आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 305/JPR/2022
निर्धारण वर्ष/Assessment Year :2018-19

Deputy Commissioner of Income Tax, Circle -1, Jaipur	बनाम Vs.	Prakash Chandra Mishra C-167 Sai Apartment, Kardhani Jhotwara, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: BDHPM 3080 R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Rajeev Sogani (CA), & Shri Rohan Sogani (CA)
राजस्व की ओर से/ Revenue by : Shri P. R Meena (CIT)

सुनवाई की तारीख/ Date of Hearing : 20/09/2022
उदघोषणा की तारीख/Date of Pronouncement: 07/10/2022

आदेश/ ORDER

PER: RATHOD KAMLESH JAYANTBHAI, A.M.

This appeal is filed by the revenue aggrieved from the order of the National Faceless Appeal Centre (NFAC) [Here in after referred as Ld. CIT(A)] for the assessment year 2018-19 dated 13.06.2022 which in turn arises from the order passed by the National Faceless Assessment Center, New Delhi passed under

Section 143(3) read with section 144B of the Income tax Act, 1961 (in short 'the Act') dated 23.09.2021.

2. Aggrieved form the order of the ld. NFAC the revenue has marched this appeal on the following grounds;

1. Whether on the facts and circumstances of this case, the ld. CIT(A) is justified in deleting the addition of Rs. 8,89,35,558/- made by the Assessing Officer u/s. 40(a)(ib) of the Income Tax Act, 1961 for non-charging of Equalization levy when the conditions prescribed as per the provisions of section 165 were fulfilled.

3. The brief fact as culled out from the records is that assessee is a proprietor of Oan Media and Web Solutions filed his return in ITR-3 declaring total income of Rs. 43,86,210/- on 31.10.2018. The case was selected for complete scrutiny under CASS for " Foreign remittance" and notice u/s. 143(2) was issued on 22.09.2019. The assessee is engaged in the business of providing support services of online advertisement, digital marketing and web designing and receives consultancy charges for such services rendered.

4. On examination of profit & loss account for the year under consideration it was noticed by the assessing officer, that the assessee has debited a sum of Rs. 8,89,35,558/- being online

advertisement (adwords) charges paid to M/s. Google Asia Pacific Pte. Ltd., Singapore [here in after referred to as Google, Singapore], a non-resident having no permanent enterprise(PE) in India. Since the payment has been made to a non-resident by the assessee for advertisement purposes in the digital mode on behalf of his clients and that no tax was deducted as equalization levy on the payment made to the non-resident, the assessee was required to show cause as to why the provision of section 40(a)(ib) of the Act should not be invoked and the entire sum of Rs.8,89,35,558/- should not be disallowed and added to the income. A detailed draft assessment order in this regard was issued along with show cause notice dated 13/7/2021 requiring the assessee to response on or before 28/7/2021. In response to the show cause notice, the assessee requested for an oral hearing through video conferencing to make his submission in view of the complexity of facts involved in the issue. The assessee was given the opportunity of an oral hearing through video conferencing to present his case vide intimation dated 24/08/2021 posting the case for hearing on 30/08/2021 at 3.30 PM. In response AR of the assessee explained the nature of business of the assessee and more specifically the

nature of transaction carried out with Google Singapore. The AR was required, during the course of hearing to submit copy of agreement entered by the assessee with Google Singapore, along with copy of authorization granted to the AR make representations on behalf of assessee. The recording of the oral hearing conducted is part of assessment, proceedings and available on file and copy of link for downloading the recording has been furnished to the assessee for his records. On examination of the reply and documents, furnished, by the assessee, AO has further requested to clarify and furnish the documents on following points:

a) Copy of sample agreement(s) entered by the assessee with his clients on whose behalf online advertisement campaign was carried out by him availing Google Singapore services.
b) Documentary evidence to establish that the assessee was an agent of Google Singapore as claimed by the assessee.
c) Establish with documentary evidence that the transaction carried out with Google Singapore feel within the exceptions mentioned in section 165 of the Finance Act and therefore, was not liable to equalization levy.
d) Clarify and explain why a sum of Rs. 8,89,35,558/- was paid to Google Singapore when as per submission already on record the export revenue received was only Rs. 7,36,79,273/-.

5. In response the assessee furnished copy of the agreements entered into by the assessee with his clients and stated that the assessee is an agent of Google Singapore whereby the assessee is granted access for the purpose of advertisement to be made on Google. On approaching the assessee, such person gets login

credentials, generated by the assessee on the website of google through such credentials such person on its own runs advertisement on google. Such person on its own decides where the advertisement is to be run i.e. on which geographical location, who would be the target audience, for how much duration such advertisement is to be done. All such aspects are decided by the person running the advertisement and not by the assessee. Assessee is merely a means of getting the advertisement run on Google. The aspects as highlighted above w.r.t. the advertisements are not at all decided by the assessee. Thus, in substance assessee is only acting as a conduit for channelizing the funds from the person wanting to advertise to the platform on which such advertisement is to be done i.e. Google. Screenshots w.r.t. the user 10 created for the clients to provide the client access on the website of google through the assessee was submitted. Based on these the client of the assessee is given complete control of the various aspects of the advertisement to be run on google and the assessee has no say over it or in the other words doesn't control it. As regards the specific query raised whether the Finance Act 2016 provided for any exception from

equalization levy to transactions wherein the client of the assessee and the target market of the advertisements run by the assessee, both were residing outside India. The assessee submitted that the provisions of Finance Act, 2016 and Income Tax Act, 1961 are only confined to the transactions in India, however, in the present case the target audience of the advertisement and the person carrying out the advertisement are both outside India, resultantly Tax Authorities in India do not have the jurisdiction to tax such transactions. The role of the assessee is merely conduit between entity carrying out the advertisement and Google. The ultimate benefit of such advertisement is not desired by the assessee but it is derived by the advertisers, who are the client of the assessee. Accordingly, provisions of Finance Act, 2016 shall not be applicable on the assessee.

6. The ld. AO based on the submission made in the oral hearing as well as in the proceeding before him, he noted that the contentions of the assessee made in their submissions to establish that equalization levy is not attracted on the payment made to Google Singapore are not accepted for the detailed

reasons discussed in his order and same is extracted here in below :

> 7. The above submissions and the submissions made so far including the submissions made during the oral hearing on 30/08/2021 and documents furnished by the assessee available on record have been given due consideration. The contentions of the assessee made in these submissions to establish that equalisation levy is not attracted on the payment made to Google Singapore are not accepted for the detailed reasons discussed in the following paragraphs.
>
> 8. Contention No.1 - Assessee is only an agent of Google Singapore
>
> It is noticed that the assessee has made a claim that he is only an agent of Google Singapore in order to escape from the clutches of equalisation levy. However, the facts as borne out from the assessee's case do not support such a claim. On perusal of the Google Advertising Service Agreement entered into between the assessee and the Google Singapore furnished by the assessee, it is seen that it is a contract between Google Singapore and the assessee who is stated as a customer and not an agent for the purpose of utilising Google's Program for placing digital advertisements on his behalf or on behalf of a third party. As per the Terms & Conditions of the agreement, as per point No.1 of the terms and conditions, the customer (assessee) authorises Google or its affiliates to place customer's advertising materials and related technology on any content or property provided by Google or its affiliates on behalf of itself or as applicable, a third party.
>
> 8A. As can be noticed on perusal of the above terms and conditions of the agreement entered into by the assessee and Google Singapore, the agreement is between a Service provider (Google) and its customer (assessee). Nowhere in the agreement is it mentioned that the assessee has been nominated and will act as an agent of Google Singapore.
>
> 8B. Further, the terms and conditions mentioned in Point No. 12 Miscellaneous (i) is reproduced here for reference:
>
> These Terms do not create any agency, partnership or joint venture among the parties."
>
> 8C. Further, it is noticed that the invoices are raised by the assessee on his clients for the service rendered and not by Google Singapore. Also, the assessee books the revenue received from his clients in his books of account as gross receipts and the cost connected thereto

including the service fee paid to Google Singapore is booked as purchase of services. Further, there is no indication that the assessee is only receiving a commission for the services rendered by him. All these facts indicate and establish the fact that the assessee is cried out by him is and can be considered only as normal service contnning of transactions Singapore as claimed by him. Therefore, the Service provider i.e revenue is received from clients for rendering services for running of online advertisement campaign on google platform and the payment made to Google Singapore is part of the cost involved in rendering such service. In fact, as per the terms in Point No.1 of the Agreement between Google Singapore and the assessee which is reproduced here for reference:

Programs. Customer authorizes Google and its affiliates to place Customer's advertising materials and related technology (collectively, "Ads" or "Creative") on any content or property (each a "Property") provided by Google or its affiliates on behalf of itself or, as applicable, a third party ("Partner"). Customer is solely responsible for all: (i) Creative, (ii) Ad trafficking or targeting decisions (e.g., keywords) ("Targets (ii) Properties to which Creative directs viewers (e.g: landing pages) along with the related URLS and redirects ("Destinations") and (iv) Services and products advertised on Destinations (collectively, "Services"). The Program is an advertising platform on which Customer authorizes Google or its affiliates to use automated tools to format Ads. Google and its affiliates may make available to Customer certain optional Program features to assist Customer with the selection and generation of Targets and Creative. Customer is not required to authorize use of these optional Targeting and Creative features and, as applicable, may opt-in to or opt-out of usage of these features, but if Customer uses these features then Customer will be solely responsible for the Targets and Creative. Google and Partners may reject or remove a specific Ad or Target at any time for any or no reason.

8D. Clearly indicates the technical aspects that are be provided by the assessee with regard to running of online advertising campaign on the google platform. This clearly establishes the nature services being provided by assessee his customers for effective running of online advertisement campaign behalf of clients which he compensated with consultancy fees.

8E. summary, the contention that he only acting as conduit/agent for channelizing

funds from Advertiser (customers of assessee) to Publisher (Google Singapore)

not acceptable and backed by factual evidence whatsoever.

