor shall advise Google immediately of any actual or proposed change in local law or regulation that would in any way affect the transfer of funds to Google in accordance with Distributor's payment obligations herein; any such change shall be grounds for immediate termination by Google of this Agreement, effective upon written notice as provided herein. Each party shall be responsible for taxes based on its own capital, net income, employment taxes of its own employees, and for taxes on any property it owns. Distributor shall be responsible for the payment of all other taxes imposed by any governmental authority in the Territory or elsewhere in connection with the distribution of AdWords Program under this Agreement. **"Taxes"** means all central, state, provincial and municipal, income, franchise, business, gross receipts, payroll, property, sales, use, excise, value-added, consumption, goods and services, harmonized sales, and all other similar taxes or duties. Distributor agrees to reimburse, indemnify, defend and hold Google harmless from any deficiency (including penalties and interest) relating to taxes that are the responsibility of Distributor under this Section 4.

123.2. Similarly in Exhibit A (payment terms and conditions) it is provided as under :

1. Distributor shall pay fees for the distribution right to Google an amount equal to the excess of :

(A) Revenue earned by Distributor and recognized in accordance with accounting standard in the books of account of Distributor pursuant to this Agreement.

(B) (i) Expenses incurred under and recorded on the books of account of Distributor in pursuant to this Agreement; and

(ii) The Specified Percentage of Expenses.

XXXX

6. Payment of fees :

6.1 Distributor shall make payments at mutually agreed intervals during the year and make the final trued-up payment on the basis of duly audited accounts to Google.

6.2 Payments by Distributor to Google shall be in the currency specified by Google.

6.3 Documentation: Google shall provide such documentation as may be required by distributor to evidence the fees for its records, compliances and audit.

6.4. All fees and payments may be subject to Indian tax laws or tax rules defined under various tax laws or under specific DTAAs (Double Taxation Avoidance Agreements) as may be applicable.

123.3. From the conjoint reading of the above two provisions it is abundantly clear that the distribution fees (Royalty) is payable during the year and up to final trued-up on the basis of the duly audited accounts of Google. Even as per clause 4 of the Service agreement, the Google Ireland will pay the invoices raised by Google India (assessee) within 90 days of receipt of invoice. On the basis of the above, there is no doubt that the payment is due and payable by the assessee to GIL within the year it became due. The same principle is applicable for distribution fees (royalty) as well as for services rendered by the assessee to GIL. The assessee, in its books of account has debited the amount of Rs.1198261982/- for AY 2008-09 towards the fees for distribution services to GIL.

123.4. As per section 195, there is an obligation on the part of the payer to deduct the TDS, in case the assessee is making payment to a non-resident. The argument that the payment made by the assessee to GIL is not being the sum chargeable under the provisions of the Act, is not available for the payer to be raised in the present proceedings. The necessary safe-guards are provided by the Act in the form of Section 195(2) which clearly provides that in case the assessee is having any doubt about the chargeability to tax of the payment, then the assessee may make an application to the AO for the purpose of determining whether the sum is chargeable to tax or not and if yes, on what proportion.

123.5. In the present case, no such application is made u/s.195(2) to the AO. The assessee on its own, without having knowledge, information and privy to the accounting standard and accounting practice of GIL, has treated the said payment as a business profit of GIL in its books of account. The uniform policy is required to be adopted for deduction of taxes at source in case, by the person responsible for paying amount to a non-resident. There is no caveat or condition laid by the Act on the person responsible for paying to non-

resident. In our view, whether it is business profit or royalty, in both the circumstances, so far as the assessee is concerned, the assessee is duty-bound to deduct the TDS unless there is an adjudication by the AO to the contrary u/s.195(2).

123.6 The argument of the Ld. AR that under the provisions of Indo-Ireland DTAA, the royalty is chargeable to tax in the hands of the non-resident on receipt basis needs to be rejected, as the benefit of DTAA, is only available to non-resident and not to the resident payer. Moreover, the assessee cannot claim that the royalty is chargeable to tax in the hands of the non-resident on receipt basis as the assessee has no access to the accounting method followed by GIL.

