IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER

ITA No.374 & 362/Bang/2013
Assessment year : 2008-09

M/s. Google India Private Ltd., No.3, RMZ Infinity Tower-E, 4th Floor, Old Madras Road, Bangalore – 560 016. **PAN: AACCG 5027D**	Vs.	The Additional Commissioner of Income Tax, Range 11, Bangalore.
ASSESSEE		RESPONDENT

Assessee by	:	Shri Percy Pardiwala, Senior Advocate, Shri Anmol Anand, Ms. Priya Tandon & Shri Mithel Reddy, Advocates.
Respondent by	:	Ms. Neera Malhotra, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	20.03.2023
Date of Pronouncement	:	31.03.2023

O R D E R

Per Bench

These appeals are against the orders of CIT(Appeals)-1, Bangalore dated 28.01.2013 & 27.02.2013 for the assessment year 2008-09 which the assessee contended against the order of the AO passed u/s.143(3) r.w.s. 144C and u/s.271(1)(c) respectively.

2. The assessee is engaged in the business of providing information technology and Information Technology enabled Services (ITeS) to its group company. Further, the assessee also acts as distributors for AdWords program in India. The assessee has service centre and offices located at Bangalore, Gurgaon, Hyderabad and Mumbai in India. For the AY 2008-09, the assessee filed return of income on 30.9.2008 declaring at total income of Rs.7,35,16,505. The case was selected for scrutiny and notice u/s. 143(2) was duly served on the assessee. Since the assessee had international transactions with its AE, the case was referred to TPO for determination of ALP of the international transaction. The TPO accepted the international transaction of the assessee with its AE to be at arm's length vide order dated 31.10.2011. The AO made the additions with respect to the following during the course of assessment proceedings and also initiated penalty proceedings u/s.271(1)(c):-

(1) Deduction of telecommunication charges from export turnover for computing deduction u/s. 10A of the Act.
(2) Allowability of deduction of the amount payable by the assessee towards distribution right of AdWord program
(3) Claim of TDS credit deducted by the Indian advertisers on advertising payment made to the assessee.

3. Aggrieved, the assessee preferred appeal before the CIT(A).

4. Before the CIT(A), the assessee contended that the following issues besides the reduction of telecommunication charges from export turnover:-

(i) Rejection of books of accounts in respect of income relating to distribution of AdWord program.
(ii) Disallowance of payments made towards distribution rights invoking provisions of section 40(a)(i) of the Act.
(iii) Recomputation of profits from distribution of Adwords program in India.
(iv) Credit for TDS deducted on the revenue from distribution rights of Adword programs.

5. The CIT(A) partially allowed the appeal whereby the CIT(A) directed the AO to recompute the deduction u/s. 10A by relying on the decision of the jurisdictional High Court in the case of *CIT v. Tata Elxsi Ltd., (2013) 247 CTR 334.* With regard to rejection of books and the disallowances made towards AdWord program, the CIT(A) upheld the order of the AO. With regard to the appeal filed against the order u/s.271(1)(c) gave marginal relief by reducing the percentage of penalty levied by the AO. Aggrieved, these orders of the CIT(A) assessee is in appeal before the Tribunal.

ITA No.374/Bang/2013

6. In this appeal the assessee raised the following grounds:-

1. The Ld CIT(A) erred in not deliberating upon the validity of the order passed by the Learned Assessing Officer ('Ld AO') without appreciating the fact that the Ld AO had passed a contingent order.

Rejection of Books of accounts:

2. The Ld CIT(A) has erred in upholding that the accounts of the Assessee were not consistent with the provisions of

section 145 of the Act and that the Ld.AO was justified in rejecting the same.

3. The Ld CIT(A) has erred in upholding that the Assessee was required to credit Rs.167,32,01,616 to its Profit and Loss account.

4. The Ld CIT(A) having held that 40% of the operations with respect to the Ad Words program were attributable to operations in India erred in holding that the Assessee was required to credit the whole of Rs.167,32,01,616 to its Profit and Loss account.