Contention No.2 Equalisation levy is not applicable if services are provided to persons outside India and the target customers of the advertisements are also outside India

On perusal of submissions indicated para 3.2 above, it noticed that the assessee has contended that the payment Rs.8.89 crores to Google Singapore for utilising their services connection with running of online advertisement campaign on behalf of his clients does not attract equalisation levy the assessee's customers from whom revenue is received by him for running the online advertisement campaign and the persons for whom the advertisements are targeted are located outside India. other words, it reiterated by the assessee that if transactions are carried out on behalf of persons and the target audience of online advertisement campaign are outside India then tax authorities India do not have the jurisdiction tax such transactions R

9A. The contentions of assessee have been given deep consideration. brief reference to legislative intent, the actual provisions of Finance Act 2016 relating Equalisation Levy and the provisions Sec.40(a)(i)(b) necessary examine the claim the assessee. The same are dealt with briefly hereunder for reference.

Legislative Intent:

The relevant portion of Finance Bill 2016 which introduced equalisation levy reproduced as under highlight the legislative intent behind the proposed equalisation levy brought into the... through finance 2016.

"Currently the digital domain, business may conducted without regard national boundaries and may dissolve the link between an income-producing activity and specific location. From certain perspective, business digital domain doesn't seem occur in physical location but instead takes place the nebulous world "cyberspace." Persons carrying business digital domain could located anywhere the world. Entrepreneurs across the world have been quick evolve their business take advantage these changes. It also made possible for businesses conduct themselves ways that did exist earlier, and given rise new business models that rely more digital and telecommunication network, do not require physical presence, and derives substantial value from data collected and transmitted from such networks."

"These new business models have created new tax challenges. The typical direct tax issues relating to e-commerce are the difficulties of characterizing the nature of payment and establishing a nexus or link

between a taxable transaction, activity and a taxing jurisdiction, the difficulty of locating the transaction, activity and identifying the taxpayer for income tax purposes. The digital business fundamentally challenges physical presence-based permanent establishment rules. If permanent establishment (PE) principles are to remain effective in the new economy, the fundamental PE components developed for the old economy i.e. place of

business, location, and permanency must be reconciled with the new digital reality. . "Considering the potential of new digital economy and the rapidly evolving nature of business operations it is found essential to address the challenges in terms of taxation of such digital transactions as mentioned above. In order to address these challenges, it is proposed to insert a new Chapter titled "Equalisation Levy" in the Finance Bill, to provide for an equalisation levy of 6% of the amount of consideration for specified services received or receivable by a non resident not having permanent establishment (PE) in India, from a resident in India who carries out business or profession, or from a non-resident having permanent establishment in India."

• "Further, in order to reduce burden of small players in the digital domain, it is also provided that no such levy shall be made if the aggregate amount of consideration for specified services received or receivable by a non-resident from a person resident in India or from a non-resident having a permanent establishment in India does not exceed one lakh rupees in any previous year."

• "To provide certainty and to avoid interpretational issues, it is also proposed to define certain terms and expressions used therein. Further it also proposes to provide for the procedure to be adopted for collection and recovery of equalisation levy.

• "In order to provide for the administrative mechanism of the equalisation levy, it also proposes to provide for statutory authorities and also prescribes the duties and powers of the authorities to administer the equalisation levy. In order to ensure effective compliance, it also proposes to provide for interest; penalty and prosecution in case of defaults with sufficient safeguards."

• "Further, it also proposes to confer the power on the Central Government to make rules for the purposes of carrying out the provisions of this Chapter and further provides that every rule

made under this Chapter shall be laid before each House of Parliament." • "In order to avoid double taxation, it is proposed to provide exemption under section 10 of the Act for any income arising

from providing specified services on which equalisation levy is chargeable."

• "In order to ensure compliance with the provisions this Chapter, it is further proposed to provide that the expenses incurred by the assessee towards specified services chargeable under this Chapter shall not be allowed as deduction in case of failure of the asseseee to deduct and deposit the equalisation levy to the credit of Central government."

9B. Provisions of Finance Act 2016 relating to Equalisation Levy Sec.165-Charge of equalisation levy on specified services

(1) On and from the date of commencement of this Chapter, there shall be charged an equalisation levy at the rate of six percent of the amount of consideration for any specified service received or receivable by a person, being a non-resident from-

(i) A person resident in India and carrying on business or profession; or

(ii) A non-resident having a permanent establishment in India. (2) The equalisation levy under sub-section (1) shall not be charged, where

a) the non-resident providing the specified service has a permanent establishment in India and the service is effectively connected with such permanent establishment,

b) the aggregate amount of consideration for specified service received or receivable in a previous year by the non-resident from a person resident in India and carrying on business or profession, or from a non-resident having a permanent establishment in India, does not exceed one lakh rupees; or

(c) where the payment for the speci service by y the person resident in India, or the permanent establishment in India is not for the purposes of carrying out business or profession.

10. Sec.40(a)(ib) of the Income Tax Act

The provisions of Sec.40(a)(ib) of the Act provide that "any consideration paid or payable to non-resident for a specified service on which equalisation levy is deductible under the er vill of the provisions of Chapter VIII of the Finance Act 2016 and such levy has not been deducted or after deduction, has not been paid on or before the due date specified in sub section (1) of Sec.139 of the Act, then 100% of expenditure requires to be disallowed on which tax has of the

expenditure require not been deducted or after deduction has not been remitted.

10A. On perusal of the legislative intent behind the Equalisation Levy it is seen that it has been brought in to plug the revenue loss on account of digital transactions being carried outside the national boundaries bereft of a physical location as it is carried out in cyberspace. In order to bring these digital transactions within the tax ambit Equalisation Levy of 6% of the amount of consideration for specified services received or receivable by a non resident not having permanent establishment (PE) in India, from a resident in India who carries out business or profession or from a non-resident having a PE in India, has been brought into the statute. To ensure effective compliance and collection of such a levy, the Income Tax Act has been amended by way of insertion of Sec.40(a)(ib) with effect from 01/06/2016. It has been provided therein that any failure to deduct and remit the equalisation levy on the specified transactions will entail disallowance of expenses incurred towards specified services under the Income Tax Act.

10B. Further, on perusal of sub section (2) of Sec.165 of the Finance Act 2016, it is seen that it provides for exceptions to the deduction of Equalisation Levy where

(a) the non-resident providing the specified service has a PE in India and the specified

service is effectively connected with such PE

(b) the aggregate amount of consideration for specified service by the non-resident from a person resident in India carrying on business or profession PE in India does not exceed one lakh rupees or

or from a non-resident having

(c) the payment for the specified service by the person resident in India or the PE in India is not for the purposes of carrying out business or profession

10C. Nowhere in the provisions of Sec. 165 it is provided that equalisation levy will not be attracted if the resident person makes a payment to non-resident for specified service out of the amounts received by him from a non-resident or the targeted customers of the advertisement campaign are located outside India. The assessee has merely stated that the payment made by him to Google Singapore, a non-resident, not having a PE in India, will not attract equalisation levy and the tax authorities do not have the jurisdiction to tax such

transactions as his customers from whom he received consultancy charges and the target audience of the online advertisement are located outside India and has not indicated the provisions of the Finance Act 2016 which form the basis for non-attraction of equalisation levy. He has also not furnished any documentary evidence in support of his above claim.

10D. It can be seen from the notes to the Finance Act 2016 it is clearly mentioned that to avoid interpretational issues and to provide certainty, definitions to the terms and expressions used in the provisions relating to Equalisation Levy have been provided. The definitions provided therein clearly indicate that the consideration paid to a non-resident for specified services by a resident in India carrying on business or profession is liable for equalisation levy provided that the transactions do not fall within the exceptions mentioned in Sec.165(2) of the Finance Act 2016. So, the attempt by the assessee to carve out an exception which is not already provided in the statute and bring out an ambiguity is to hide his failure to deduct the equalisation levy on the payment to Google Singapore for the specified services rendered to the assessee for running an online advertisement campaign on behalf of his clients.

10E. In view of the detailed discussion above, the contention of the assessee that the consideration paid to Google Singapore is not amenable to equalisation levy is rejected.

11. Conclusion

It is noticed from the factual matrix present in this case that the payment has been made to a Non Resident (Google Singapore) by the assessee for advertisement purposes in the digital mode on behalf of his clients and that no tax was deducted as equalisation levy on the payment made to the non-resident. The above transaction carried out by the assessee clearly attract the provisions of sec.165(1) of the Finance Bill, 2016 as the condition specified therein are clearly satisfied by the facts present in this case. Further the assessee's case does not fall within the exception provided u/s 165(2) of the Finance Act. Therefore, the facts present in the assessee case clearly lead to the conclusion that equalisation levy is attracted in the payment made by the assessee to Google Singapore. Therefore, the provisions of Sec.40(a)(ib) of the Act which provide that "any consideration paid or payable to non-resident for a specified service on which equalisation levy is deductible under the provisions of Chapter VIII of the Finance Act 2016 and such levy has not been deducted or after deduction, has not been paid on or before the due date specified in sub section (1) of Sec. 139 of the Act, then 100% of the expenditure requires to be disallowed on which tax has not been deducted or after deduction has

not been remitted, is clearly applicable in the assessee's case and the sum paid to Google Singapore is required to be disallowed in its entirety.

Further, it is pointed out here that equalisation levy is not part of income-tax and therefore, any payment on which equalisation levy is applicable will not fall within the provisions of Double Tax Avoidance Agreement (DTAA) and the tax payer will have to pay equalization levy regardless of the provisions of the DTAA and the country the recipient belongs to. The contentions of the assessee that no tax equalisation levy to be deducted on the payment of adword charges to M/s. Google Asia Pacific Pte Ltd., Singapore is not tenable for the detailed reasons mentioned in paras 7 to 10 above. As such, the entire payment of Rs.8,89,35,558/- made to M/s. Google Asia Pacific Pte Ltd., Singapore, a non resident having no PE in India, claimed as expenses in the P&L A/c by the assessee is disallowed and added to his income following provisions of Sec.40(a)(ib) as the assessee has failed to deduct the equalisation levy in respect of the above payment of Rs.8,89,35,558/-.