123.7 The Ld. Standing Counsel for the Revenue had filed the copy of the return of income for AY 2008-09 where the GIL had mentioned against the column – Method of accounting employed in the previous year – "Merc" (Mercantile). For the ready reference we are herewith reproducing the first page and sixth page of ITR 6 of AY 2008-09.

INDIAN INCOME TAX RETURN ACKNOWLEDGEMENT

[Where the data of the Return of Income/Fringe Benefits in Form ITR-1, ITR-2, ITR-3, ITR-4, ITR-5, ITR-6 & ITR-8 transmitted electronically with digital signature]

Assessment Year 2008-09

PERSONAL INFORMATION AND THE DATE OF ELECTRONIC TRANSMISSION

Name			PAN
GOOGLE IRELAND LIMITED			AADCG7672A
Flat/Door/Block No	Name Of Premises/Building/Village		Form No. which has been electronically transmitted: ITR-6
GORDON HOUSE			
Road/Street/Post Office	Area/Locality		Status: Pvt Company
	BARROW STREET		
Town/City/District	State	Pin	Designation of Assessing Officer
DUBLIN 4	STATE OUTSIDE INDIA	999999	DCIT(INT.TAX), CIRCLE 1(1), BANGALORE
E-filing Acknowledgement Number	530869541111116		Date(DD/MM/YYYY) 11-11-2016

COMPUTATION OF INCOME AND TAX THEREON

1	Gross total income			1	0
2	Deductions under Chapter-VI-A			2	0
3	Total Income			3	0
3a	Current Year loss, if any			3a	0
4	Net tax payable			4	0
5	Interest payable			5	0
6	Total tax and interest payable			6	0
7	Taxes Paid	a Advance Tax	7a 0		
		b TDS	7b 0		
		c TCS	7c 0		
		d Self Assessment Tax	7e 0		
		e Total Taxes Paid (7a+7b+7c +7d)		7e	0
8	Tax Payable (6-7d)			8	0
9	Refund (7e-6)			9	0

COMPUTATION OF FRINGE BENEFITS AND TAX THEREON

10	Value of Fringe Benefits			10	
11	Total fringe benefit tax liability			11	
12	Total interest payable			12	0
13	Total tax and interest payable			13	0
14	Taxes Paid				
	a	Advance Tax	14a 0		
	b	Self Assessment Tax	14b 0		
	c	Total Taxes Paid (14a+14b)		14c	
15	Tax Payable (13-14c)			15	0
16	Refund			16	0

his return has been digitally signed by ELIZABETH CUNNINGHAM

	f	Total rates and taxes paid or payable (34a+34b+34c+34d+34e)			34f	0
	35	Audit fee			35	0
	36	Other expenses			36	0
	37	Bad debts			37	0
	38	Provision for bad and doubtful debts			38	0
	39	Other provisions			39	0
	40	Profit before interest, depreciation and taxes [5 - (6 + 7 + 8h + 9 to 14 + 15k + 16e + 17 to 33 + 34f + 35 to 39)]			40	0
	41	Interest			41	0
	42	Depreciation			42	0
	43	Profit before taxes (40-41-42)			43	0
TAX PROVISIONS AND APPROPRIATIONS	44	Provision for current tax			44	0
	45	Provision for Fringe benefit Tax			45	0
	46	Provision for Deferred Tax			46	0
	47	Profit after tax (43 - 44 - 45 - 46)			47	0
	48	Balance brought forward from previous year			48	0
	49	Amount available for appropriation (47 + 48)			49	0
	50	Appropriations				
		a	Transferred to reserves and surplus	a	0	
		b	Proposed dividend / Interim dividend	b	0	
		c	Tax on dividend / Tax on dividend for earlier years	c	0	
		d	Any other Appropriation	d	0	
	50e	Total (50 a to d)			50e	0
	51	Balance carried to balance sheet in partner's account (49 - 50e)			51	0