Disallowance of payments towards distribution rights invoking provisions of section 40(a)(i) of the Act

5. The Ld CIT(A) has erred in upholding that the amount Rs.119,82,61,994 remittable by the Assessee to Google Ireland under the Ad Words Program was taxable in India.

6. The Ld CIT(A) has erred in upholding that the Assessee, in relation to distribution of AdWords Program, was a Dependent Agent Permanent Establishment of Google Ireland Ltd under Article 5 of the India-Ireland Double Taxation Avoidance Agreement.

7. The Ld CIT(A) has erred in holding that the Assessee was not remunerated at arm's length.

8. The Ld CIT(A) has erred in upholding that the Assessee was required to deduct tax at source from Rs.119,82,61,994 remittable by the Assessee to Google Ireland and in view of its failure to deduct tax, the amount of Rs.119,82,61,994 was required to be disallowed u/s 40(a)(i) of the Act.

9. The Ld CIT(A) having held that the Assessee was an agent of Google Ireland Ltd. erred in holding that Assessee 'was a person responsible for paying' any amount to Google Ireland Ltd. within the meaning of section 195 of the Act.

Re-computation of profits from distribution of AdWords program in India

10. The Ld CIT(A) has erred in upholding that the profits of Google Ireland Ltd. from the AdWords program, to the extent they were attributable to activities carried on in India, could be taxed in the hands of the Assessee.

11. The Ld CIT(A) has erred in holding that 40% of re-computed profits on the Rs.167,32,01,616, being the revenues collected in India under the AdWords program, are attributable to activities carried on in India.

12. The Ld CIT(A) has erred in holding that the profit from revenues collected in India under the AdWords program is 30.535%.

13. The Ld CIT(A) has erred in rejecting cost-plus method basis of remuneration of the Assessee for the distribution of the AdWords program, disregarding the fact that the same has been concluded by the transfer pricing officer to be at arm's length under the Transactional Net Margin Method.

14. The Ld CIT(A) has erred in subjecting the Assessee to tax on 40% of the re-computed profits from revenues collected in India under the AdWords program.

Miscellaneous

15. The Ld CIT(A) has erred in surmising that Google Ireland Ltd. would, insofar as the revenues collected in India under the AdWords program is concerned, contend that "the amounts are liable for taxation in India only in the hands of" the Assessee.

16. The Ld CIT(A) has erred in surmising that the Assessee and Google Ireland would engage in self-serving pleas with the intent "to evade being taxed in India".

17. The Ld CIT(A) has erred in upholding the levy of interest u/s 234B of the Act.

18. The Ld CIT(A) has erred in upholding the validity of the initiation of the penalty proceedings initiated u/s 271(1)(c) of the Act disregarding the fact the Ld AO has passed a penalty order levying a penalty u/s 271(1)(c) of the Act.

The Assessee craves, to consider each of the above grounds of appeal independently without prejudice to one another and craves leave to add, alter, delete or modify all or any of the above grounds of appeal.

Brief facts relating to the issue under consideration

7. The assessee acts as the Distributor for the Adwords program whereby the advertisements which appear on the Google website are sold in India for Indian business establishment. The assessee and its AE Google Ireland Ltd. [GIL] have entered into an agreement for marketing and distribution of the AdWord programs. The Google AdWords program is an option based advertising program that lets advertisers purchase and deliver relevant ads targeted to search queries or web contents across Google sites and through the website of Google Network.

8. During the course of hearing, the AO noticed that the assessee has claimed TDS credit of Rs.3,55,23,891 against the amount of Rs.47,49,39,634 shown as advertisement revenue in the Profit & Loss account (net of amount remitted to GIL account). The AO called on the assessee to furnish the details pertaining to the advertisement revenue as shown in the P&L account. The assessee in response filed a reply stating that an amount of Rs.167,32,01,616 is received from the advertisers on which the TDS of Rs.3,55,23,891 is deducted at source.