7. Aggrieved from the findings of the ld. AO, assessee moved an appeal before the ld. CIT(A). The ld. CIT(A) has allowed the appeal of the assessee. As the revenue did not agree to the findings of the ld. CIT(A) has moved this appeal before us only on the solitary ground of deletion of an addition made u/s. 40(a)(ib) for non-charging of Equalization levy when the conditions prescribed u/s. 165 of the Finance Act, 2016 are fulfilled. Before we proceed on the issue it is better to understand the findings of the ld. PCIT, the same is reiterated herein below:-

“7.1 Ground of Appeal No. 1- Disallowance u/s 40(a)(ib) Rs.8,89,35,558/-.

a) The gist of disallowance made by the AO is outlined in paras 2(a) to 2(f) of this order.

b) The undersigned has gone through the assessment order, written submissions filed by Appellant and contentions of Ld.AR of Appellant presented through Video conferencing. This Ground of appeal is discussed and decided in subsequent paras of this order.

7.2 Equalisation levy

a) Law in respect of Equalisation levy was introduced pursuant to Base Erosion and Profit Shifting -Action Plan-1(BEPS Action Plan 1) on Digital Taxation.

b) It was noted that lots of were remitted outside India on account of online advertisement. Indian Govt. was not able to recover the taxes on such online ads as no tax was deducted at source while remitting funds outside India for such online ads as the Ad Platforms like Google, Yahoo etc was not having any PE in India and all transactions were online.

c) The Indian residents procuring advertising services from Platforms like Google/Yahoo etc get deduction for advertising expenses while calculating their taxable Income but Advertising Income arising to non resident digital platforms remain untaxed in India. To tax such digital advertising services by way of Equalisation levy, Section 165 was inserted with Finance Act, 2016

d) Equalisation levy means the tax leviable on any consideration received or receivable for

- Any specified services (Finance Act, 2016) or
- E-commerce supply or Services (Finance Act, 2020)

e) The following 'Specified Services' are covered under Equalisation levy

- Online ads
- Any provision for digital advertising space or
- Any other facility or service for the purpose of online ads and
- Includes any other notified services.

f) Equalisation levy u/s 165 is to be charged effectively 01.06.2016.

g) When is Equalisation levy applicable u/s 165 of the Act.

Equalisation Levy shall be chargeable for consideration received or receivable by a non resident from providing specified services to a person resident in India and carrying on

business or profession or a non resident having a PE in India. In simple words, when the following two categories of persons, procure online ad services or digital ad space from a Non Resident like Google/yahoo then Equalisation Levy shall be chargeable.

Resident Indian Carrying on business or profession or
A Non Resident having PE in India.

h) When is Equalisation levy not applicable. These provisions are not applicable in following three cases-

- Where Non Resident providing the Specified Services has a PE in India and the Specified Service is effectively connected with such PE.
- Where aggregate amount of consideration for Specified Services does not exceed Rs. 1 lac.
- Where the payment for specified services by person resident in India or the PE in India is not purpose of carrying out business or profession.

i) The essential ingredients for Equalisation Levy are as under:

- Amount of consideration in excess of Rs.1,00,000/-
- Specified Services received or receivable.
- Service provided by a Non Resident and does not have PE in India
- Services received by -

a) Resident in India and carrying on business or profession in India.
b) Non resident having PE in India.

When all the above ingredients are in a transaction then liability arises for Equalisation levy @ 6% on the amount of consideration received or receivable.

7.3 The next issue to be decided in whether Equalisation levy is applicable in the case of Appellant or not on the transaction of Rs.8,89,35,558/- with Google, Singapore

a) The gist of addition/disallowance made by the AO is outlined in paras 2(b) to 2(f) of this order. App The 40 concluded that payment of Rs.8,89,35,558/- made by Appellant to a Non Resident (Google Singapore) for ad purpose in digital mode on behalf of this clients clearly attract the provisions of Section 165(1) of the Act as the conditions specified therein are clearly satisfied by facts present in this case. AO further held that Appellant's case does not fall in the

Exception clause provided u/s 165(2) of the Act. Thus, Equalisation Levy was held to be attracted on this payment made by Appellant to Google Singapore. As a result, the AO made disallowance u/s 40(a)(ib) of the Act to tune of Rs.8,89,35,558/-.

b) The undersigned has discussed all the aspects of Equalisation Levy as per Section 165 of the Act in para 7.2 of this order. The conditions prescribed in cases where equalisation levy is not applicable is also discussed in para 7.2 of this order.

7.4 The facts of the Appellants case are as under:

a) Appellant is in business of providing support services of online ads, Digital marketing and Web Designing through his proprietorship concern namely M/s Oan Media and Web Solutions.

b) Appellant has received payment for running online and campaign from his clients. Appellant claims to be a premier partner of Google Singapore. This amount collected by Appellant from his clients was thereafter paid to Google Singapore by the Appellant for an on behalf of his clients.

c) Appellant has two types of receipts from his clients. For services rendered to his clients, Appellant receives certain amount as consultancy charges. Alongwith consultancy charges the clients also pay the Appellant lump sum amount for carrying out online ad campaigns. This lump sum amount was then paid by Appellant to Google Singapore for and on behalf of his clients for running online ads. The lump sum amount so received by Appellant was received with a clear mandate of it to be utilized for running the online ad. Appellant had no right on this lump sum amount and could not utilize the same for any purpose other than online ad purpose for and on behalf of its clients. ME TAX DEPAR

d) The main clients for which online ad was run by Appellant and payment made to Google Singapore were all located outside India. The addresses of main clients of Appellant are as under:

- Harmony commerce Co. Ltd, Hong Kong.
- Hongkong Blue Sea Whale Technology Co. Ltd, Hongkong.
- Shenzhen Scolour Technology Co. Ltd., Hongkong.
- Shenzhen Tonsee Electronics Co. Ltd, Hongkong.

All these ads were run outside India as their target audience was outside India. Thus, the online ads for which payments were made by Appellant to Google Singapore were for clients located outside

India and the target audience for these online ads were also outside India.

To support the above contention the Appellant filed the following details/documents,

Information was provided in a tabulated manner giving Name of clients for whom ads were run by Appellant, Addresses of such clients (which are out side India), Amount received from these clients for purpose of running such online ads. Amounts subsequently paid to Google Singapore and Target audience for such ads.

Copies of FIRC were submitted on sample basis to establish that amount was received by Appellant for purpose of online ad on behalf of clients located outside India.

Some samples of campaign reports obtained from Google Singapore in respect of such online ads of such clients. These campaign reports give Targeted locations, campaign details, number of clicks, Impr. etc. It shows that Target location/Target audience for all such online ads was located outside India.

e) How online ads are run by Google on behalf of Clients of Appellant.

Appellant claims to be an agent of Google Singapore and has been granted access for purpose of online ads to be run on Google.

If any client wants online ad on Google, then the client had option of getting online ad on Google through Appellant.

Client was given login credentials (generated by Appellant) on website of Google. Through those login credentials the client on its own could run the online ad on Google.

Client decides the geographical location where the online ad will be run, who would be the target audience and for how much time the online ad will run. These aspects are not decided by Appellant.

Appellant is only a mean of getting online ad run on Google.

Appellant's role was limited to preparing online ad campaign for the client for which he charged certain amount from the client and Appellant had to make payment to Google on behalf of his client for running the online ad.

Client of Appellant had complete control on various aspects of online ad to be run on Google and Appellant had no say in this matter.

Advertisement can be specifically targeted to target customers at a target location. If the client wants online ad to be shown in 1 Washington, USA then IP Address/area code of Washington is specified on Google portal. Thereafter the online ads will run only in Washington, USA only. To prove that online ads were run outside India the Appellant filed campaign reports which establish the locations where online ads were run were all located outside India.

Appellant's role is limited to making the ad campaign to be run. Rest everything is done by client eg how much amount to be apportioned to each online ad campaign. Target audience and Target location to be decided for each campaign by the client only. Clients were given full access to Google platform.

The above stated facts show as under:

- Appellant acted as an agent of Google Singapore.
- Appellant receives payments from his clients located outside India and makes payment to Google Singapore on behalf of such clients.
- Ultimate beneficiary of such online ads were the clients of Appellant who are all located outside India.
- The target audience/target location of all these online ads are located outside India.
- Appellant is not the ultimate beneficiary of such online ads and these online ads are not related to Appellant's business perse.
- The clients for whom the Appellant acted were all located outside India and they did not have any connection of whatsoever nature to business in India. Neither did these clients carry out any business in India nor did they have any target audience in India.
- Section 165A was introduced through Finance Act, 2020. It clearly specifies that services will be taxable in India, only if they are provided to a person in India or to a person who buys such goods or services using IP Address based in India. The intention of this amendment is to bring under purview of Equalisation levy the transactions which have some connection to India in relation to business carried out or services rendered.

  In the present case, the business of clients is located outside India and their target audience/customers for online ads are located outside India. Thus, these clients have no

connection to India in respect of business carried out or services rendered.

The invoice was not raised directly by Google Singapore to client of Appellant. It was channelized through the Appellant as Appellant is premier partner of Google Singapore. Benefit of being premier partner of Google was that entire online ads were run through the user ID allocated to Appellant but the ultimate decision on running the online ads was with the client of Appellant. Role of Appellant was of effectuating the online ads, whereas, the entire decision as to what ad was to be run, how much amount to be spent on each ad campaign, who are the target audience, what is the target location were decided by the client of Appellant. Role of Appellant was that of coordinator/agent between Google Singapore and a number of clients as Google Singapore need not deal with each client separately.

7.4 In view of the detailed facts outlined in paras 7.2 and 7.3 of this order let us now decide which the essential ingredient for applicability of Equalisation Levy are applicable in respect of this transaction of Rs.8,89,35,558/

a) Amount of consideration is in excess of Rs.1,00,000/--Applicable.

b) Specified Services received or receivable - Applicable.

c) Services provided by a Non Resident i.e. Google Singapore-Applicable.

d) Services received by a) Residents in India and carrying on business or profession in India or b) Non Resident having PE in India-Not Applicable.