Part A- OI	Other Information (optional in a case not liable for audit under section 44AB)					
OTHER INFORMATION	1	Method of accounting employed in the previous year			1	MERC
	2	Is there any change in method of accounting			2	N
	3	Effect on the profit because of deviation, if any, in the method of accounting employed in the previous year from accounting standards prescribed under section 145A			3	0
	4	Method of valuation of closing stock employed in the previous year				
		a	Raw Material (if at cost or market rates whichever is less write 1, if at cost write 2, if at market rate write 3)		4a	
		b	Finished goods (if at cost or market rates whichever is less write 1, if at cost write 2, if at market rate write 3)		4b	
		c	Is there any change in stock valuation method		4cs	
		d	Effect on the profit or loss because of deviation, if any, from the method of valuation prescribed under section 145A		4d	
	5	Amounts not credited to the profit and loss account, being -				
		a	the items falling within the scope of section 28	5a	0	
		b	the proforma credits, drawbacks, refund of duty of customs or excise or service tax, or refund of sales tax or value added tax, where such credits, drawbacks or refunds are admitted as due by the authorities concerned	5b	0	
		c	escalation claims accepted during the previous year	5c	0	
		d	any other item of income	5d	0	
		e	capital receipt, if any	5e	0	
		f	Total of amounts not credited to profit and loss account (5a+5b+5c+5d+5e)		5f	0
	6	Amounts debited to the profit and loss account, to the extent disallowable under section 36:-				
		a	Premium paid for insurance against risk of damage or destruction of stocks or store	6a	0	
		b	Premium paid for insurance on the health of employees	6b	0	
		c	Any sum paid to an employee as bonus or commission for services rendered, where such sum was otherwise payable to him as profits or dividend.	6c	0	
		d	Any amount of interest paid in respect of borrowed capital	6d	0	
		e	Amount of discount on a zero-coupon bond	6e	0	
		f	Amount of contributions to a recognised provident fund	6f	0	
		g	Amount of contributions to an approved superannuation fund	6g	0	
		h	Amount of contributions to an approved gratuity fund	6h	0	
		i	Amount of contributions to any other fund	6i	0	

127.8 Thus it is clear that GIL was following the mercantile method of accounting and not the cash method of accounting. As per the mercantile method of accounting, the GIL should have shown the

distribution fees (royalty) on accrual basis and not on receipt basis. Therefore the argument of chargeability of royalty in the hands of non-resident (GIL), on receipt basis is required to be rejected.

123.10 There are only two methods of accounting prevalent in the world, i.e., mercantile method and cash method. In mercantile method, the taxability is done on accrual basis, whereas in cash method, the taxability is done on receipt basis. In the present case, though it is not the concern of the assessee as to which method is being following by the GIL yet, GIL as mentioned herein above, is following the mercantile method of accounting, therefore, the chargeability of tax would be in the year when it is accrued and not in the year when it was received.

123.11. The argument of chargeability to tax in the hands of non-resident on receipt basis, is also required to be rejected as the scope and ambit of DTAA (Double Taxation Avoidance Agreement) as per section 90 of the Act is to grant relief from double taxation, to promote mutual economic relations, trade and investment, for exchange of information for prevention of evasion or avoidance of income-tax chargeable under this Act or in other country, or for recovery of income-tax under this Act or under corresponding laws. In the opinion of Bench, the DTAA can only provide the characterization of the income, the country where it is to be paid and at what rate the said income is to be taxed. However, it is not within the scope of the

DTAA to provide when (i.e year of accrual or receipt), the income is required to be charged.

123.12 In our view the literal rule of interpretation is not required to be followed and instead thereof linga or lakshana principle has to be followed, i.e., we have to see the intent and not go by the literal rule as pointed out by Lord Denning in his book, 'The Discipline of Law". If we go by literal meaning of DTAA, then unscrupoulous persons may misuse the provision and avoid payment of taxes. To illustrate this, if A company is rendering services to B company, and B company is supplying some technology to A company, then there is a mutual obligation of paying and receiving the amount. It is possible for both A and B either to keep separate accounts for both transactions or they can indulge into adjustment of their accounts by debiting and crediting their accounts without actual payment. In such a situation, there will not be any occasion for B company to receive the actual payment from A company.