Of this amount, an amount of Rs.119,82,61,984 is the distribution fee payable to GIL and the assessee in the P&L account has netted these two figures and has reflected the net amount to the credit of the P&L account. The AO did not accept the submissions of the assessee and rejected the books of accounts and recasted the profit & loss account of the assessee by holding as under:-

> "16. The submissions made by the assessee company are considered. It is seen that as per this contract dated 12-12-2005 with M/s. Google Ireland Ltd., the assessee company was required to conduct the Adwords marketing on its own account and as an independent distributor of the said programme. The contract mentions in many words that the 'Adwords programme' is sold by the assessee for its own account in its own name, and not as an agent, employee, partner or franchisee of Google". The various other clauses of the said agreement also make it clear that the assessee company was required to run the businesses on its own account. Moreover the assessee company was expected to pay "fees for distribution right to M/s. Google and all this fees and payments were made subject to DTAA and Indian Tax Laws. The assessee is an Indian company incorporated under the Companies Act with the Registrar of companies. **The Indian companies Act makes the accounting standards given by Institute of Chartered Accountants of India (ICA) mandatory for all the Indian companies. The revenue generated from the said activity must be declared in its entirety on a gross basis as per the accounting principles**. The assessee company has failed to do so and has claimed that the revenue shown as per Profit and Loss account filed is as per a non-existent Indian 'GAAP' accounting norms. **By claiming to show the revenue on a net basis, the assessee company has tried to avoid**
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> a) TDS provisions applicable u/s. 195 of the Income Tax Act, specifically with respect to fees paid to Google Ireland ltd.
> b) Working out and showing correct income based on the gross revenue received by the assessee year on year.

c) Showing correct revenue for the purpose of Transfer Pricing adjustment which is on a markup basis and correct Transfer Pricing evaluation method.

17. This non-inclusion of gross revenue by the assessee in its return cannot be accepted on account of the reasons as above. The assessee shall show its full income based on a gross basis and claim any expenses thereon. This is mandatory as per the accounting standards of ICAI applicable to all the companies in India. The assessee cannot be an exception. For this limited purpose, the accounts shown by the assessee from its Ad revenue are rejected u/s. 145 of the Income Tax Act and income is computed as per section 144 of the Income Tax Act by recasting the profit and Loss account from its 'Adwords Programme as below:

Segmental `Adwords' Programme P & L Account as per accounting standards of ICAI for AY 08-09

Expenditure (Rs.)		Income (Rs.)	
- expenses incurred in India as regards marketing/service of Adwords Programme	41,12,03,145	Revenue from Adwords Programme	167,32,01,616
- fees remitted to Google Ireland Ltd.	119,82,61,984		
- Net profit admitted in India	6,37,36,487		
	167,32,01,616		167,32,01,616

9. The AO further held that the distribution fee of Rs.119,82,61,994 is to be disallowed u/s. 40(a)(ia) since the assessee has remitted the amount without deducting tax at source u/s. 195. The AO held that the distribution fee is chargeable to tax in India for the reason that assessee being a Dependent Agent Permanent Establishment (DAPE) of GIL in terms of Article 5(6) of India-Ireland Double Taxation Avoidance Agreement. Alternatively, the AO held that the distribution fee is to be held as royalty/fees for technical

services as per Article 12 of DTAA. Accordingly, the AO disallowed the entire amount of distribution fees in the hands of the assessee.

10. The AO further made an addition of Rs.51,09,12,113 by applying a notional profit rate of 30.535% on the total amount received by the assessee towards AdWord program. The AO in this regard held that the profit arising in India with regard to the activity of AdWord program needs to be taxed at the percentage of profit earned by Google Inc. Worldwide. The AO considered the profits percentage of Google Inc. for the year 2006 to 2008 to arrive at the average profit rate of 30.335% and applied the said percentage on the total amount received by the assessee towards AdWord program from the advertisers and accordingly made an addition. The AO's reason for making the addition is that the assessee being a DAPE of GIL in terms of Article 5(6) r.w. Article 7(1) of the DTA and accordingly the global profit percentage should be applied on the amount received by the assessee.