In the present case, the services of online ads were received by clients of Appellant who were all located outside India with their business or profession located outside India. The entire target audience/target location of these online ads was located outside India and had no connection with India. Appellant is only acting as a conduit of receiving payments from his clients from outside India and thereafter making payment to Google Singapore on behalf of his clients. Clients for whose benefits these online ads are run on Google and who are the ultimate beneficiaries of these online ads are neither residents of India nor can they be called as Non resident having PE in India. The entire business related to these online ads was carried out outside India. Ultimate beneficiaries of these online ads were non residents having business in India and the target audience for these

online ads were all located outside India. Appellant was working on behalf these ultimate beneficiaries who were his clients. In this case the Appellant made payment to Google Singapore (Non Resident) for specified services required by his clients out of the amount received by him from Non Resident having no business in India (clients of Appellant). The clients of Appellant carried out their business outside India. The target audience for whom such online ads were run were located outside India. Nothing on account of such business was carried out from India. Appellant only was a conduit/agent between his Non Resident clients and Google Singapore. The Indian jurisdiction was used only for transfer of funds. In view of the above facts as outlined in paras 7.2 to 7.4 of this order, it is hereby held that as per section 165 of the Act the Appellant had no liability for payment of Equalisation Levy. Hence, the disallowance of Rs.8,89,35,558/- made by the AO u/s 40(a)(ib) of the Act is not sustainable and is hereby deleted. **Ground of Appeal No. 1 is allowed.**

8. The ld. DR appearing on behalf of the revenue submitted that the assessee is engaged in the business of online advertiser and his activity consist of digital marketing and web designing. Since, the assessee has paid to Google Singapore he is subjected to equalization levy and the disallowance made by the AO u/s. 40(a)(ib) is correct. He explained the explanatory notes to the provisions of the Finance Act, 2016 from the board circular no. 3/2017 vide para 32. He further explained the bare provisions of section 164, 165 & 166 Finance Act, 2016 by which the equalization levy brought into the statute in India. He explained that Organization for Economic Cooperation and Development (OECD) under action plan one of Base Erosion and profit shifting (BEPS) project has suggested several options to tackle the direct

tax challenges. The options inter alia include option to impose a final withholding tax on certain payments for digital goods or services provided by a foreign e-commerce provide. The committee on taxation of e-commerce formed by the CBDT, after deliberating on all the options provided by OECD recommended equalization levy in the form of final withholding tax option for taxation of digital transactions in India. Based on these back ground "Equalization levy" was inserted though the Finance Act, 2016 so as to provide that an Equalization levy of 6 % of the amount of consideration for specified services received or receivable by a non resident not having permanent establishment (PE) in India, from a resident in India who carries out business or profession, or from a non-resident having permanent establishment in India. In order to make compliance to this levy it is provided that the expenses incurred by the assessee towards specified services chargeable under this chapter, it is further provided that the expenses incurred by the assessee towards specified services chargeable under the chapter shall not be allowed as deduction in case of failure of the assessee to deduct and deposit the equalization levy to the credit of Central

Government. He supported the detailed reasoned order of the ld. AO. As the levy is very much new no case law is available in support, but it is to be seen based on the intention of the law to tax the new digital taxation regime. In the law there is no provision to see the target audience when the consideration is passing through a person of Indian resident the levy is applicable in the present case. The ld. DR also stated that even the contention and logic of AO's arguments is accepted by the ld. CIT(A) in his order even though he has deleted the addition. Based on these set of arguments he supported the order of the AO and requested to restore the findings of the AO. In addition, during the process of hearing the ld. DR called for the detailed copy of the audited accounts so as to reconcile the payment disallowed with that of the income received from foreign client. The same has been supplied and the ld. AR satisfied the ld. DR about the difference of amount and the ld. DR has that the export revenue is only Rs. 7.36Cr and local revenue Rs. 2.39 cr and that payment cannot be considered as export revenue and paid to Google Singapore. The ld. AR of the assessee counters this arguments of the ld. DR and submitted that the said issue is dealt by the AO in his order at

page 4 para 6C and based on the submission of the assessee no adverse inference is drawn and in fact the same is also of foreign client and is explained vide submission already placed on the records and the said revenue is related to Buzz Media 32 lakhs and Drive Digital for Rs. 1.49 cr wherein also the nature of services are same and if that amount included then the same is matching with the figure of the remittance paid to Google Singapore.

9. Per contra, the ld. AR of the assessee has relied upon the written submission filed by him. The same is extracted here in below ;

DPT. GROUND NO. 1: DISALLOWANCE OF RS. 8,89,35,558 U/S 40(a)(ib)

1. BRIEF FACTS

1.1. Assessee, an individual, for the relevant previous year, was in the business of providing support services of **Online Advertisement, Digital Marketing and Web Designing**, through his proprietorship concern, **M/s Oan Media and Web Solutions**.

1.2. During the course of his business, assessee received payment for running Online Advertisement Campaign, from his clients. Such amount was collected and, thereafter, paid to online advertising platform, i.e. Google Singapore, by the assessee **for and on behalf** of his clients.Assessee wasa premier partner of Google Singapore.

1.3. For the services rendered to his clients, assessee received certain amount as his consultancy charges. However, along with

the consultancy charges, clients also paid assessee **lumpsum** amount for carrying out online advertisement campaigns. **Such amount was then paid by the assessee, to Google Singaporefor and on behalf of the clients, for running the online advertisement.**

1.4. This can be explained with the help of example. For instance, **ABC INC.** is the client of assessee. ABC INC paid $110 to the assessee. Out of the $110 so received by the assessee, online advertisements ran by the assessee, for and on behalf of ABC INC for $100 and such amount was paid by the assessee to Google Singapore. Remaining amount of $10 is nothing but the consultancy charges charged by the assessee. Thus, at the time of receiving $110, sum of $100 was received by the assessee with the **clear mandate** of it to be utilized for running the online advertisement. The assessee had no right whatsoever on this $100 and could notutilize the samefor any purpose other than online advertisement purpose for and on behalf of ABC INC.

1.5. Clients for which online advertisement was run by the assessee and payment was made to Google Singapore were **all located outside India**. Also, the advertisement for which payments were made by the assessee, for and on behalf of his clients, were run outside India, with their **target audience outside India**.

1.6. Assessee, during the relevant previous year, paid amount of **Rs.8,89,35,558** to Google Singapore, for the purpose of online advertisement, for and on behalf of his clients.

2. SUBMISSION ON FACTUAL ASPECTS

2.1. Aforementioned factual position/brief factswere submitted before the lower authorities during the course of assessment and appellate proceedings.

2.2. In this regard, the below mention details/documents were put forth before the lower authorities**[PB : 1-34]**:-

2.2.i. **TABLE SUGGESTING** (i) Name of the customers/clients for and on behalf of whom advertisement was run by the assessee;(ii) Such Table/factual position established that the clients of the assessee were companies/entities outside India; (iii)Amount for the purpose of running online advertisement was received by the assessee from outside India;(iv) Amount subsequently spent on such advertisement was paid by the assessee to Google Singapore; (v)Advertisements were run outside India or in

other words the target audience of such advertisements were outside India.

2.2.ii. **<u>FOREIGN INWARD REMITTANCE CERTIFICATES</u> (“FIRCs”)**were submitted, on sample basis, to establish that the amount was received by the assessee, for the purpose of online advertisement, on behalf of the clients, from outside India only.

2.2.iii. **<u>CAMPAIGN REPORT OBTAINED FROM GOOGLE SINGAPORE</u>**, on sample basis, establishing the fact that the target audience of such advertisements were outside India.

2.3. ***MODUS OPERANDI*** of how the online advertisement was run by the assessee on Google, for and on behalf of his clients, was also explained before the lower authorities, which is again summarized hereunder**[PB: 35-61]**:-

2.3.i. Assessee was an agent of Google Singapore, whereby, the assessee was granted access for the purpose of advertisement to be run on Google;

2.3.ii. If any person/entity wanted to do advertisement through Google, then such person had an option of getting the advertisement on Google through the assessee;

2.3.iii. On approaching the assessee, such client got login credentials, generated by the assessee on the website of Google through such credentials such client on its own could run the advertisement on Google;

2.3.iv. Such person on its own decided where the advertisement was to be run, i.e. on which geographical location, who would be the target audience, for how much duration such advertisement was to be run;

2.3.v. All such aspects were decided by the person running the advertisement and not by the assessee;

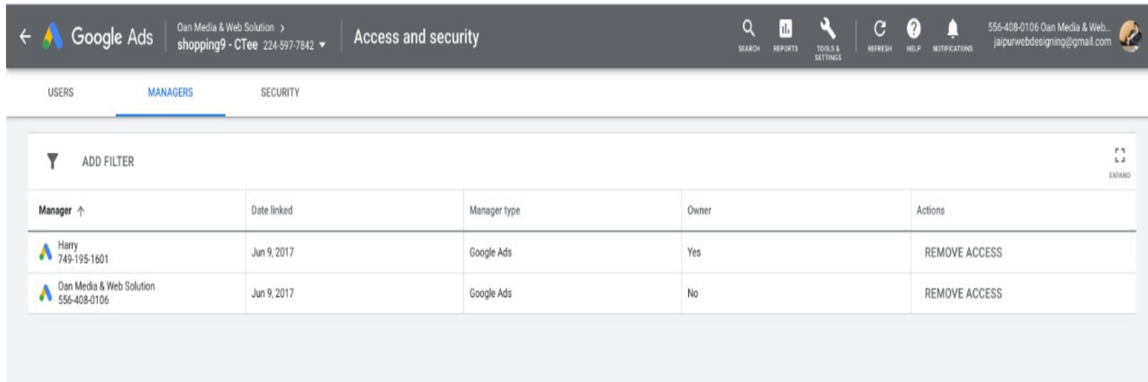
2.3.vi. Assessee was merely a means of getting the advertisement run on Google.