123.13 Further, the income arising on account of royalty payable by resident or non-resident in respect of any right, property or information used or services utilized for the purposes of business or profession shall become due and payable as per the provisions of the IT Act, as well as under DTAA when such information is used or service is utilized by the recipient. In the present case, the distribution fees was credited as accrued by the assessee after utilizing the benefit

under the distribution agreement to the account of GIL, Therefore, the same is chargeable to tax when it was credited to the account of GIL and the appellant is duty-bound to deduct TDS at the time of crediting it to the account of GIL. The appellant will not suffer any loss on this account if the payment is made to the GIL after deducting the tax. In any case if the GIL proves that the amount is not required to be taxed in India then the GIL can claim refund in the assessment proceedings.

123.14. The assessee in the present case has used the information, patented technology, etc., from GIL which in the opinion of the bench, is royalty and therefore, as per the mandate of Article 12(2), the royalty is to be taxed in the contracting state (India) in accordance with the laws of India. Clause (2) of Article 12 of DTAA clearly provides as under :

12(2) : However, such royalties or fees for technical services may also be taxed in the Contracting State in which they arise, and according to the laws of that State….

Further the laws of India provide taxability of royalty on the basis of the accrual (mercantile method) and not on receipt (cash basis). Therefore, once field is occupied by clause 2 of Article 12, the royalty paid by the assessee to GIL is taxable as per Indian law.

123.15. In our view, the assessee has used the information, patented technology, etc., from GIL which in the opinion of the bench, is royalty and therefore, as per the mandate of Article 12(2), the royalty is to be taxed in the contracting state (India) in accordance with the laws of India. Further the laws of India provide taxability of royalty on the basis of the accrual (mercantile method) and not on receipt (cash basis). In our view once the field is occupied by clause 2 of Article 12, then the same is required to be applied and enforced.

123.16. The reliance placed by the Ld. AR on paragraphs 7 and 8 of the decision of the coordinate bench in the matter of **Pizza Hut International LLC (supra**) is to support its case, is out of place and is therefore required to be rejected. **For arriving at the conclusion that the royalty is taxable on cash basis, the coordinate bench** neither gone into the method of account nor considered Article 12(2) of DTAA which provides that the royalty is taxable in accordance with the laws of India (contracting state/ source country)

123.17. As admitted by the assessee during the course of argument as well as in the written submissions that the assessee had applied for RBI permission only in November, 2011. The following written submissions were made in this regard.

> The distribution fee payable by the Appellant to Google Ireland for the period December 2006 to June 2009 remained unpaid until FY 2011-12. The Appellant had approached the Reserve Bank of India

> through the Authorised Dealer bank in November 2011 requesting for approval to remit the amounts to Google Ireland. Pursuant to the approval from the RBI on 12 May 2014, the Appellant has remitted the distribution fee pertaining to aforementioned period in May 2014.

123.18. If we examine the conduct of the assessee it is clear that the assessee has not sought the permission for the distribution fees to be paid to its AE (GIL) for AY 2006-2009, upto Nov 2011.

123.19 Thus the intention of the assessee as well as of the GIL is clear and conspicuous that they wanted to avoid the payment of taxes in India. That is why, despite the duty of the assessee to deduct the tax at the time of payment to GIL, no tax was deducted nor any permission was sought for paying the amount. If the permission for paying the amount is taken immediately after entering into agreement, then this argument of not making the payment as late as May, 2014 would not have been available to the assessee. This is a clear design to skip the liability by both the assessee as well as GIL by having mutual understanding.