11. With regard to the issue of rejection of books of accounts, the CIT(A) upheld the decision of the AO by stating that –

> "5.7 I have carefully considered the Assessee's submissions and the reasons given by the AO in the assessment order as well as the remand reports. As per the provisions of section 145 of the Act, income chargeable under the head 'Profits and Gains of business or profession' has to be computed' in accordance with either cash or mercantile system of accounting regularly employed by the Assessee and also notified Accounting Standards in this regard. As per the Accounting Standard - 1 vide notification No.9949 dated 25/1/1996, accounting policies adopted by an assessee should be such that it represents a true and fair view of the state of affairs of the business in the financial

statements prepared and presented on the basis of such accounting policies. Clause No.4 of the AS-1 mentioned above is extracted below:

"4. Accounting policies adopted by an assessee should be such so as to represent a true and fair view of the state of affairs of the business, profession or vocation in the financial statements prepared and presented on the basis of such accounting policies. For this purpose, the major considerations governing the selection and application of accounting policies are following, namely:-

(i) Prudence – Provisions should be made for all known liabilities and losses even though the amount cannot be determined with certainty and represents only a best estimate in the light of available information;

(ii) Substance over form - The accounting treatment and presentation in financial statements and transactions and events should be governed by their substance and not merely by the legal form;

(iii) Materiality - Financial statements should disclose all material items, the knowledge of which might influence the decisions of the user of the financial statements."

5.8 It may be seen from the above, the financial statements should disclose all the material items, the knowledge of which might influence the decisions of the user of the financial statements apart from other important considerations mentioned therein. In the instant case, the Assessee has not included the revenue receipt of Rs.167,32,01,606/- in the profit and loss account on the ground that they followed (GAAP Accounting Norms;) The obligation on the part of the Assessee is very important to show the said receipt in the profit and loss account particularly when it claimed the TDS in respect of such receipts for credit. The AO in his order very elaborately mentioned that the Adwords programme sold by the Assessee "for its own account in its own name, and not as an agent, employee, partner or franchisee of Google" and established that the Assessee was running the business on its own account; hence the revenue from the Adwords programme should have been reflected in the profit and loss account. It has been judicially held by various courts on

> various occasions that the income-tax provisions will prevail over any accounting norms. The accounting norms of GAAP followed_by the Assessee is neither accepted nor notified by the CBDT. Even otherwise, the Assessee being a company should have followed the Accounting Standards of TCAT by showing the gross receipts and expenses thereon. The accounting policy followed by the Assessee is not consistent with the method of accounting and the notified accounting standards u/s 145 of the Act. Thus the accounts are inaccurate _incomplete and do not represent the true and fair view of the state of affairs of the Assessee company. This has been sufficiently explained and established by the AO in the assessment order. The Assessee relied on certain decisions in support of their contentions objecting to the rejection of books of account. I have gone through the said decisions and the facts of the said cases are different from the Assessee's case. Though the Assessee might have followed this particular accounting policy regularly, the same is not consistent with the provisions of section 145 of the Act. In view of this, the action of the AO in rejecting the books of account and recasting the profit and loss account in respect of AdWords Business' is completely justifiable and upheld."

12. With regard to the disallowance u/s. 40(a)(i) of distribution fee paid by the assessee to GIL, the CIT(A) upheld the disallowance by stating that the amount paid by the assessee to GIL is chargeable to tax as the AO has established the DAPE between the assessee and GIL and therefore the assessee is liable to deduct tax u/s. 195.

13. With regard to addition on account of re-computation of profits of Adword Program by holding that GIL has refused to recognize the taxability of its incomes in India for the reason that there is no PE in India though the assessee is conducting business on behalf of GIL. The CIT(A) further held that the revenue is compelled to draw both the assessee and GIL in conjunction to their tax liability in India and hence

there was no alternate but to bring the entire amount of Rs.51,00,12,113/- to tax in the hands of the assessee. The CIT(A) however reduced the percentage of profit to be taxed in India in the hands of the assessee to be 40% of 30.335% for the reason that the activities carried on by the assessee and GIL with regard to AdWord Program are different and accordingly the addition made was reduced by Rs.30,65,47,268.