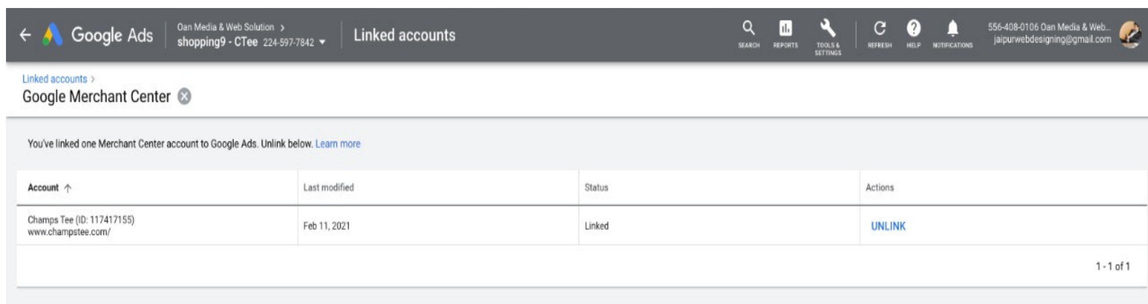
2.3.vii. Aspects as highlighted above w.r.t the advertisements were not at all decided by the assessee;

2.3.viii. In substance assessee only acted as a *conduit* for channelizing the funds from the clients wanting to advertise on the platform on which such advertisement was to be done i.e. Google.

2.3.ix. Role of the assessee was limited to preparing campaign to be run for the client, for which the assessee charged certain amount from the client and also making payment to Google for running the advertisement, for and on behalf of his client.

2.3.x. Screenshots w.r.t the user ID created for the clients to provide the client access on the website of google through the assessee is as under:-





2.3.xi. Thus, the client of the assessee was given complete control of the various aspects of the advertisement to be run on Google and the assessee had no say over it or in other words didn't control it.

2.3.xii. The above screenshots were submitted to the lower authorities on sample basis.

2.4. Whenever any advertisement is run through Google, the **IP address/area code** of the place where the advertisement is to be run can be specified clearly. As a result of which, advertisement can be specifically targeted to the customers/audience who are stationed/based in that location.

2.4.i. For instance, if the client of the assessee wanted that the advertisement should be shown in **Washington DC, USA**, then specific to that location, the details were filled on the Google portal.

2.4.ii. Thereafter, the advertisements were run only specific to Washington DC.

2.4.iii. Due to this reason, and for establishing that the advertisements were run outside India only, campaign reports were submitted to the lower authorities, which

clearly established that the locations of such advertisement were all outside India and not in India.

2.5. Assessee, being stationed in Jaipur, was not fully aware as to for which campaign, which area code was to be specified. For such purposes and for selecting the target audience assessee was completely dependent on his client. The clients were given access to the Google platform, with assessee being the co-user of such platform, Assessee was only responsible for making the campaign to be run, rest everything was done by the client of the assessee, including how much amount is to be appropriated to which campaign and also the target audience for each and every campaign.

3. SUBMISSION ON <u>LEGAL ASPECTS</u>

3.1. Before the lower authorities,following contentions were raised by the assessee for submitting that for such online advertisement, no equalization levy was to be paid by the assessee, in accordance with **Section 165** of the **Finance Act, 2016:-**

3.1.i. Assessee only acted as a *conduit* for receiving the payment from his clients from outside India and thereafter making the payment to Google Singapore for and on behalf of his clients. Assessee only acted as an agent of Google Singapore and the ultimate beneficiary of such advertisements were assessee's clients who were outside India and not the assessee;

3.1.ii. Since the clients for the benefit of whose business advertisements were run on Google were outside India and the target audience of such advertisement were also stationed outside India, there cannot be any liability of Equalization Levy on such transactions by the Indian tax Authorities.

3.2. Attention is drawn towards **Section 165** of the **Finance Act, 2016** which is the **<u>charging section</u>** of Equalization Levy. The same is reproduced hereunder:-

"…[Charge of equilisation levy on specified services]

165. (1) On and from the date of commencement of this Chapter, there shall be charged an equalisation levy at the rate of six per cent of the amount of consideration for any specified service received or receivable by a person, being a non-resident from—

<u>(i)a person resident in India and carrying on business or profession; or</u>

<u>(ii)a non-resident having a permanent establishment in India.</u>

(2) The equalisation levy under sub-section (1) shall not be charged, where—

(a)the non-resident providing the specified service has a permanent establishment in India and the specified service is effectively connected with such permanent establishment;
(b)the aggregate amount of consideration for specified service received or receivable in a previous year by the non-resident from a person resident in India and carrying on business or profession, or from a non-resident having a permanent establishment in India, does not exceed one lakh rupees; or
(c)where the payment for the specified service by the person resident in India, or the permanent establishment in India is not for the purposes of carrying out business or profession…"

3.3. As per **Sub-Section (1)**of **Section 165**,Equalization Levy is applicable on **<u>consideration for specified servicesreceived or receivable</u>** by a person who is a Non-Resident from:-
3.3.i. Person resident in India <u>and</u> carrying on business or profession; or
3.3.ii. Non-Resident having a Permanent Establishment in India.

3.4. For applicability of **Section 165(1)**, following conditions have to be fulfilled:-
3.4.i. **<u>Consideration should be received by the non-resident from the person resident in India</u>**.

- Word ***"consideration"*** has not been defined under the ITA or in the Finance Act, 2016;
- Consideration is which creates a contractual relationship between the **promisor**and the **promisee**, in regard to the performance of promise and in regard to which the parties to the agreement or contract get related to each other;
- As per **Section 2(d)** of the **Indian Contract Act, 1872,** when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;
- In the present case, the client of the assessee, being outside India, wanting to get its advertisement done on Google is the **"promisor"** and Google Singapore is the **"promisee"**.
- The contract, in substance, is made between the client of the assessee outside India and Google Singapore. If the payment is not made by the client of the assessee outside India then there would not be any requirement for the Google Singapore to run any advertisement.
- **Assessee and the entire scenario only acted as a conduit.**

3.4.ii. **Consideration should be received/receivable by the Non-Resident from Resident and such Resident should be carrying on business India.**

- Thus, if the services are being **received** by a person resident in India, then it should be **received for the purpose of carrying out his business or profession in India**.
- However, in the present case, the ultimate recipient of the services of Google Singapore is not the assessee but his clients who were located outside India.
- Assessee, it is reiterated, was simply a *conduit*channelizing the funds for his customers received from outside India and thereafter paid for and on their behalf by the assessee to Google Singapore.
- Also, the ultimate beneficiary of the advertisement services is not the business of the assessee but the business of the clients on behalf of whom the payment was made by the assessee to Google Singapore.

3.5. Section 163 of the Finance Act, 2016, deals with the **Extent, Commencement and Application** of Equalization Levy. As per Sub-Section 163(3), Equalization Levy is applicable on the "**considerationreceived or receivable**" for the specified services, being online advertisement.In the present case, the consideration waspaid by theclient of the assessee and not the assessee.Even the ultimate beneficiary of such advertisements was the client of the assessee as the customers of the assessee's clients were the ultimate target audience.Thus, the consideration for the online advertisement cannot be said to have been paid by the assessee himself, but by the client of the assessee. Assessee only held in channelizing the amount for online advertisement, being a channel partner for Google Singapore.

3.6. Law with respect to Equalization Levy was introduced pursuant to the BEPSAction Plan 1,i.e. BASE EROSION AND PROFIT SHIFTING - ACTION PLAN 1 on DIGITAL TAXATION.

3.6.i. From the Indian context, it was felt that lot of payments were remitted outside the India for the purpose of online advertisement.

3.6.ii. The businesses for the purpose of which online advertisements were carried out were located in India and the target customers were from India.

3.6.iii. Thus, the online advertising platforms were deriving lot of value, which was directly in relation to business in India.

3.6.iv. Indian Government was not able to recover the taxes on such online advertisement as no tax at source wasdeducted while remitting funds outside India for online advertisements, for the reasons that such advertising platforms, such as Google/Yahoo were not having any Permanent Establishment in India and all the transactions were done online.

3.6.v. Thus, it was felt that although the income was earned by such online advertisers, from India, from the **businesses run in India**, however, no tax was collected on such payments by the Indian Tax Authorities.

3.6.vi. To plug this loopholes Equalization Levy was introduced so that whatever advertisement revenue is generated by the online platforms from business run in India, that can be recovered by the Indian Tax Authorities at the threshold level itself. This was in line with the recommendations of the BEPS ACTION PLAN 1.

3.6.vii. The primary requirement for such taxability is that the business for which the online advertisement is being run should be in India or the target audience of such advertisement should be in India. However, in the present case neither of the two elements are based in India. Assessee, in the present case, only acted as a means to effectuate the online advertisements and acted as a *conduit.*

3.7. Finance Minister, in his speech, while introducing the Finance Bill, 2016, for the purpose of law on Equalization Levy stated as follows:-
*"…151. In order to tap tax on **income accruing** to foreign e-commerce companies **from India** it is proposed that a person making payment to a non-resident, who does not have a permanent establishment, exceeding in aggregate Rs. 1 lakh in a year, as consideration for online advertisement, with withhold tax at 6% of gross amount paid, as EL. The levy will only apply to B2B transactions..."*

3.8. Relevant extract of the memorandum explaining the provisions of the Finance Bill, 2016 are as under:-
*"…The Organization for Economic Co-Operation and Development (OECD) has recommended in Base Erosion and Profit Shifting (BEPS) project under Action Plan 1, several options to tackle the direct tax challenges which include modifying the existing Permanent Establishment (PE) rule to include that where an enterprise engaged in fully de-materialized digital activities would constitute a PE if it is **maintained a Significant Digital Presence in another country's economy. …"***

3.9. **Significant Digital Presence** can only be said to have taken place when the target audience of the advertisement run online is in India or when the business for the purpose of which such online advertisement is done is in India. Both the conditions are not being fulfilled in the present case for the only reason that assessee merely acted as an agent channelizing the funds between his client and Google Singapore for the purpose of online advertisement.

3.10. Attention is drawn towards the recent amendment to Section 9 of the ITA, *vide***Finance Act, 2020, w.e.f 1.04.2022,** in relation to **income deemed to accrue or arise in India.** As per Sub-Section (1) of Clause (i) of Section 9 in case of there is any Business Connection on account of **Significant Economic Presence**, then income generated from such business shall be deemed to accrue or arise in India.