123.20 Therefore in our view the Ld. DR was right in his submission that the assessee deliberately not sought permission for making the payment to GIL and is taking chance to avoid taxes within the four corners of IT Act. The judgment referred by the assessee in the case of **Pizza Hut International LLC** (supra) and CSC Technology (supra), mentioned about the misuse and deliberate

attempt to delay the payment of taxes when the transaction is between the AE. In the case on hand conduct of the two parties, which are associated enterprises (AEs) clearly show that both are trying to misuse the provision of DTAA by structuring the transaction with the intention to avoid payment of taxes. The same is not permissible in law. The proviso is being abused by them as a device to defer the tax for any length of time by mutual understanding of the parties, particularly when both the parties are under an obligation to pay and receive the payment for the services rendered and for distribution fees (royalty). Therefore, we have no hesitation to hold that the judgment relied upon by the assessee is not applicable to the facts and circumstances of the case, rather it supports the case of the Revenue..

123.21 Ld AR had submitted that for the purpose of determining whether an amount is chargeable to tax in the hands of a non-resident, the provisions of the relevant DTAA would also need to be factored and royalty would triggered only when the amount is paid and not when the amount is accrued or even due accordingly, the liability to withhold under section 195 would arise only when the sum becomes chargeable in the hands of Google Ireland i.e. when the amount is paid. In support the ld AR relied upon the order of coordinate bench in the matter of **Saira Asia Interiors Pvt Ltd (ITA No.673/Ahd/2014)** Referred herein above.

123.22 In our view the finding recorded by the coordinate bench was on the facts before it, however said order is not applicable to the present set of

facts and is distinguishable for various reasons including the following reasons : as there is no mechanism available with the revenue to know whether the actual amount was paid or credited in the hand of Google Ireland or not in the Assessment years under consideration or not or even before the lapse of time limit to deduct and deposit the TAX , Secondly the Appellant have not sought permission for remittance till Nov 2011Though the agreement was entered on 12.12.2005, thirdly present case is a case of collusion between the payer and payee . Further when Google Ireland itself is following the mercantile method of accounting then there is no occasion to treat the cash method of accounting and concluding that the Royalty would trigger only on actual payment of amount lastly the royalty paid to Google Ireland is taxable as per Income Tax Act , which provides for maintaining the accounts as per mercantile method as per section 145 of Income Tax. Further the coordinate bench had not followed the binding judgment of Hon'ble Supreme court in the matter of Transmission Corporation of AP (Supra).

123.23 The contention of the Ld. AR that the judgment passed by the Hon'ble Apex Court in the case of Transmission Corporation of AP (Supra) is applicable to the facts is not correct. In fact, Section 195 deals with a situation where any person is making the payment or part of the payment, to a non-resident which is chargeable to tax under the provision of the Act. In case any person responsible for making the payment is having any doubt about chargeability to tax under the

provisions of the Act, then an application is to be made u/s.195(2) of the Act. There was no occasion for the Hon'ble Supreme Court to deal with the argument that the sum paid to non-resident is not chargeable to tax in India. In our view, once the Hon'ble Supreme Court has dealt and decided the issue of payment by any person to a non-resident for a sum chargeable to tax in India, the negative also stood automatically adjudicated by the Hon'ble court. As held hereinabove, the question of chargeability of the sum paid by the assessee to the GIL would appropriately be decided in the proceedings of GIL and the assessee cannot shirk from its duty to deduct the tax at the time of making the payment. If Appellant was having any doubt about chargeability then the assessee should have filed an application u/s.195(2).Once the Hon'ble Supreme Court has held that the person responsible to deduct the tax at source on the payment to a non-resident, which is chargeable to tax in India, then there is no scope for further interference.

124 The Ld. AR contradicted the submissions of theLd. DR whereby it was submitted by him that section 195 the provisions of 4, 5, 9 and 90 (2) and not with the provisions of the DTAA by referring to following paragraph in the matter of GE India Technology Centre P. Ltd (supra).