14. The ld AR submitted a detailed written submission with regard to the impugned additions. The arguments of the ld AR, during the course of hearing is summarizes as under –

Rejection of books u/s.145 of the Act - I. Grounds No. 2 to 4

The ld AR submitted that the AO/CIT(A) did not point out any discrepancy in the books of account of the assessee, owing to which, the accounts are not correct and complete. The ld AR further submitted that the profit of Rs.6,13,46,430/- from advertising services, determined by the AO/ CIT(A) after rejecting books u/s. 145 of the Act, is the same as has been declared by the assessee in its books of account. The ld AR also submitted that the books of the assessee have been rejected, primarily with the intention of disallowing Rs. 119,82,61,984/- under section 40(a)(i) of the Act.

Disallowance of distribution fees u/s 40(a)(i) of the Act - Grounds No. 5 to 9

The ld AR submitted that the Department has not alleged DAPE of GIL in GIL's own assessment for AY 2008-09, or that the nature of "distribution fee" was FTS, as per Article 12 of the DTAA and therefore, disallowance under section 40(a)(i) of the Act on the ground that the assessee is GIL's DAPE or that the payment in question is FTS does not survive. It is further submitted that, payment of "distribution

fee" by the assessee to GIL has been held to be not "royalty" and hence, not taxable in India by this Hon'ble Tribunal in assessee own case (ITA No.1513-1516/Bang/2013) and in GIL's appeal (ITA 2845/Bang/2017). The ld AR therefore contended that the assessee was not required to withhold tax while paying "distribution fee" to GIL and accordingly, no disallowance under section 40(a)(i) of the Act is sustainable.

Attribution of additional profits in the hands of the assessee - Grounds No. 10 to 14

The ld AR reiterated that the revenue in GIL's own assessment for AY 2008-09, has not alleged GIL to have a DAPE in India, the business profits of GIL cannot be brought to tax/ attributed in India under Article 7(1) of the DTAA. The ld AR further submitted that as a consequence no profits can be attributed in the hands of the assessee, who has, contrary to the assessment of GIL, been alleged to be the DAPE of GIL in the present case. The ld AR brought to our attention that the transfer pricing officer ("TPO") has found the transaction between the assessee and GIL to be at arm's length for AY 2008-09 and therefore, no further profits can be attributed to the alleged DAPE of GIL in assessee's assessment.

15. The ld AR further submitted that the assessee is not a DAPE since the assessee does not fall within the purview of the provisions of Article 5(6) and 5(8) of the DTAA which is substantiated by the fact that the unequivocal terms of the Distribution Agreement, do not cast any obligation on or empower the Assessee to either act as an agent of GIL, or to that end, habitually conclude/ secure contract on behalf of GIL. Therefore it is argued that the distribution fee paid to GIL is not taxable in India as Business Income as GIL does not have PE India and accordingly the same is not subject to TDS even on this count.

16. The ld DR submitted a detailed a written submissions contending that the "distribution fee" should be held to be "royalty"/ fees for technical services ("FTS") as per Article 12 of the DTAA and the written submission is taken on record for the purpose of adjudication.

17. We heard the parties and perused the material on record. The trigger for the impugned additions/disallowance is that the assessee has reflected the receipts towards AdWord Program from various customers net of the distribution fees payable to GIL though the TDS is claimed on the gross receipts. The AO therefore as a first step rejected the books of accounts u/s.145 before proceeding to make other additions/disallowances. We notice that the assessee has reflected the income in the following manner in the P&L account –

		Rupees	Rupees
INCOME			
Software development and services	K	4,413,697,292	1,852,633,523
Advertising services (net)	L	474,939,634	231,158,726
Other income	M	552,704	93,561
		4,889,189,630	2,083,885,810

Schedule - L: Advertising services (net)		
Domestic advertising revenues net of fees for distribution services Rs. 1,198,261,982 (Previous year Rs. 425,753,347)	474,939,634	231,158,726
	474,939,634	231,158,726

18. From the above it is clear that the assessee has reflected, in the books, the entire sale proceeds of Rs.167,32,01,618/- and the liability to pay GIL, a sum of Rs. 119,82,61,984/-, on net basis. We notice that

the only observation of the AO is concerning the form of reporting of revenue from advertisement services in the books of account of the assessee and that there has been no finding to the effect that the books of the Assessee were unreliable or that the entire revenue earned by the assessee from distributing and marketing online advertisement space, was not credited in the books. This is supported by the fact that the net profit of the assessee as disclosed in the financials and the net profit computed by the AO (refer page 22 para 17 of assessment order) are the same. In our considered view when the assessee has presented the results of the impugned transactions that reflects the substance of the transaction we see no reason for the AO not to be satisfied with the correctness or completeness of the books of accounts of the assessee. The ld AR during the course of hearing drew our attention to the observations of the coordinate bench of the Tribunal where by virtue of Grounds No. 2 to 4 (refer para 176 of order dated 11.05.2018) the issue was decided in favour of the Assessee. It was further brought to our attention that the said finding of this Hon'ble Tribunal was never challenged in appeal by the Department and that this issue was not the subject matter of appeal before the Hon'ble High Court of Karnataka which means that the same has attained finality. From these factual findings and given that there is no adverse finding with regard to the books of accounts, in our view the action of the AO by rejecting the books to recast the P&L with an intention to disallow distribution fee paid by the Assessee to GIL is not tenable. The grounds 2 to 4 with

regard to rejection of books of accounts are accordingly held in favour of the assessee.

19. Now coming to main issue of disallowance of distribution fee u/s.40(a)(i), we notice that the basis on which the revenue has made the disallowance is that the assessee is the DAPE of GIL. The alternative ground of the revenue is that the payment is being in the nature of Royalty / FTS. We notice that the issue of taxing the distribution fees by treating the same as Royalty / FTS has already settled in favour of the assessee by the coordinate bench in assessee's own case from the perspective of applicability of provisions of section 201 and accordingly there cannot be any disallowance u/s.40(a)(i) on this count. Therefore we in this order will restrict our adjudication to whether the assessee is the DAPE of GIL and whether the assessee is required to deduct tax at source u/s.195 on the impugned payments accordingly.

20. To recapitulate the Assessee, during the year under consideration, recorded gross revenue of Rs.167,32,01,618/- from distributing online advertisement space to advertisers in India, out of which it paid Rs.119,82,61,984/- to GIL and retained net revenue of INR 47,49,39,634/-. The case of the revenue is that the assessee being the agent of GIL, the distribution fees is taxable in India i.e. assessee being the PE of GIL and therefore the payment is disallowed u/s.40(a)(i) in the hands of the assessee for failure on the part of the assessee to deduct tax at source. Before proceeding we will look at the relevant Article of DTAA. The term PE is defined in Article 5 of the

DTAA and one of the forms of PE is DAPE, which is defined and governed by the provisions of Article 5(6) and 5(8) of the DTAA, reads as under:

> "6. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 8 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such a person:
>
> (a) has and habitually exercises in that State an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 5 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or
>
> (b) has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise; or
>
> (c) habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises controlling, controlled by, or subject to the same control as that enterprise.
> ……
>
> 8. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, if the activities of such an agent are carried out wholly or almost wholly for the enterprise and the conditions

made or imposed between them in their commercial and financial relations differ from those which would have been made or imposed if this had not been the case, that agent shall not be considered to be an agent of an independent status for the purpose of this paragraph."

21. The plain reading of the above provision would point out to the following requisites, before an Indian entity can be classified as a DAPE of an Irish entity:

(i) The Indian entity is broker, general commission agent or any other agent of the Irish entity and is not acting in the ordinary course of its business and is thus not an agent of independent status,

(ii) The activities of such Indian entity are carried out wholly or almost wholly for the Irish entity and the conditions made or imposed between the two in their commercial and financial relations differ from those which would been made or imposed if this had not been the case, and

(iii) Such Indian entity:

(a) has and habitually exercises in India, an authority to conclude contracts in the name of the Irish entity, unless the activities of such Indian entity fall under any of the provision of Article 5(5) of the DTAA, or

(b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the Irish entity, or

(c) habitually secures orders in India, wholly or almost wholly for the Irish entity itself or the Irish entity or any of its related party.

22. Therefore, all the above conditions must be satisfied, in the present case for the Assessee to be characterized as DAPE of GIL and in this regard one needs to examine the terms of Distribution Agreement, as the nature of the relationship should be determined based on such terms. The ld AR during the course of hearing drew our attention to the following clauses of the agreement to contend that the assessee is not a DAPE of GIL.

> **Clause 2.1** that GIL appointed the Assessee as a **distributor** of Google AdWords Program to advertisers in India. It has been further provided in this clause that **Assessee would conduct its business for its own account, in its own name**, and **not as an agent**, employee, partner of franchisee of GIL.
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> **Clause 2.2** that the Assessee would market and distribute Google AdWords Program **with its reasonable commercial expertise** and own sales force and customer service infrastructure.
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> **Clause 2.6** that the Assessee would provide after-sales services to advertisers in India.
>
> **Clause 14** that the Assessee and GIL shall remain independent contractors and nothing in the Distribution Agreement shall be deemed to create any agency, partnership, or joint venture between the Assessee and GIL. It has also been provided in this clause that neither Assessee nor GIL shall have any right or authority to create any obligation on behalf of each other.

23. We further notice that pursuant to the terms of the Distribution Agreement the Assessee entered into contracts with advertisers in India called "Google India Private Limited Advertising Program Terms" and

perusal of the sample invoice (page 359 of Paper Book Volume 1) raised by the Assessee on an advertiser shows that the Assessee has raised the invoice and collected payments from the advertiser in its own name and right. It is also noticed that the coordinate bench in assessee's own case found the Assessee to be the distributor of the Google AdWords Program and therefore, the characterization as a distributor would mean that the Assessee is not an agent as per the findings of the Hon'ble Tribunal. Further the Distribution Agreement between the Assessee and GIL as well as Standard Contract entered into by the Assessee and advertisers in India do not contain any clauses that can lead to the conclusion that the Assessee has any authority to bind GIL.

24. We also notice that the CIT(A) though has confirmed the addition on the ground that the assessee is a DAPE of GIL, has given the following findings which is contrary to the same –

- Internal Page 12: The CIT(A) noted the observation of the AO that various clauses of the Distribution Agreement between the Assessee and GIL make it clear that the Assessee is required to run the business on its own account.
- Para 5.8 at Internal Page 21: The CIT(A) noted the observations of the AO yet again that the AdWords Program was sold by the Assessee for its own account, in its own name, and not as an agent, employee, partner or franchisee of GIL.
- Para 6.8(iii) at Internal Page 39: The CIT(A) has categorically observed in this para that the Assessee is not a conduit or an agent of GIL.
- Para 7.6(i) at Internal Page 51: The CIT(A) has observed that the Assessee never brought GIL into the picture for all its transactions

and that all the payments had been collected by the Assessee in its own name.

25. It is noticed that inspite of giving the above findings, the CIT(A) upheld the AO's decision by reproducing the AO's observations and without bringing any contrary evidence on record from his end to prove that the Assessee has habitually concluded contracts on behalf of GIL.

26. During the course of hearing the ld AR relied on various judicial pronouncements to submit that none of the requirements of Article 5(6) of the DTAA are satisfied since it is necessary for the Assessee to be characterized as DAPE that the conditions of Article 5(6) of the DTAA are satisfied and that burden of proving that an assessee has a PE is on the Department

(i) Hon'ble High Court of Delhi in the case of Formula One World Championship Limited v. CIT, (2017) 390 ITR 199
(ii) Hon'ble High Court of Delhi in Nortel Networks India International Inc. v. DIT, (2016) 386 ITR 353
(iii) ADIT v. E-Funds IT Solution Inc., (2017) 399 ITR 34 (Supreme Court)
(iv) Reuters Limited v. DCIT, (2015) SCC OnLine ITAT 8760 (Mum-Trib)
(v) Taj TV Ltd. v. DCIT, (2022) 136 taxmann.com 278 (Mum-Trib)
(vi) ESS Distribution (Mauritius) SNC et Compaginie v. DDIT, (2022) 145 taxmann.com 267 (Delhi-Trib)
(vii) DDIT v. B4U International Holdings Ltd., (2012) 23 taxmann.com 372 (Mum-Trib)

27. In view of the above discussion with respect to the clauses in the Distribution agreement between the assessee and GIL, the invoices raised on advertisers and the relevant Articles of DTAA between India and Ireland, we hold that the Assessee cannot be treated as DAPE of GIL. Accordingly the distribution fees paid by the assessee to GIL is not liable for TDS u/s.195 of the Act and therefore no disallowance u/s.40(a)(i) is warranted. Grounds 5 to 9 is held in favour of the assessee.

28. The ld AR also made a without prejudice submission that even if the assessee is to be treated as DAPE of GIL, the assessee is not the person responsible since the agent cannot be classified as the "person responsible for paying" within the meaning of section 195 of the Act. Given that we have already held that the assessee cannot be treated as DAPE of GIL, this contention has become academic not warranting any adjudication.

29. With regard to the attribution of additional profits in the hands of the assessee, we notice that as per the TPO's order for the year under consideration (page 1311 of Paper Book Volume 2), all transactions of the Assessee with its associated enterprises for purchase of online advertisement space has been held to be at arm's length and therefore we see merit in the submissions of the ld AR that no further profits could be attributed, in terms of the decisions of the Hon'ble Supreme Court in DIT v. Morgan Stanley (2007) 292 ITR 416 the decision of this Hon'ble Tribunal in ABB Inc. v. DDIT, (2015) 69 SOT

537 (Bang-Trib). Further we have already held that the assessee is not a DAPE of GIL and therefore the revenue cannot sustain addition on that ground. We notice that the reason as has been given in the CIT(A)'s order which is extracted below is that the GIL is avoiding the payment of tax in India and therefore the addition made in the hands of the assessee on notional basis is justified –

> 8.6 However, in this regard one has to exercise utmost caution. In the assessment proceedings of M/s Google India Pvt. Ltd, Google India will make a plea to the revenue authorities to tax the profits from the Adwords enterprise in the hands of M/s Google Ireland Ltd. However in the assessment proceedings of Google Ireland Ltd., M/s Google Ireland would as well make a plea that the amounts are liable for taxation in India only in the hands of the M/s Google India Pvt. Ltd. and not in the hands of M/s Google Ireland Ltd. By making these self-serving pleas, both the assessee group companies intend to evade being taxed in India on their business profits. It is for the revenue to see through the tax evasive game plan of the Assessee group and to ensure that correct amounts are brought to taxation in India.

30. In our considered view, this stand of the revenue for making the addition is not tenable since each assessee has to be assessed in respect of income that accrues or is received by it, unless by a statutory enactment, the income of another is permitted to be assessed in the hands of a person. Therefore, the Assessee can only be assessed in respect of the amount it retains pursuant to the contract, which it has entered into with GIL and therefore the addition made by applying the notional rate of profit in the distribution fees is not sustainable.

31. In the result, the appeal of the assessee in ITA No.374/Bang/2013 is allowed. As a result the appeal in ITA No.362/Bang/2013 against levy of penalty has become infructuous.

Pronounced in the open court on this 31st day of March, 2023.

Sd/-	Sd/-
(GEORGE GEORGE K.)	(PADMAVATHY S.)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 31st March, 2023.

/*Desai S Murthy /*

Copy to:

1. Assessee 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.