3.11. Meaning of **Significant Economic Presence** has been provided in **Explanation 2A,** which is reproduced here under:-
"…Explanation 2A.—For the removal of doubts, it is hereby declared that the significant economic presence of a non-resident

in India shall constitute "business connection" in India and "significant economic presence" for this purpose, shall mean—
*(a) transaction in respect of any goods, services or property carried out by a non-resident **with any person in India** including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or*
*(b) systematic and continuous soliciting of business activities or engaging in interaction with **such number of users in India**, as may be prescribed.."*

3.12. The other requirement, in Section 165 of the Finance Act, 2016. is that the Non-Resident should have a Permanent Establishment in India. However, in the present case, it was establishment by the assessee before the ld. AO and is also an undisputed fact that the clients for whom the assessee acted were all located outside India and they did not have any connection, of whatsoever nature, for business in India. **Neither they carried out business in India nor did their target audience were based in India.**

3.13. Reference is also drawn to **Section 165A**, introduced in Finance Act, 2016, *vide* amendment brought about through Finance Act, 2020. In such section it has been clearly specified that the services shall be taxable in India, only if they are provided or facilitated to a **person resident in India** or to a person who buys such goods or services or both using **Internet Protocol Address located in India**. Thus, the intention of the statute is to bring within the purview of Equalization Levy, only those transactions which have some connection with India. The connection should be in relation to the business carried out in India or services rendered in India. However, in the present case, it is reiterated, that the business of the clients on whose behalf the assessee acted upon were all located outside India and also the target customers/audience for the advertisement were also located outside India.

3.14. The entire emphasis is that for the taxability of such transactions there has to be some **intimate connection**of the business carried out in India or with the **users being stationed** in India. However, since in the present case, both are outside India there cannot be any taxability of such transaction within the purview of the Indian Tax laws [Income Tax Act or Equalization Levy]

3.15. Although Section 165A was introduced by Finance Act, 2020 and Section 9, in relation to Significant Economic Presence, was also

introduced subsequently and are not relevant to the case at hand and is the law introduced after the relevant previous year, however, the same denotes the intention of the statute. **It is clearly discernible from these provisions that the intention is only to tax those transactions which have some business connection with India and not otherwise.**

3.16. It is a settled proposition that under the tax laws, only those transactions can be covered which have **territorial nexus with India**. In Tata Iron and Steel Co. Ltd. vs. State of Bihar 1958 SCR 1355, while dealing with the levy of sales tax and a challenge to the provisions of the Bihar State Sales Tax Act, 1947, the Hon'ble Apex Court made significant reference to the **Territorial Nexus Theory** and observed that the issue of **sufficiency of the territorial connection** involved a consideration of two elements, i.e. (i) that the connection must be **real and not illusionary** and; (ii) that the liability sought to be imposed must be pertaining to that connection. In this regard, **Hon'ble Apex Court** in the case of **Ishikawajma-Harima Heavy Industries Limited Vs. Director of Income Tax [2007] 3SCC 481 (SC),** where the court while dealing with the applicability of Section 9 of the Income Tax Act to the transaction in question, observed that the territorial Nexus doctrine, plays an important part in assessment of tax. It was observed that only such part of the income as is attributable to the operations carried out in India can be tax in India.

3.17. What is to be seen for applicability of Equalization Levy is that whether the business for which advertisement has been carried out has earned any income from India?

3.17.i. **Situation I:** If the answer to this question is in negative, then there would not be any liability of Equalization Levy. It is for the reason that in such a scenario the business, in effect, would have been not carried out in India. Accordingly, the Indian Government would not have the jurisdiction to tax such transactions in India. As has been explained hereinabove, assessee only acted as a *conduit* between his client and Google Singapore. His client carried business outside India, the target audience, for whom such advertisement was run, were also located outside India, the advertiser ultimately running the advertisement was also located outside India. The Indian jurisdiction was only used for channelizing the funds. Nothing on account of such business was carried out from India. Under such circumstances, there cannot be any applicability of Equalization Levy.

3.17.ii. **Situation II:** On the contrary, if the answer to the above question is in positive, i.e. if any advertisement had been carried out for any business which had earned income from India or which had been carried out in India then there would have been applicability of Equalization Levy. In such a scenario, even if the funds had been channelized through any other country, then also there would have been applicability of Equalization Levy for the entity for whose business the advertisements were run. For instance, if suppose a business would have been carried out in India in the name of ABC Private Limited **("ABC")**. ABC would have remitted funds to any third country, say Bangladesh to its agent, for example XYZ, and that XYZ would have been made the payment for online advertisement to Google Singapore. In such a scenario, although directly the payment has not been made by ABC to Google Singapore, but has been channelized through XYZ, based in Bangladesh, then also on making payment by ABC to XYZ for the purpose of online advertisement, there would have been applicability of Equalization Levy, for the sole reason that the business, which was the ultimate beneficiary of the advertisement, was which carried out in India and the income was earned from India. It would not have been relevant whether the advertisement was run in India or outside India.

3.17.iii. Also one needs to take care that in **Situation I** Google Singapore did not earn anything from the Indian jurisdiction but was earning from any other jurisdiction, other than India, from where the funds for online advertisement have originated. In such a scenario, Indian jurisdiction would not have any right to tax this online advertisement and bring it under the purview of Equalization levy. Whereas, in the **Situation II,** although the funds have been channelized from Bangladesh by XYZ then also Google Singapore would be considered to have been **earned income from India** and **not from Bangladesh** in such a scenario the Indian tax authorities would have the right to tax the online advertisement amount paid by ABC to Google Singapore through XYZ. Google Singapore in such a scenario would be considered to have earned this advertisement income from India and not from Bangladesh.

3.17.iv. The present case, of that of the assessee, falls under **Situation I.**

4. REBUTTAL OF THE CONTENTIONS RAISED BY LD. AO

4.1. Entire factual position was explained to the ld. AO. It was also submitted that assessee is no one else but an agent working on behalf of Google Singapore on one hand and his client on the other hand.

4.1.i. The transaction between the client of the assessee and Google Singapore were on a **Principle to Principal basis** and the assessee acted only as a *conduit* for channelizing the funds for the purpose of payment to Google Singapore, from his clients located outside India.

4.1.ii. Ld. AO disregarded the arrangement for the reason that the agreement nowhere mentioned that assessee was agent of Google Singapore. Also that the invoice was raised by assessee to his client and also by Google Singapore to assessee.

4.1.iii. The invoices were not raised by Google Singapore to the client of the assessee directly but it was channelized through the assessee. This is for the reason that assessee was the Premier Partner for Google Singapore. Also, applicability of Equalization Levy is not based on the person raising the invoice, but the **ultimate beneficiary** of such advertisement and where such ultimate beneficiary is located.

4.1.iv. Entire online advertisements were run through the User ID allocated to the assessee, being the Premier Partner, however, ultimately the advertisements were run by the client of the assessee.

4.1.v. Ld. AO disregarded that the entire amount was channelized from outside India into the bank account of assessee in India and thereafter the entire such amount was paid as online advertisement to Google Singapore.

4.1.vi. The *modus operandi* adopted for the advertisement was such that assessee only helped in effectuating the online advertisement, whereas, the entire decision making of what advertisement was to be run and how much amount was to be spent on each campaign and who were the target audience were all decided by the client of the assessee and not the assessee.

4.1.vii. **This clearly proved that the assessee was merely an agent working in between the client on one hand and Google Singapore on the other hand.**

4.2. Ld. AO has stated that nowhere in Section 165 of the Finance Act, 2016, it is stated that Equalization Levy will not be attracted if the person making the payment to non-resident for specified services out of the amount received by him from a non-resident

with all the target customers of the advertisement campaign located outside India.

4.2.i. Ld. AO completely ignored the fact that ultimately the business was carried out outside India. It was not the assessee who was the ultimate beneficiary of the advertisements but was working for and on behalf of his clients.

4.2.ii. **In such a scenario no income accrued in India and accordingly there was no liability for payment of Equalization levy.**

4.3. Ld. AO stated in his order that the assessee has claimed the amount paid to Google Singapore as part of the expenses. It is submitted that, merely for the purpose of accounting, whatever amount was received by the assessee for the purpose of online advertisement, from his clients, was shown by the assessee as his revenue and whatever corresponding amount was paid by the assessee to Google Singapore was claimed as expenditure. However, such accounting treatment would not make the transaction entered by the assessee with his client or with Google Singapore to be on a Principal to Principal Basis.

4.3.i. It is established principle that entries in the books of accounts are not decisive of the nature and character of expenses. It is not material and relevant how the assessee treated these expenses in its books of accounts but what is material and relevant is the exact nature of the transaction. This issue was examined by the **Hon'ble Supreme Court** in **Kedarnath Jute Mfg Co. Ltd [1971] 82 ITR 363 (SC).** In this case the tax authorities and the Hon'ble ITAT, denied the deduction of the sales tax liability to the taxpayer contending that the taxpayer denied its liability to pay the sales tax and also, had not made a provision in its books of account for the said liability. Hon'ble Apex Court allowed the claim of the assessee and held that *"….We are wholly unable to appreciate the suggestion that if an assessee under some misapprehension or mistake fails to make an entry in the books of account and although, under the law, a deduction must be allowed by the Income-tax Officer, the assessee will lose the right of claiming or will be debarred from being allowed that deduction. Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter…."* **Hon'ble Delhi High Court** in

the case of **TriveniEngg. & Industries Ltd. (2009) 181 Taxman 5 (Delhi)** support the above contentions.

5. ORDER PASSED BY LD. CIT(A) – DELETING THE DISALLOWANCE

5.1. Ld. CIT(A) considered the entire factual and legal position as set out hereinbefore, during the course of appellate proceedings.