> *"While deciding the scope of s. 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle of s. 195. Hence, apart from s. 9(1), ss.4, 5, 9, 90, 91 as*

well as the provisions of ***DTAA are also relevant,*** *while applying TDS provisions"*

125 In our opinion, the scope and ambit of Section 195(2) is clear and unambiguous, which mandates the AO to decide whether any payment(Royalty) paid by the appellant to GIL is chargeable to Tax on cash / receipt basis or not. However, to trigger 195(2), the payer (assessee) was duty-bound to make an application with the AO. Unless an application is made to the AO, there would not be any occasion for him to determine the chargeability of payment of royalty to tax by referring to DTAA or under the ACT. Therefore, the finding given by the Hon'ble Supreme Court GE India Technology Centre P. Ltd (supra) does not come to the rescue of the assessee. The applicability of DTAA cannot be suo-moto be determined by AO without there being any application under section 195(2) of the Act for the purposes of deducting the Tax at source. The Coordinate bench in the matter of Vodafone South Ltd. [2015] 53 taxmann.com 441 (Bangalore - Trib.) after referring and dealing GE India Technology Centre P. Ltd (supra) held as under :

> **36**. The next peripheral issue is, can the payer claim full protection of DTAA as is available to the payee in respect to the payments payee had received. The DTAAs are not more than the allocation of the taxes, they do not provide any other mode, how the taxes are to be collected whether by advance deduction etc. This is an area of the domestic law, the sum chargeable to tax is to be considered, with an angle of the domestic law, unless the payee is there to demonstrate that he is not chargeable under the DTAA either by himself or through a payer. The payee never comes u/s 195 (3) of the I.T. Act. It is not available on the record that payee had ever informed the payer about the holding of their tax residency certificate and also whether they want the benefit of DTAA. According to the learned Counsel for the Revenue the tax residency certificate given by the sovereign of the State or State(s) would satisfy that payee

is a taxable entity in that state and it is entitled for the benefit of DTAA, if the provisions are more beneficial than the domestic law. Contrary to this contentions, it was pointed out by the learned Counsel for the assessee that the assessee has complied with the procedural requirement contemplated under Rule 37BB of the ITR 1962. It had submitted the details of the payee relevant clauses of the DTAA. According to him the entire literatures, commentaries and judicial decisions run counter to the arguments of the Revenue. The judgment of the Hon'ble Andhra Pradesh High Court in the case of *Sanofi Pasteur Holdings* (*supra*), was brought to our notice during the course of hearing. The Hon'ble Court has made a reference with regard to the background giving rise to tax treaties and how the treaties and domestic law co-exists for administering the taxation of any assessee. The findings of the Hon'ble Court explaining the scope and role of the DTAA is worth to note here, it read as under:

"Double tax treaties are international agreements, their creation and consequences determined according to the rules contained in the Vienna Convention on the Law of Treaties, 1969 (VCLT). The conclusion of a treaty/convention is preceded by negotiations. States intending to conclude a treaty are represented by the appropriate level of executive, political or diplomatic expertise according to individual practices and judgment of the participant states. There are several steps in the negotiations phase eventually leading to conclusion of the treaty.

Treaties or conventions are thus instruments signaling sovereign political choices negotiated between States. The efficacy of a treaty over domestic law turns upon either State – specific conventions operating to govern the sovereign practices, or where there is a written constitution provisions of that charter.

'Double taxation treaty rules do not "authorize" or "allocate" jurisdiction to tax to the contracting State nor attribute the "right to tax". As is recognized by public international law and constitutional law, States have the original jurisdiction to tax, as an attribute of sovereignty. What double taxation treaties do is to establish an independent mechanism to avoid double taxation through restriction of tax claims in areas where overlapping tax claims are expected, or at least theoretically possible. Essentially therefore, through the mechanism of a treaty the contracting states mutually bind themselves not to levy taxes, or to tax only to a limited extent, in cases where the treaty reserves taxation for the other contracting states, either wholly or in part. Contracting states thus and qua treaty provisions, waive tax claims or divide tax sources and/or the taxable object.

Unlike rules of private international law tax treaty norms assume that both contracting states tax according to their own law. Treaty rules do not lead to the application of foreign law. What treaty rules do is to limit the content of the tax law of both the contracting states to avoid double-taxation. In effect, double taxation avoidance treaty rules merely alter the legal consequences derived from the tax laws of the contracting states, either by excluding application of provisions of the domestic tax law where these apply or by obliging one or both of the concerned States to allow a credit against their domestic tax for taxes paid

in the other State. Klaus Wogel (Supra) explains that rules or double taxation are thus not conflict rules, similar to that in private international law but are rules of limitation of law, comparable to those of international administrative law'.

37. According to the learned Counsel for the Revenue, the treaty is not to be applied automatically. Section 90(2) of the Income Tax Act mandates application of treaty and it is applicable in relation to an assessee upon whom such agreements are applicable. In the present case it is applicable in the case of payee, if at all is applicable, he has highlighted that Article-1 in all the treaties specifies the type of person to whom treaty would be applicable. The treaty would be applicable to a person who is resident of State (R) or source of income in a State(s). It does not mean that it is applicable according to the domicile. He also questioned who will make inquiry about the residential status of the payee under Article-4. He also pointed that DTAA is not a parallel Code and not a complete Code. It only allocates taxing rights. The Hon'ble Andhra Pradesh High Court has specifically observed that treaty rules do not force or "allocate jurisdiction" to tax to the contracting state, nor attribute the "right to tax". According to the Hon'ble Court it is recognized by public international law and constitutional law, states have the original jurisdiction to tax as an attribute of sovereignty, the rule of double taxation treaties is to establish an independent mechanism to avoid double taxation through restriction of tax claims in areas where overlapping tax claims are accepted. The learned Counsel for the Revenue has not raked up any new controversy in his submissions. He has just highlighted the procedural limitations of the inquiry required to be conducted u/s 195 r.w.s 201. To our mind onus is upon the assessee to determine that payments made by it do not involve the element of income. The role of the Assessing Officer while conducting the inquiry u/s 201 would be to demolish the formation of this opinion at the end of the assessee. The Assessing Officer has to indicate that the payments made by the assessee are the sums chargeable to tax and belief harboured by the assessee that it is not chargeable to tax and therefore it did not deduct the tax was an erroneous belief. We will consider the evidence available on record in support of the assessee's conclusions in the later part of this order, but analysis of the scheme of income tax act, namely recovery of taxes in advance by withholding under Chapter XVII, procedure u/s 195(2) and 195(3) and procedure for assessment persuade us to say that certainly the rights as available to the payee to defend itself in an income tax assessment proceedings are not available to the assessee as payer in equal force. The learned Counsel for the Revenue has rightly pointed that provisions of DTAA would not automatically attract in the defense of the payer. There may be number of reasons for not assessing the income in the hands of the payee. The payee may be entitled for some deductions, some exemption etc. The cumulative setting of all these peripheral factor and their bearing in ultimate decision making process will be considered by us in later part of the order.

126 Respectfully following the judgment of Hon’ble SC in the matter of *Transmission Corporation of AP Ltd.* v. *CIT* [1999] 239 ITR

587, orders of the coordinate benches in the matter of Vodafone South Ltd. [2015] 53 taxmann.com 441 (Bangalore - Trib.) and also for the reasons mentioned herein above ground 13 of the appeals is dismissed .

We may also mention here that we have considered the common arguments raised in cross appeals bearing Nos.IT(IT)A.374 & 466/Bang/2013 while adjudicating the present six appeals.

127. In the result, all the six appeals of the assessee are dismissed.

Order pronounced in the open court on 23rd October, 2017

Sd/-	*Sd/-*
(JASON P. BOAZ)	**(LALIET KUMAR)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Place : Bengaluru
D a t e d : 23/10/2017
MCN*

Copy to :

1 Appellant
2 Respondent
3 CIT(A)-
4 CIT
5 DR, ITAT, Bangalore.
6 Guard file

By order

Senior Private Secretary
Income-tax Appellate Tribunal
Bangalore