

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES : "C", BANGALORE**

**BEFORE SHRI B.R.BASKARAN, ACCOUNTANT MEMBER
AND
SMT.BEENA PILLAI, JUDICIAL MEMBER**

**ITA No.362(Bang)/2013
(Assessment Year : 2008-09)**

M/s Google India Pvt.Ltd.,
No.3, RMZ Infinity Tower-E,
4th Floor, Old Madras Road,
Bangalore-560 016
Pan No.AACCG0527D

Appellant

Vs

The Asst. Commissioner of Income tax,
Range-11,
Bangalore

Respondent

**Appellant by Shri Percy Pardiwala, Sr. Advocate
Shri Anmol Anand & Ms. Jomol Joy,
Advocates**

Revenue by : Shri Pradeep Kumar, CIT

Date of hearing : 08-08-2019

Date of pronouncement : 06-09-2019

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER :

Present penalty appeal has been filed by assessee against order dated 27/02/13 passed by Ld. CIT (A)-1, Bangalore for assessment year 2008-09 on following grounds of appeal:

"Based on the facts and circumstances of the case, Google India Pvt.Ltd., respectfully submits that the order of the Ld.CIT(A)-I, Bangalore is not correct as it

is based on incorrect interpretation of fact and law and therefore, is bad in law and hence, needs to be cancelled. The appellant also submits that each of the grounds hereinafter are independent and without prejudice to one another.

1.The Ld.CIT(A) erred in upholding the levy of penalty u/s 271(1) (c) of the Act on the disallowances and additions made by the Ld.Addl.CIT, Range-11, Bangalore in the assessment order without awaiting the outcome of the quantum appeal proposed to be filed by the appellant before the ITAT.

2. The Ld.CIT(A) erred in upholding the levy of penalty u/s 271(1)(c) of the Act by the Ld. AO on the disallowance u/s 40(a)(i) of the Act.

3.The Ld.CIT(A) has erred in upholding the levy of penalty stating that:

- the disallowance made by the Ld.AO in the assessment order does not involve difference in interpretation of law;

-the claim made by the appellant was not based on a bonafide belief; and

- there were no two views possible on the claim of the appellant.

4. The Ld.CIT(A) erred in upholding the levy of penalty u/s 271(c) of the Act by the Ld.AO on the additions made to the total income of the appellant on an ad hoc basis.

5. *The Ld.CIT(A) without appreciating the facts of the appellant, erred in concluding that the appellant has attempted to conceal the true and correct particulars of receipts from the AdWords business and holding that the appellants non withholding of tax amounts to shielding the foreign principal from being made liable to payment of taxes in India.*

The appellant 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”.

Assessee has also filed the following additional ground of appeal:

Based on the facts and circumstances of the case, the appellant respectfully submits the following additional ground of appeal.

6. *The Ld.AO has erred in law by not stating the exact reason in the notice issued under section 274 to the appellant as to whether there was concealment of income or whether the appellant has furnished inaccurate particulars of income for initiating the penalty proceedings under section 271(1)(c) of the Act, and therefore, the notice u/s 274 dated 30 November 2011 is invalid.*

2. Brief facts of the case are as under:

Assessee is a wholly owned subsidiary of Google international LLC, USA and is engaged in business of providing information technology and information technology enabled services to its group companies. It also acted as distributor for AdWord

programmes in India. Assessee thus entered into distribution agreement with Ireland PE, whereby assessee was granted marketing and distribution rights of AdWord Program to advertisers in India, and assessee was remunerated on cost plus market basis for distribution services under AdWord Programmes. Ld.AO observed that assessee under agreement acquired marketing and distribution rights over AdWord Programmes for the territory of India from its U.S. AE and that distribution agreement involved three parties being license or the reseller, the distributor and the advertiser. In the instant case AE was the license or, the distributor and reseller was assessee before us and end-users were advertisers. Ld.AO noticed that assessee credited a sum of Rs.1,115 crore to the account of AE without deduction of TDS and also had not obtained 'nil' deduction certificate in respect of the same from Department under section 195 of the Act.

Ld.AO thus rejected books of account as per section 145 of the Act, and calculated disallowance under section 40(a)(ia) of the Act for non-deduction of TDS.

3. On the contrary assessee was of the view that amount payable to AE was not in the nature of royalty either under the act or under the India Ireland DTAA.

Before this *Tribunal*, it was argued that payments made by assessee under AdWord Distributor Agreement were in fact business profits in the hands of U.S.AE as, these were paid on account of purchase of AdWord space, though AdWord advertisement spaces was further sold to different advertisers. It has been submitted that nature of payment remained the same and thus it should be treated as business profit in the hands of U.S.

AE. It was also argued that there was no transfer of technical knowhow or trademark, intellectual property rights or any process in favour of assessee under the ad word distribution agreement as held by Ld.AO and therefore payment made under this agreement would not be termed to be payment of royalty and was chargeable to tax under section 9 (1) (vi) as deemed income accrued in India.

Per contra revenue argued that payment was towards purchase of AdWord space for its resale to advertisers and payment was made after deducting particular percentage from the advertisement receipts received from the advertisers, though as per service agreement assessee rendered certain technical services, that too for AdWord Programs only, for which assessee received certain payments as per terms of agreement with U.S. AE. Revenue was also of the opinion that after sales services and add review was not possible without aid of ITES division and therefore payments made to U.S. AE by assessee were on account of usage of trademark, intellectual property rights, processes, derivative Works etc., and thus nature of payment was royalty.

Subsequently, penalty order was passed levying penalty for alleged **'tax evasion'**.

4. Aggrieved by penalty order, assessee preferred appeal before Ld.CIT (A) who confirmed the same.

5. Aggrieved by order passed by Ld.CIT (A) assessee is in appeal before us now.

Ld.Counsel submitted that against consolidated order passed by this *Tribunal* dated 11/05/18 assessee preferred appeal before *Hon'ble Karnataka High Court. Hon'ble Court*, and vide consolidated order dated 28/08/2018, admitted questions of law, relating to

issues, for which penalty has been levied. He placed on record order passed by *Hon'ble Karnataka High Court*, wherein following questions of law has been admitted;

'1. Whether the Tribunal erred on facts and in law incoming to the conclusion that the payments made by the Appellant under the 'Distribution Agreement' dated 12.12.2005 (superseded by Reseller Agreement) to GIL constituted 'Royalty' under the provisions of Section 9(1)(iv) of the Income Tax Act, 1961 and Article 12 of the Double Taxation Avoidance agreement between India and Ireland?.'

2. Whether the Tribunal's conclusion that the ITES and Distribution agreements are to be read together and that the functions under the Distribution agreement could only be discharged under the ITES agreement is perverse given that the same is contrary to facts and material on record which would demonstrate that the two Agreements are for separate and distinct purposes?.'

3. Whether the Tribunal erred in law in not appreciating that the revenues from the Distribution Agreement (superseded by Reseller agreement) constituted 'business income' in the hands of GIL and in the absence of any Permanent Establishment of GIL in India, such receipts could not be brought to

tax in India and consequently the provisions of Section 195 and 201 of the Act had no application?.

4. Whether the Tribunal completely failed to appreciate that the rights granted under the Distribution Agreement were in the nature of 'Commercial rights' and did not partake the character of/or grant any right to use any intellectual property so as to fall within the ambit of Section 9(1)(vi) of the Act?

5. Whether the Tribunal also erred on facts and in law in concluding that the entire payment made by the Appellant constituted 'Royalty' under section 9(1)(vi) of the Act and Article 12 of the DTAA on the basis that since the appellant had the right to use brand features, patent, technical know-how, IPRS, trade mark, process, derivate work, brand features etc. of GIL?

6. That without prejudice, whether the Tribunal failed to appreciate that there could not arise any withholding tax obligations on the Appellant for part of the payment that was paid during AY: 2014-15 and hence were taxable income of GIL only in AY: 2014-15 since 'Royalty' as per the DTAA is taxable on receipt basis?.

7. Whether the Tribunal failed to appreciate that the withholding obligations on the Appellant were integrally linked/dependent with/on the taxability of the amounts in the hands of GIL and in the absence of such taxability for the period under consideration, there could be no withholding obligations?.

Referring to consolidated order passed by Hon'ble Karnataka High Court, Ld.Counsel submitted that ITA No.504/2018 pertains to year under consideration. He also placed reliance upon decision of Hon'ble Karnataka High Court in case of *CIT vs Ankita Electronics Pvt Ltd., reported in (2015) 379 ITR 50* wherein it has been laid down that;

“.....

The mere admission of the appeal by High Court on the substantial questions of law would make it up apparent that the additions made were debatable. There was no concealment of income or furnishing of inaccurate particulars of such income. The penalty could not be imposed under section 271 (1) (c).”

Similar is the view taken by Hon'ble Karnataka High Court in a subsequent decision in case of *CIT vs Dr Hirsha N. Biliangady* reported in *(2017) 79 Taxmann.com 376*.

Ld.CIT.DR on contrary placed reliance on orders passed by authorities below.

6. We have perused submissions advanced by both sides in light of records placed before us.

It is pertinent to observe that while passing assessment order Ld.AO initiated penalty proceedings without referring to any charge

as to for “concealment of income” or “filing of inaccurate particulars of income”. Further Ld.AO subsequent to order passed by Ld. CIT (A) passes penalty order, wherein penalty has been levied for deliberateness of **“tax evasion”**, which in our considered opinion is not at all the requirement of Sec.271(1)(c) of the IT Act.

Be that as it may, it is observed that *Hon’ble High Court* for year under consideration admitted substantial questions of law by which addition itself becomes debatable. On perusal of decision relied upon by Ld.AR in case of *CIT vs Ankita Electronics Pvt Ltd and CIT vs Dr Hirsha N. Biliangady (supra)*, additions in respect of which penalty was confirmed has been accepted by *Hon’ble Karnataka High Court*, leading to substantial question of law. Thus when *Hon’ble High Court* admitted substantial question of law on additions, it becomes apparent that issue is certainly debatable. In such circumstances penalty cannot be levied under section 271 (1) (c) of the Act.

We are therefore inclined to delete penalty levied by Ld.AO on this count respectfully following the view taken by *Hon’ble Karnataka High Court* in case of *CIT vs Ankita Electronics Pvt Ltd and CIT vs Dr Hirsha N. Biliangady (supra)*.

Accordingly ground raised by assessee stands allowed.

In the result appeal filed by assessee stands allowed.

Order pronounced in the open court on 06-09-2019

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Dated: 06-09-2019

***am**

Sd/-
(BEENA PILLAI)
JUDICIAL MEMBER

Copy of the Order forwarded to:

- 1.Appellant;
- 2.Respondent;
- 3.CIT;
- 4.CIT(A);
5. DR
6. ITO (TDS)
- 7.Guard File

By Order

Asst. Registrar