5.2. Ld. CIT(A) accepted the contention of the assessee and deleted the entire disallowance made by the ld. AO.

5.3. **Ld. CIT(A) at Page 26 of the order held as under:-**

5.3.i. Services of online ads were received by clients of assessee who were all located outside India with their business or profession located outside India;

5.3.ii. Entire target audience/target location of these online ads was located outside India and had no connection with India;

5.3.iii. Assessee only acted as a *conduit* of receiving payments from his clients from outside India and thereafter making payment to Google Singapore on behalf of his clients.

5.3.iv. Clients for whose benefits these online ads are run on Google and who are the ultimate beneficiaries of these online ads were neither residents of India nor could they be called as non-resident having PE in India.

5.3.v. Entire business related to these online ads was carried out outside India.

5.3.vi. Ultimate beneficiaries of these online ads were non residents having no business in India and the target audience for these online ads were all located outside India.

5.3.vii. Assessee was working on behalf these ultimate beneficiaries who were his clients.

5.3.viii. In this case the assessee made payment to Google Singapore (Non Resident) for specified services required by his clients out of the amount received by him from Non Resident having no business in India (clients of assessee).

5.3.ix. The clients of assessee carried out their business outside India.

5.3.x. The target audience for whom such online ads were run were located outside India.

5.3.xi. Nothing on account of such business was carried out from India.

5.3.xii. Appellant only was a conduit/agent between his Non-Resident clients and Google Singapore.

5.3.xiii. The Indian jurisdiction was used only for transfer of funds.

5.4. Considering the entire factual and legal position, ld. CIT(A) deleted the entire disallowance made by the ld. AO under Section 40(a)(ib).

In view of the above, ld. CIT(A) was correct in law in deleting the disallowance made by the ld. AO under Section 40(a)(ib), amounting to Rs.8,89,35,558.

10. The ld. AR of the assessee in addition to the above written submission further argued that the assessee received the money from their foreign client to act as conduit for their advertisement which are neither placed in Indian territory nor their target audience as per the mandate given to Google Singapore is in India. This fact is not only explained to AO to ld. CIT(A) and ld. CIT(A) has rightly taken a approaches that the expenditure that the assessee is claiming and paid to Google Singapore neither accrued or arise in India nor the digital target audience is in India. It is not disputed by the revenue that the income that the assessee has received is for the following foreign entity:

a) Harmony Commerce Co. Ltd. Hong Kong.
b) Hongkong Bule Seawhale Technology co. Ltd. Hong Kong.
c) Shenzhen Scolour Technology co. Ltd. Hong Kong.
d) Shenzhen Tonsee Electronics Co. Ltd. Hong Kong

Copy of Foreign Inward remittance certificate (FIRC) has been placed on record and thus the fact that the assessee has received the income from the foreign client is not disputed. Further the assessee placed on record a consolidated report as downloaded from the website of Google, for the campaign run by the assessee for his clients outside India. Such report is placed on record to establish that the target customers for the advertisement's campaigns were located outside India. All these facts were not disputed by the Id. AO. The assessee just creates a login Id with the money in the wallet and there after it is the client who decide about the place and area where the advertisement campaign is going to run. The target audience and place of advertisement is only decided by the client and the assessee has no role play except the creation of id and wallet. Even the time and place of run of advertisement is decided by client on their login and the relevant screen shots placed on records. Even the IP address of the target audience is not of India which is also not disputed and based on these once the neither the service provider nor the beneficiaries of the online advertisement both are outside India. The assessee has received the money and paid the money to

create the login id and creating a wallet on the portal and both this activity has nothing to on the said transactions. There should not be any EL on these payments and there is no jurisdiction to tax and even the legislative intention is not to tax those transaction which are not having the territorial jurisdiction under the EL also. During the course of hearing before the ld. AO and ld. CIT(A) entire modus operandi explained in the video conference hearing process. He explained that the charges that is also based on the number of clicks that the target audience has achieved and these details were also shared with the lower authorities and nothing contrary observed. The target audience and decision to make the advertisement were proved to be outside India and the ld. AO has not objected to this proposition that the ultimate business and benefit to this advertisement both are outside India. The relevant findings of the ld. CIT(A) are relied upon and recorded at page 22 to 24 of the order of the ld. CIT(A). The purpose behind levy is target the Indian business and Indian advertisement market and not the world market as explored by the others in India through digital marketing and for this purpose the target area and IP addresses are important to decide about the EL. Even the

assessee has paid the money to Google India about the operation that they have done for the Indian target audience and even the purpose of having the company Google India to pay the tax in India on the operations that they carry in India. The Id. AR of the assessee draw our attention to the budgetary provision introduction speech of the Honourable Finance Minister which is extracted here in below for the sake brevity :

> 151. In order to tap tax on income **accruing to foreign e-commerce companies from India,** it is proposed that a person making payment to non-resident, who does not have permanent establishment, exceeding in aggregate Rs. 1 lakh in a year, as consideration for online advertisement, will withhold tax at 6 % of gross amount paid, as Equalization levy. The levy will only apply to B2B transactions.

In the present set of facts no income accruing to foreign e-commerce companies from India as it is established from the set of evidence placed on record that the advertiser and target audience and the service provider all are outside India and the expenditure the assessee has incurred has not relation to any Indian operations and thus, the income is not accruing to India and therefore, the view of the AO merely the same is paid and subjected to EL without verifying the facts and circumstances is bad in law. Even, as per section 165 of the Finance Act, Equalization Levy [hereinafter "EL"] is applicable where non-resident e-commerce operators supply to (a) person resident in

India (b) Person using an Indian IP address (c) Non-resident in specific cases. Examples of specific cases where supply to a non-resident is subject to equalization levy are (a) sale of advertisement to non-resident and such advertisement target Indian Resident (b) sale of data to non-resident and the data targets Indian residents. Equalization Levy (EL) is a tax leviable on consideration received by a non-resident for specified services. Specified Service means online advertising or provision of digital space for online advertisement or any other service for purpose of online advertising. Equalization Levy is imposed under the Finance Act 2016 and not as a part of the Indian Income Tax Act, 1961 The Government introduced Equalization Levy vide Finance Bill, 2016, with the intention of taxing the digital transactions. As per Sec 165 of Finance Act 2016, a person resident in India or a non-resident having a permanent establishment in India shall deduct EL at 6% on the consideration paid to non-resident towards specified services. Here the consideration and contract is between the foreign client and Google Singapore and the assesse is merely a conduit and agent so the provision is required to be looked into considering that aspects of the case as it is proved

based from the FIRC, online screen shot showing the name of client and the area of advertisement displayed along the number of hits that has been generated from that targeted audience and thus, the provision of section 165 is not applicable in the present of the case. Here the EL is to be collected on customer target subjected to Indian targeted customer and not on the company's outside Indian target customer. So, looking to the facts of the case on hand the levy is not applicable. In the present set of fact neither the company, assessee or the Google Singapore has digital or economic presence in India which will attract the levy. The assessee is not carrying out any business activity in India based on the set of facts. The levy is on the consideration and consideration is not defined in the Act. Thus, the meaning of the consideration is extracted from the Contract Act, the same is extracted herein below for the sake of brevity:

> 'Consideration' means "something in return", *i.e. quid pro quo* that is an essential element to find out the genuine intention of the parties of the promise to create legal relationship. Consideration is an essential component of a valid contract. Consideration is the price for the contract. An agreement without consideration is void and thus not enforceable by law except under certain circumstances. According to Sir Frederick Pollock. Consideration is the price for which the promise of the other is bought, and the promise thus given for value is enforceable." An agreement without consideration is a bare promise and exnudo pacto non *aritio actio, i.e.,* cannot be held to binding on the parties.

Based on the above definition the consideration that the assessee is paying not a valid contract flow between the Google Singapore and the assessee, it is the customer outside India and Google Singapore the assessee has mere acted as agent and consideration and contract flows both with the persons having no PE or presence in India and their advertisement target is also not having the territory of India, so the dual condition prescribed under the section 165 is not established and therefore, based on these set of transaction the provision is not applicable. Thus, the EL can be levied only if the India Government has valid jurisdiction to levy the tax based on the PE, SEP [significance presence] or target audience none of the criteria is fulfilled to tax the payment that the assessee has made. The ld. AR of the assessee to support this argument has relied upon the provision of section 165A of the Act. The relevant extract is as under:

Charge of equalisation levy on e-commerce supply of services.

165A. (1) On and from the 1st day of April, 2020, there shall be charged an equalisation levy at the rate of two per cent. of the amount of consideration received or receivable by an e-commerce operator from e-commerce supply or services made or provided or facilitated by it—

(i)	to a person resident in India; or
(ii)	to a non-resident in the specified circumstances as referred to in sub-section (3); or

(iii)	to a person who buys such goods or services or both usinginternet protocol address located in India.

(2) The equalisation levy under sub-section (1) shall not be charged—

(i)	where the e-commerce operator making or providing or facilitating e-commerce supply or services has a permanent establishment in India and such e-commerce supply or services is effectively connected with such permanent establishment;
(ii)	where the equalisation levy is leviable under section 165; or
(iii)	sales, turnover or gross receipts, as the case may be, of the e-commerce operator from the e-commerce supply or services made or provided or facilitated as referred to in sub-section (1) is less than two crore rupees during the previous year.

(3) For the purposes of this [section,—

(a)	"specified circumstances" mean—]

(i)	**sale of advertisement, which targets a customer, who is resident in India or a customer who accesses the advertisement though internet protocol address located in India; and**
(ii)	**sale of data, collected from a person who is resident in India or from a person who uses internet protocol address located in India]**

[(b)	consideration received or receivable from e-commerce supply or services shall include—

(i)	consideration for sale of goods irrespective of whether the e-commerce operator owns the goods, so, however, that it shall not include consideration for sale of such goods which are owned by a person resident in India or by a permanent establishment in India of a person non-resident in India, if sale of such goods is effectively connected with such permanent establishment.
(ii)	consideration for provision of services irrespective of whether service is provided or facilitated by the e-commerce operator, so, however, that it shall not

	include consideration for provision of services which are provided by a person resident in India or by permanent establishment in India of a person non-resident in India, if provision of such services is effectively connected with such permanent establishment.]

Thus, it is evident that here the specific definition make clears the intention and when the same is not expressly covered it must be seen from the other similar provisions of the Act and a harmonious reading of law should be made to correctly interpret the provision of law newly introduced. Mere conduit service payment where the income is neither accrue or arise in India and the clear definition given in section 165A of the Finance Act, 2016 the levy is not required to be paid by the assessee as correctly held by the ld. CIT(A) by giving a detailed finding in this case. The ld. AR of the support his arguments further relied upon the provision of section 9(1) Explanation I which is extracted here in below:

Income deemed to accrue or arise in India.

9. (1) The following incomes shall be deemed to accrue or arise in India :—

(i) 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, or through the transfer of a capital asset situate in India.

Explanation 1.—For the purposes of this clause—

(a) **in the case of a business [, other than the business having business connection in India on account of significant economic presence,] of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India** ;

[Explanation 2A.—For the removal of doubts, it is hereby declared that the significant economic presence of a non-resident in India shall constitute "business connection" in India and "significant economic presence" for this purpose, shall mean—

(a) transaction in respect of **any goods, services or property carried out by a non-resident with any person in India including provision of download of data or software in India**, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or

(b) **systematic and continuous soliciting of business activities or engaging in interaction with such number of users in India**, as may be prescribed:

Here in this case no operation are carried out in India. Only the services of id and wallet creation is rendered for which the assessee has already paid the tax in India and is rendering of the services and its reasonableness is not under dispute. Only the payment made to Google Singapore for which there is no income which accrue or arise in India based on the provision of section 9 and section 165 of EL. To support further the ld. AR of the assessee relied upon the decision of the Hon'ble Supreme Court in the case of Ishikawajma-Harima Heavy Industries Limited 158

Taxman 259 (SC) the relevant extract of the finding is reiterated here in below :

> 74. What is relevant is receipt or accrual of income, as would be evident from a plain reading of section 5(2) of the Act. The legal fiction created although in a given case may be held to be of wide import, but it is trite that the terms of a contract are required to be construed having regard to the international covenants and conventions. In a case of this nature, interpretation with reference to the nexus to tax territories will also assume significance. Territorial nexus for the purpose of determining the tax liability is an internationally accepted principle. An endeavour should, thus, be made to construe the taxability of a non-resident in respect of income derived by it. Having regard to the internationally accepted principle and DTAA, it may not be possible to give an extended meaning to the words 'income deemed to accrue or arise in India' as expressed in section 9 of the Act. Section 9 incorporated various heads of income on which tax is sought to be levied by the Republic of India. Whatever is payable by a resident to a non-resident by way of fees for technical services, thus, would not always come within the purview of section 9(1)(vii) of the Act. **It must have sufficient territorial nexus with India so as to furnish a basis for imposition of tax**. Whereas a resident would come within the purview of section 9(1)(vii) of the Act, a non-resident would not, as services of a non-resident to a resident utilize in India may not have much relevance in determining whether the income of the non-resident accrues or arises in India. It must have a direct live link between the services rendered in India, when such a link is established. the same may again be subjected to any relief under DTAA. **A distinction may also be made between rendition of services and utilization thereof.**
>
> 75. Section 9(1)(vii)(c) clearly states "...where the fees are payable in respect of services utilized in a business or profession carried on by such person in India..." It is evident that section 9(1)(vii), read in its plain, same envisages **the fulfilment of two conditions: services, which are source of income sought to be taxed in India must be (1) utilized in India and (ii) rendered in India. In the present case, both these conditions have not been satisfied simultaneously**.

Thus, it has been proved by the ld. AR of the assessee that in the present set of case neither the services are utilized in India nor rendered in India and thus the levy of EL on the particular

transaction does not arise. This detailed finding is appearing on the order of the ld. CIT(A) at page 18 to 22 and then discussing the business model of the assessee at page 23-24 CIT (A) has deleted the addition made by the AO u/s. 40(a)(ib) for an amount of Rs. 8,89,35,558/-

11. We have considered the rival contentions, perused the material available on record and also gone through the findings of the lower authorities recorded in their respective orders. The bench noted that the only grievance of the revenue is that the assessee has paid a sum of Rs. 8,89,35,558/- on which disallowance u/s. 40(a)(ib) is required to be made, as the assessee fails to deduct equalization levy under the provisions of Chapter VIII of the Finance Act, 2016. The ld. AO made the disallowance of this amount contending that nowhere in the provisions of section 165 it is provided that equalization levy will not be attracted if the residential person makes a payment to non-resident for specified service out of the amount received by him from a non-resident or the targeted customers of the advertisement campaign are located outside India. The assessee has merely stated that the payment made by him to Google Singapore, a non-resident, not having a PE

in India, will not attract equalization levy and the tax authorities do not have the jurisdiction to tax such transactions as his customers from whom he received consultancy charges and the target audience of the online advertisement are located outside India and has not indicated the provisions of the Finance Act 2016 which form the basis for non-attraction of equalization levy. It can be seen from the notes to the Finance Act 2016 it is clearly mentioned that to avoid interpretational issues and to provide certainty, definitions to the terms and expressions used in the provisions relating to Equalization Levy have been provided. The definitions provided therein clearly indicate that the consideration paid to a non-resident for specified services by a resident in India carrying on business or profession is liable for equalization levy provided that the transactions do not fall within the exceptions mentioned in Sec. 165(2) of the Finance Act 2016. So, the attempt by the assessee to carve out an exception which is not already provided in the statute and bring out an ambiguity is to hide his failure to deduct the equalization levy on the payment to Google Singapore for the specified services rendered to the assessee for running an online advertisement campaign on behalf of his clients. In view of that

contention of the assessee that the consideration paid to Google Singapore is not amenable to equalization levy was rejected by the AO stating that as it is noticed from the factual matrix present in this case that the payment has been made to a Non Resident (Google Singapore) by the assessee for advertisement purposes in the digital mode on behalf of his clients and that no tax was deducted as equalization levy on the payment made to the non-resident. The above transaction carried out by the assessee clearly attract the provisions of sec. 165(1) of the Finance Bill, 2016 as the condition specified therein are clearly satisfied by the facts present in this case. Further the assessee's case does not fall within the exception provided u/s 165(2) of the Finance Act. Therefore, the facts present in the assessee case clearly lead to the conclusion that equalization levy is attracted in the payment made by the assessee to Google Singapore. Therefore, the provisions of Sec.40(a)(ib) of the Act which provide that "any consideration paid or payable to non-resident for a specified service on which equalization levy is deductible under the provisions of Chapter VIII of the Finance Act 2016 and such levy has not been deducted or after deduction, has not been paid on or before the due date

specified in sub section (1) of section 139 of the Act and thus he disallowed 100 % of the sum paid to Google Singapore, a non-resident having no PE in India.

12. We have also carefully gone through the order of the ld. CIT(A) who has analyzed the contentions raised by the ld. AO and given a detailed and reasoned findings as reiterated here in above. The role of the assessee is that of an agent of Google Singapore whereby the assessee is granted access for the purpose of advertisement to be made on Google. On approaching the assessee, such person gets login credentials, generated by the assessee on the website of google through such credentials, the person on its own runs advertisement on google. Such person on its own decides where the advertisement is to be run on which geographical location, who would be the targeted audience, for how much duration such advertisement is to run. All such aspects are decided by the person running the advertisement and not by the assessee. Assessee is merely a conduit of getting the advertisement run on Google. The aspects as highlighted above w.r.t. the advertisements are not at all decided by the assessee.

Thus, in substance assessee is only acting as a conduit for channelizing the funds from the person wanting to advertise to the platform on which such advertisement is to be done i.e. Google. We have gone through the submission in detailed placed on record by the assessee in the form of Screenshots w.r.t. the user 10 created for the clients to provide the client access on the website of google, the contention of the assessee that all these clients are of the non jurisdiction to India not only that the targeted customers or the area has no business or ultimate relation any business in India. This very basic facts were not disputed by the revenue. The only dispute that the revenue carries in this appeal that whether the online advertisement which are of non-jurisdictional area for which the assessee has claimed the expense are subjected to EL or not? To relates the client as well as cluster or area of the ultimate advertisement both are undisputedly out of India but since the assessee has made the payment outside India and claimed as expenses the ld. AO is of the view that the assessee is subjected to EL and since the levy is not collected it attract disallowance u/s. 40(a)(ib) of the Act at 100 % of the payment made.

13. The ld. AR of the assessee has shown on the issue that targeted audience, the person who runs advertisement and party who assist on displaying [Google Singapore] all are outside India and on this aspect there is no dispute. The ld. CIT, DR was specifically asked that on these facts whether the services are rendered in India?. The ld. DR could not convert that the person running the advertisement, person displaying the advertisement and the person using that advertisement are all outside India. In view of this the revenue has failed to show us that how these specified services are provided to a resident in India. The ld. AR of the assessee further submitted that on this issue he has not only persuaded these facts to the CIT(A) but also to the ld. AO on the issue and there are no contrary findings placed on record by the revenue and the ld. DR in this proceeding. Thus, when the intention of levy is related to the targeted audience and party paying the online advertisement has no relation in India, EL is not attracted in the set of present facts and circumstance placed before us and we see no reason to interfere in the reasoned findings given by the ld. National Faceless Appeal Center as

revenue did not controvert any of the factual aspect related this case. Therefore, the order passed by the learned National Faceless Appellate Center could not be found fault with and therefore, we see no reason to intervene in the findings of the learned National Faceless Appellate Center. Based on these facts we hold the view of the learned National Faceless appeal Centre as correct and appeal of the revenue is dismissed.

Resultantly, the appeal filed by the revenue is dismissed.

Order pronounced in the open Court on 07/10/2022.

Sd/-	Sd/-
(डा० एस. सीतालक्ष्मी)	(राठोड कमलेश जयन्तभाई)
(Dr. S. Seethalakshmi)	(Rathod Kamlesh Jayantbhai)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 07/10/2022
*Ganesh Kr.
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- DCIT, Circle-01, Jaipur
2. प्रत्यर्थी / The Respondent- Prakash Chandra Mishra, Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 305/JP/2022}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar