

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 17<sup>TH</sup> DAY OF APRIL, 2021

PRESENT

THE HON'BLE MR. JUSTICE SATISH CHANDRA SHARMA

AND

THE HON'BLE MR. JUSTICE S VISHWAJITH SHETTY

ITA NO.502/2018

C/W

ITA NO.503/2018, ITA NO.504/2018, ITA NO.505/2018,  
ITA NO.506/2018, ITA NO.507/2018, ITA NO.549/2018,  
ITA NO.550/2018, ITA NO.560/2018, ITA NO.561/2018,  
ITA NO.562/2018, ITA NO.563/2018, ITA NO.564/2018,  
ITA NO.879/2017, ITA NO.882/2017, ITA NO.883/2017,  
ITA NO.897/2017, ITA NO.898/2017, ITA NO.899/2017,  
ITA NO.125/2020

IN ITA NO.502/2018 C/W ITA NOS.503/2018, 504/2018, 505/2018,  
507/2018, 549/2018, 550/2018, 560/2018, 561/2018, 562/2018,  
563/2018, 564/2018, 879/2017, 882/2017, 883/2017, 897/2017,  
898/2017, 899/2017

BETWEEN

M/S GOOGLE INDIA PRIVATE LTD  
NO.3, RMZ INFINITY TOWER-E  
4<sup>TH</sup> FLOOR, OLD MADRAS ROAD  
BENGALURU-560016  
PAN:AACCG0527D

...APPELLANT

(BY SRI.S.GANESH, SENIOR COUNSEL FOR (COMMON)  
SRI.ANMOL ANAND A/W SMT.PRIYA THANDON, ADVOCATES  
SRI.MITHUL REDDY, FOR SRI.ADITYA VIKRAM BHAT, ADVOCATE)

**IN ITA NO.506/2018**

M/S GOOGLE IRELAND LIMITED  
C/O PRICEWATERHOUSECOOPERS PVT LTD  
BUILDING NO.10, TOWER-C,  
18TH FLOOR, DLF CYBER CITY,  
GURGAON-122002

...APPELLANT

(BY SRI.S.GANESH, SENIOR COUNSEL FOR  
SRI.ANMOL ANAND A/W SMT.PRIYA THANDON, ADVOCATES  
SRI.MITHUL REDDY, FOR SRI.ADITYA VIKRAM BHAT, ADVOCATE)

AND

THE COMMISSIONER OF INCOME TAX  
INTERNATIONAL TAXATION  
7<sup>TH</sup> FLOOR, BMTc BUILDING  
80 FEET ROAD  
KORAMANGALA  
BENGALURU

...RESPONDENT  
(COMMON)

(By SRI. K.V. ARAVIND, ADVOCATE)

**ITA NO.502/2018** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 11.05.2018 PASSED IN ITA 1190/BANG/2014, FOR THE ASSESSMENT YEAR 2013-2014, VIDE ANNEXURE-A AND ETC.

**ITA NO.503/2018** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 11.05.2018 PASSED IN ITA 69/BANG/2014, FOR THE ASSESSMENT YEAR 2009-10, VIDE ANNEXURE-A AND ETC.

**ITA NO.504/2018** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 11.05.2018 PASSED IN ITA 374/BANG/2013, FOR THE ASSESSMENT YEAR 2008-2009, VIDE ANNEXURE-A AND ETC.

**ITA NO.505/2018** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 11.05.2018 PASSED IN ITA 1295/BANG/2014, FOR THE ASSESSMENT YEAR 2013-2014, VIDE ANNEXURE-A AND ETC.

**ITA NO.506/2018** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 11.05.2018 PASSED IN ITA 2845/BANG/2017, FOR THE ASSESSMENT YEAR 2007-2008, VIDE ANNEXURE-A AND ETC.

**ITA NO.507/2018** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 11.05.2018 PASSED IN ITA 191/BANG/2014, FOR THE ASSESSMENT YEAR 2009-2010, VIDE ANNEXURE-A AND ETC.

**ITA NO.549/2018** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 11.05.2018 PASSED IN ITA 949/BANG/2017, VIDE ANNEXURE-A AND ETC.

**ITA NO.550/2018** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 11.05.2018 PASSED IN ITA 950/BANG/2017, VIDE ANNEXURE-A AND ETC.

**ITA NO.560/2018** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 11.05.2018 PASSED IN ITA 205/BANG/2015, FOR THE ASSESSMENT YEAR 2010-2011, VIDE ANNEXURE-A AND ETC.

**ITA NO.561/2018** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 11.05.2018 PASSED IN ITA 881/BANG/2016, FOR THE ASSESSMENT YEAR 2011-2012, VIDE ANNEXURE-A AND ETC.

**ITA NO.562/2018** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 11.05.2018 PASSED IN ITA 68/BANG/2015, FOR THE ASSESSMENT YEAR 2010-2011, VIDE ANNEXURE-A AND ETC.

**ITA NO.563/2018** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 11.05.2018 PASSED IN ITA 559/BANG/2016, FOR THE ASSESSMENT YEAR 2011-2012, VIDE ANNEXURE-A AND ETC.

**ITA NO.564/2018** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 11.05.2018 PASSED IN ITA 387/BANG/2017, FOR THE ASSESSMENT YEAR 2012-2013, VIDE ANNEXURE-A AND ETC.

**ITA NO.879/2017** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 23.10.2017 PASSED IN ITA 1511/BANG/2013, FOR THE ASSESSMENT YEAR 2007-2008, VIDE ANNEXURE-C AND ETC.

**ITA NO.882/2017** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 23.10.2017 PASSED IN ITA 1512/BANG/2013, FOR THE ASSESSMENT YEAR 2008-2009, VIDE ANNEXURE-C AND ETC.

**ITA NO.883/2017** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 23.10.2017 PASSED IN ITA 1513/BANG/2013, FOR THE ASSESSMENT YEAR 2009-2010, VIDE ANNEXURE-C AND ETC.

**ITA NO.897/2017** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT, 1961 PRAYING TO SET ASIDE THE ORDER DATED

23.10.2017 PASSED IN ITA 1514/BANG/2013, FOR THE ASSESSMENT YEAR 2010-2011, VIDE ANNEXURE-C AND ETC.

**ITA NO.898/2017** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 23.10.2017 PASSED IN ITA 1515/BANG/2013, FOR THE ASSESSMENT YEAR 2011-2012, VIDE ANNEXURE-C AND ETC.

**ITA NO.899/2017** IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 23.10.2017 PASSED IN ITA 1516/BANG/2013, FOR THE ASSESSMENT YEAR 2011-2012, VIDE ANNEXURE-C AND ETC.

**IN ITA NO.125/2020**

BETWEEN

1. THE PR. COMMISSIONER OF INCOME TAX  
CIT (A), 5<sup>TH</sup> FLOOR, BMTC BUILDING  
5<sup>TH</sup> BLOCK, 80 FEET ROAD  
KORAMANGALA  
BENGALURU-560 095
2. THE ASST. COMMISSIONER OF INCOME TAX  
RANGE -11, PRESENT ADDRESS  
ADDL. CIT, SPECIAL RANGE-3  
2<sup>ND</sup> FLOOR, BMTC BUILDING  
6<sup>TH</sup> BLOCK, 80 FEET ROAD  
KORAMANGALA  
BENGALURU-560 095

...APPELLANTS

(BY SRI. K.V. ARAVIND, ADVOCATE)

AND

M/S GOOGLE INDIA PRIVATE LTD  
NO.3, RMZ INFINITY TOWER-E  
4<sup>TH</sup> FLOOR, OLD MADRAS ROAD  
BENGALURU-560016  
PAN:AACCG0527D

...RESPONDENT

(BY SRI.S.GANESH, SENIOR COUNSEL FOR  
SRI.ANIND THOMAS, ADV.  
SRI.DEEPAK CHOPRA, ADV.)

THIS ITA IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT PRAYING TO SET ASIDE THE ORDER DATED 06.09.2019 PASSED IN ITA NO.362/BANG/2013 FOR THE ASSESSMENT YEAR 2008-2009 AND ETC.

THESE ITAs HAVING BEEN HEARD AND RESERVED ON 09.04.2021, COMING ON FOR 'PRONOUNCEMENT OF JUDGMENT' THIS DAY, **SATISH CHANDRA SHARMA J.**, DELIVERED THE FOLLOWING:

JUDGMENT

Regard being had to the similitude in the controversy involved in all these cases, they were heard analogously together and a common judgment is being passed.

2. ITA No.879/2017 is arising out of the order passed by the Income Tax Appellate Tribunal, dated 23.10.2017 in ITA No.1511/Bang/2013 (between M/s Google India Private Ltd., vs. Addl.Commissioner of Income-tax, Range-11, Bengaluru.)

3. The facts of the case reveal that the appellant - company, Google India Private Ltd., is a company incorporated under the Companies Act, 1956. It has been incorporated for providing back end support services for the foreign Associated Enterprises and as such, is engaged in the business of global outsourced Information Technology and IT Enabled Services. It is also a non-exclusive distributor of the online advertising space under the 'AdWords programme' to advertisers in India.

4. In the year 2004 the appellant-company has entered into an IT Enables Services agreement with Google Ireland Limited and the appellant has established its IT Enabled Services division for provision of IT Enables Services which primarily involved rendering support services in administering the Google editorial guidelines in relation to global advertisements and responding to the queries from customers globally. The appellant under the said agreement has been rendering outsourced services for which the appellant is being separately compensated by the Google Ireland Limited.

5. The assessing officer initiated proceedings under Sections 201 and 201(1A) of the Income Tax Act, 1961 (hereinafter referred to as IT Act), vide notice dated 20.11.2012 for the assessment year 2007-08 and in the said notice, the assessing officer referred to the assessment order dated 30.11.2011 under Section 143(3) of the IT Act passed in the case of the appellant for the assessment year 2008-09 by the Additional Commissioner of Income-tax, Range-11, wherein disallowance under Section 40(a)(i) of the IT Act was made on account of non-deduction of tax at source for the sums payable by the appellant to Google Ireland under the Distribution

Agreement. The assessing officer vide common order dated 22.2.2013 for the assessment years 2007-08 to 2012-13 passed an order under Section 201(1) and 201(1A) of the IT Act, thereby determining the appellant as 'assessee in default' in respect of non-deduction of tax at source for the sums payable to Google Ireland as 'fee for distribution rights' and consequently, attaching a tax liability of INR 7,40,47,853/- for the assessment year 2007-08.

6. The appellant-assessee being aggrieved by the common order dated 22.2.2013 passed by the assessing officer for the assessment years 2007-08 to 2012-13 preferred an appeal before the Commissioner of Income-tax (Appeals) and the appeal was dismissed by an order dated 20.9.2013 by the appellate authority.

7. The appellant-assessee thereafter preferred an appeal before the Income Tax Appellate Tribunal for the assessment year 2007-08 and the Tribunal has also dismissed the appeal of the appellant-assessee.

8. Learned Senior Counsel Sri.Ganesh for the appellant – assessee at the outset has argued before this Court that in order to enable the Tribunal to decide the controversy on merits

voluminous documents were filed before the Tribunal and the Tribunal has not looked into the documents filed by the assessee at any point of time. He has drawn the attention of this Court towards an affidavit filed in the appeal before the Tribunal dated 19.3.2018 sworn by Mr.Hari Raju, Director of the appellant-company during the course of the hearing in the present appeal as well as other connected appeals. He has also drawn the attention of this Court towards the application preferred under Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 filed before the Tribunal during the course of the hearing of ITA.No.1190/Bang/2014 (relating to ITA No.502/2018) and has also drawn the attention of this Court towards the extracts of factual submissions dated 19.3.2018 filed before the Tribunal during the course of the hearing of ITA.No.1190/Banga/2014 (relating to ITA.No.502/2018). His contention is that none of the documents produced on record were looked into.

9. Learned Senior Counsel for the appellant has further stated that the documents filed by the assessee were not looked into and altogether a different approach was adopted by the Tribunal by conducting a research and the material after conducting the research on various platforms have been made to be the basis of the judgment delivered by the Tribunal. His



contention is that it is a well settled proposition of law that if any material/any document is relied upon, the same has to be given to all the parties, otherwise it amounts to violation of principles of natural justice and fair play. He has vehemently argued before this Court that the material collected behind back of the assessee was used and relied upon by the Tribunal and therefore, the same amounts to violation of principles of natural justice and fair play, hence, the matter should be remanded back to the Tribunal permitting the parties to raise all possible grounds while arguing the matter afresh. He has also vehemently argued before this Court that a liberty be granted to all the parties to place all documents before the Tribunal enabling the Tribunal to decide the matter afresh on merits.

10. The learned Senior Counsel has also argued that erroneous findings have been arrived at by the Tribunal in paragraph 35 based upon some material which was not furnished to the assessee and therefore, the matter be remanded back to the Tribunal. Reliance has been placed upon a judgment delivered by the Division Bench of Madras High Court in the case of **Ramco Industries Ltd., vs. Deputy Commissioner of Income-tax, Corporate Circle-2**, [2020] 117 taxmann.com 382 (Madras) and his contention is that the

Division Bench of the Madras High Court in similar circumstances has set aside the orders passed by the Tribunal and the matter was remanded back to the Tribunal for fresh adjudication.

11. Sri.Aravind, learned counsel for the Income-tax department has argued before this Court that the material which has been relied upon by the Tribunal is available on internet and merely because the material which is available on internet was not given to the assessee, it does not mean that there is violation of natural justice and fair play. He has vehemently opposed the prayer made by the learned Senior Counsel for the assessee in respect of remand.

12. This Court by an order dated 15.11.2017 has admitted the present appeal on the following substantial questions of law;

III(1) Whether the Tribunal erred on facts and in law in coming to the conclusion that the payments made by the Appellate under the "Distribution Agreement" dated 12.12.2005 to GIL constituted "Royalty" under the provisions of Section 9(1)(vi) of the Income-tax Act, 1961 and Article 12 of the Double Taxation Avoidance Agreement between India and Ireland?

III(2) Whether the impugned order of the Tribunal is perverse in as much as the conclusions of the Tribunal are based on assumptions, conjectures and surmises and not on the basis of facts available on record and as such liable to be set aside?

III(3) Whether the Tribunal grossly erred in law in placing reliance on unverified material available in public domain to conclude that payments made by the Appellant to GIL constituted 'royalty' under the provisions of the Act and DTAA and more so since the Appellant was not confronted with such material, thereby violating the principles of natural justice?

III(4) Whether the Tribunal erred in ignoring that the initiation of proceedings under section 201 of the Act was barred by limitation?

III(5) Whether the Tribunal erred in law in applying the amended provisions relating to limitation in section 201 to the period under consideration given that the limitation for completion of such proceedings had already expired and could not be restored by subsequent amendments?

III(7) Whether the Tribunal erred in law in not appreciating that the amended provisions of section 201(3) as amended by Finance Act, 2012 (applicable with retrospective effect from 1.4.2010), which bestowed limitation in respect of resident payee's was not applicable for the financial year under consideration

and in the absence of any limitation prescribed, a period of 4 years was a reasonable period for initiation of proceedings under section 201 of the Act?

13. Learned Senior Counsel for the assessee while arguing the matter has fairly stated before this Court that question Nos.2 and 3 are required to be decided in the present case so far as his prayer in respect of remand is concerned and the other questions be left open.

14. Substantial questions of law III(2) and III(3) read as under;

III(2) Whether the impugned order of the Tribunal is perverse in as much as the conclusions of the Tribunal are based on assumptions, conjectures and surmises and not on the basis of facts available on record and as such liable to be set aside?

III(3) Whether the Tribunal grossly erred in law in placing reliance on unverified material available in public domain to conclude that payments made by the Appellant to GIL constituted 'royalty' under the provisions of the Act and DTAA and more so since the Appellant was not confronted with such material, thereby violating the principles of natural justice?

15. Heard the learned counsel for the parties at length and perused the record.

16. The basic question before this Court is whether the Tribunal while passing the common order dated 23.10.2017 has violated the principles of natural justice and fair play as it has not afforded an opportunity to the appellant to rebut fresh evidence especially when the fresh evidence was based on Google study. The relevant paragraph of the order passed by the Tribunal i.e., paragraph 38 reads as under;

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

i. The Google Adword gives an opportunity to the advertiser to reach its target audience with the advertising messages. The text based ads are displayed on Google search results Page - 45 IT(TP)A.1511 to 1516/Bang/2013 however the Google Adwords can also be used to message out in other forms including image, audio and videos. Another way of advertisement is displaying the advertisement as people browse and engaged with the content online.

ii. The online advertising is different from the traditional advertising like advertisement in magazine, newspaper and Television as the online advertising is

measurable on cost per click basis (CPC) and also gives the advantage to the advertiser to target the particular class into age, sex, language, religion, region etc,.

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

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

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

17. The Tribunal in the aforesaid paragraph has held that no literature or books or documents were filed by the assessee except some of the documents mentioned in the order of the Tribunal and as the parties have failed to bring any tangible material except in the form of written note, the Bench had gone through the books available in public domain at Google Adword or Google analytics and also gone through the website of the Google and the Adword links and based upon the above research carried out by the Tribunal, they have summarized the Google

Adword functions. The material on which Google Adword functions were summarized does not find place in the order of the Tribunal nor the material was brought to the notice of the appellant, meaning thereby some material collected behind back of the appellant has been used by the Tribunal and the material brought on record through proper application has not been looked into.

18. The Madras High Court in similar circumstances, in the case of **Ramco Industries Ltd.**, (supra) in paragraphs 5 to 10 has held as under;

“5. This Court paid its best attention to the rival submissions and also perused the materials placed before it.

6. Sub-section [6] of Section 255 of the Income Tax Act, 1961, in turn, refers to Section 131 of the Act and under Sub-section [1] of Section 131 of the Act, the authorities have the same powers that are vested in a Court under the Code of Civil Procedure, 1908 - the details of which, have been enumerated in the earlier paragraphs.

7. Rule 29 of the Income Tax [Appellate Tribunal] Rules, 1963 also speaks about the production of additional evidence and Rule 30 speaks about the mode of taking additional evidence and it is relevant to extract the same:-

Rule 29:-Production of additional evidence before the Tribunal:- The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any documents to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or, if the income-tax authorities have decided

the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them or not specified by them, the Tribunal, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced.

Rule 30-Mode of taking additional evidence:-

Such document may be produced or such witness examined or such evidence adduced either before the Tribunal or before such income-tax authority as the Tribunal may direct.

8. A perusal and consideration of paragraph No.7 of the impugned common order passed by ITAT would disclose that the Tribunal, for reaching the conclusion to confirm the order of the Assessing Officer, has also done its part by doing some research on Google Study. Admittedly, the research done by ITAT in the form of Google study was not put either to the appellant/assessee Company or to the said Revenue. As already pointed out by this Court in the earlier paragraphs, in the absence of any specific rule including the applicability of the natural justice, it is a well settled position of law that adherence to the principles of natural justice, is implied in any legislation.

9. As rightly pointed out by the learned counsel for the appellant/assessee with regard to the study or research done by ITAT, the appellant/assessee was not put on notice. Hence, on this sole ground, the impugned common order warrants interference.

10. The Substantial Questions of Law Nos.1 and 2 are answered in affirmative and in favour of the appellant/assessee company."

19. In the considered opinion of this Court, keeping in view Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 and also keeping in view the fact that the material on the basis of which the order has been passed was not furnished to the



appellant at any point time, the order passed by the Tribunal is certainly violative of principles of natural justice and fair play as the appellant was not afforded an opportunity to rebut fresh evidence especially when such evidence was based on Google study.

20. Another important aspect of the case is that details of the material has also not been reflected in the order passed by the Tribunal and therefore, this Court is of the opinion that as there is a violation of principles of natural justice and fair play, the matter deserves to be remanded back to the Tribunal for hearing it afresh in accordance with law.

21. In light of the aforesaid, the questions are answered in favour of the assessee and against the revenue and the other questions are left open. Accordingly, the appeal in ITA.No.879/2017 is allowed. The order passed by the Tribunal is set aside. The matter is remanded back to the Tribunal for fresh adjudication in accordance with law.

22. The parties will appear before the Tribunal on **3.5.2021** and within a period of 15 days the appellant shall be free to file the documents/additional documents in support of his contentions and the revenue shall also be free to file

documents/additional submissions in support of their contentions. In case any other material is being relied upon by the Tribunal, the same shall also be made available to the assessee/appellant as well as to the counsel for revenue before passing a final order. The Tribunal is requested to make all possible endeavour to decide the matter at an earlier date.

23. In light of the order passed in ITA.No.879/2017, the connected appeals i.e., ITA.Nos.882/2017, 883/2017, 897/2017, 898/2017 and 899/2017 are also allowed and the order passed by the Tribunal is set aside and all the matters are remanded back to the Tribunal to decide the appeals afresh in accordance with law.

24. The other batch of cases i.e., ITA Nos.502/2018, 505/2018, 549/2018, 550/2018, 504/2018, 503/2018, 507/2018, 560/2018, 562/2018, 561/2018, 563/2018, 564/2018 and 506/2018 are arising out of subsequent orders passed by the Income Tax Appellate Tribunal.

25. It is pertinent to note that in the first batch of matters i.e., ITA 879/2017 and connected matters it was brought to the notice of this Court that other income tax appeals

are pending before the Tribunal and this Court has directed the Tribunal to decide the matters without being influenced by its order dated 23.10.2017.

26. The Division Bench of this Court on 15.11.2017 has passed the following order;

"Heard Dr.A.M.Singhvi, learned Senior Counsel appearing for Sri Aditya Vikram Bhat, learned counsel for the appellant. The learned Senior Counsel submits that substantial questions of law formulated at paras III(1), III(2), III(3), III(4), III(5) and III(7) in the appeal memorandum require determination by this Court.

Sri.K.v.Aravind, learned Standing Counsel is directed to take notice for the respondent and is heard.

Perused the record.

The matter requires consideration. The appeal is admitted to consider substantial questions of law formulated at paras III(1), III(2), III(3), III(4), III(5) and III(7) in the appeal memorandum.

ORDER ON IA.NO.2/2017

The learned Senior Counsel appearing for the appellant submits that IA.No.2/2017 may be disposed of by directing the Income Tax Appellate Tribunal, Bengaluru, to dispose of the appeals namely, I.T.A.No.1190/Bang/2014, I.T.A.No.949/Bang/2017 and I.T.A.No.950/Bang/2017 without being influenced by the order dated 23.10.2017 passed in IT(TP) A.1511/Bang/2013 which is impugned in this appeal.

We find no legal impediment to grant the aforesaid prayer. Accordingly, we direct the Income Tax Appellate Tribunal, Bengaluru, to dispose of the appeals in I.T.A.No.1190/Bang/2014, I.T.A.No.949/Bang/2017 and I.T.A.No.950/Bang/2017 in accordance with law and without in any way being influenced by the order dated 23.10.2017 passed in IT (TP) A.1511/Bang/2013 which is impugned in this appeal. IA.No.2/2017 stands disposed of accordingly."

27. In spite of the fact that an order was passed by this Court directing the Tribunal to decide the matters without being influenced by its earlier order, the Tribunal in fact has repeated its earlier order. The present appeal and connected appeals were admitted on the following substantial questions of law.

28. The substantial questions of law framed in ITA.No.502/2018 and connected appeals by this Court on 28.8.2018 read as under;

"1. Whether the Tribunal erred on facts and in law in coming 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)(vi)** 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, trademark, process, derivative 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?"

29. The order passed by the Tribunal dated 11.5.2018 has been passed in a mechanical manner. It is nothing but a cut, copy, paste order and in some of the paragraphs the earlier order dated 23.10.2017 has been relied upon word by word.

30. The following is the comparison of extracts of order dated 11.5.2018 vis-à-vis order dated 23.10.2017;

<b>Order dated 11.5.2018 passed in ITA 502/2018 and subsequent appeals.</b>	<b>Order dated 23.10.2017 impugned in the captioned appeal.</b>
<b>Para 102 page 126:</b> "It gives advertiser the access to the tools of the Adword Program which can be	<b>Para 40 page 46:</b> "It gives the access to the advertiser the tools of the Adword program which can be

<p>accessed through the gateway of Google India/Appellant through the use of patent technology. Adword Program gives the advertiser to choose the preferred time, season of the year when the ads are to be shown. Once advertiser accepts the terms, the appellant gives access to the various tools of Adwords Program."</p>	<p>accessed through the gateway of Google India/appellant. Through the use of patented technology with the help of appellant gate way, Adword platform gives the advertiser to choose the preferred time, season of the year when the ads are to be shown. In fact after advertiser accept the terms, thereafter assessee gives the advertiser accesses to the various tools of Adwards program."</p>
<p><b>Para 102 page 126:</b> "The time zone and display time of the advertisement is identified and allocated by the appellant to the advertiser with the help of Google Adwords Program. Adword Program is more focused and targeted in advertisement campaign which results into more attention, engagement, delivery and conversion which is only possible on the Google network with the access of tools of search engine and google analytics."</p>	<p><b>Para 41 page 47:</b> "The time zone and display time of advertisement is identified and allocated by Appellant to the advertiser with the help of the assistance of the Google Adword program. Adwords Program is more focused and targeted in advertisement campaign which results into more attention, engagement, delivery and conversion, which is only possible on the Google network with the access of tools of search engine and Google analytics."</p>
<p><b>Page 102 page 126 and 27:</b> "Appellant is having the access to IP address at desktop or laptop or IP address of the tablet, photographs, time spent on website, eating habits, wearing preferences. With the help of IP address, Google search engine is having access to various information and data pertaining to the user of the website in the form of name, sex, city, state, country, phone number, religion, etc. Besides the above basic information, Google is also having the access of the history of the user as well as the behaviour of the person searching in google engine."</p>	<p><b>Para 42 page 47:</b> " Appellant/Google is having the access to the I.P. address of the desktop or laptop or I.P address of the tablet, photographs, time spent on a website, eating habits wearing preferences etc. With the help of I.P address, Google search engine is having the access to various information and data pertaining to the user of the website in the form of name, sex, city, state, country, phone number, religion etc. Besides the above basic information, the Google is also having the access of the history of the users as well as to the behavior of the persons searching Google engine."</p>
<p><b>Para 102 page 127 and 128:</b> " Based on various inputs mentioned above and contents of more than 2 million website, the Appellant was able to provide the effective focus ad campaign to the advertiser. The Adword Program and tools therein gives the advertiser to pick up the keywords, phrases which are similar in nature and germane, and in a</p>	<p><b>Para 43 page 48:</b> "Based on various inputs mentioned above and contents of more than two million websites the appellant/ Google was able to provide the effective focused ad campaign to the advertisers. The Adword programs and tools therein give the advertiser to pick up the key words, phrases which are similar in nature and</p>

<p>digitalized and tabulated form and grouped together. The advertiser is having the access to this Google Analytics Program through the appellant. Whenever one particular keyword is searched, the targeted ad will be shown to the consumer and by clicking on the ad, the consumer will be landed on a webpage. The selection and display of the keyword, play a pivotal role in the advertising campaign and for this purpose appellant has provided the optimization and technique to the advertiser. The appellant being a service provider under the agreement uses its expertise and the information within its domain and control, to suggest the keywords based on recent marketing material and need of the advertiser. He appellant also suggests a periodical review of the website homepage, product and services which can be bundled together. It also suggests the traffic forecast of the list of keywords, multiple keywords placed to get the new keyword ideas. Based on the initial keywords the advertiser enters, the tools shows various keywords suggestion automatically grouped into different adgroups. This is only possible if the Appellant is permitted to use information, data and keyplanner to the advertiser which is patent and protected software of the Google. The keyword planner also suggests the suitability of the keywords which are useful in the particular month of the year. The advertiser is able to plan its compaign for optimization or for the purpose of getting more information and conversion based on keyword planners. Based on this information and forecast, the advertiser is able to build on the keywords."</p>	<p>germane, which are in a digitalized tabulated form/ grouped together. The advertiser is having the access to this Google analytics programme (patented and specialized software) through the appellant. Whenever one particular keyword is searched, the targeted consumers will be shown the ad and by clicking on the ad, the consumers will be landed on a web page. The selection and the display of the key word, play a pivotal role in the advertising campaign and for the purpose, Appellant/Google has provided the optimization and technique to the advertiser. Google (appellant as service provider under the agreement) uses its expertise and the information within its domain and control, to suggest the key words based on the recent marketing material and need of the advertiser. The appellant also suggests periodical review of the website home page, product and services which can be bundled together... It also suggests the traffic forecast of the list of key words, multiple key word placed to get new key word ideas... Based on initial key words, the advertiser enters and the tools shows various key word suggestions automatically grouped into different ad groups. This is only possible as Appellant permits the use of information, data and key planner to the advertisers which is patent and protected software of the Google. The key word planner also suggests the suitability of the key words which are useful in the particular month of the year. The advertiser is able to plan its compaign for optimization or for the purpose of getting more impression and conversion based on keyword planner. Based on this impression and forecast, the advertiser is able to bid on the key words."</p>
<p><b>Para 103 page 128:</b> "The display of the advertisement based on the keywords, is dependent upon the auction price paid by the advertiser. The keywords bid at the highest rate</p>	<p><b>Para 44 page 49:</b> "The display of the advertisement based on the key words, is dependent upon the auction price paid by the advertiser. The key word bid at highest rate by the</p>

<p>by the advertiser would be shown at the top of search result and therefore, is likely to fetch more visibility and attention. With the help of tools of Google, the advertiser as well as the appellant have an access to the impact of change of keywords on the likely impressions of the advertisement."</p>	<p>advertiser would be shown at the top of the search results and therefore, is likely to fetch more visibility and attention.. With the help of tools of Google, the advertiser as well as the appellant have an access to the impact of change of key words on the likely impressions of the advertisement..."</p>
<p><b>Para 103 page 128 and 129:</b> "With the help of keywords matching, various approaches are being adopted by the Google AdWord Program i.e., broad match, phrase match and exact match for example allows the advertiser to focus on the optimization phrase on the individual keywords and it yields the best results possible. Whereas, the phrase match is more processing than broad match and the broad match provides the greatest possibility of coverage of the advertisement."</p>	<p><b>Para 45 page 49 and 50:</b> "With the help of key word matching, various approaches are being adopted by the Google Adword program i.e. broad match, phrase match and exact match. The exact match for example allows the advertiser to focus on the optimization phrase on the individual key words and it yield the best result possible. Whereas the phrase match is more processing than the broad match and the broad match provides the greatest possibility of coverage of the advertisement."</p>
<p><b>Para 104 page 129:</b> "The appellant facilitates the advertisers to start the campaign of advertising initially with the help of broad match thereafter with the phrase match and thereafter with the exact match. With the help of keyword management, the Google Adword Program takes care of misspelling, singular, plural, abbreviation, achronynms, stemming, etc. For example, if the advertisement shows the formal shoes then the keywords are the formal plus shoes. If it is broad match keywords then the advertisement will show formal shoes, sports shoes, black shoes, party shoes, etc. However, if the advertiser had only opted for exact word match, then search result will show only a formal shoe."</p>	<p><b>Para 46 page 50:</b> "The Appellant facilitate the advertisers to start the campaign of advertising initially with the help broad match thereafter with phrase match and thereafter with exact match. Now with the help of the key word management, the Google Adword program takes care of the miss spelling, singular plural abbreviation, acronyms (short word) stemming. For example, if the advertisement shows the formal shoes, then the key words are formal plus shoes, if it is broad match key words then the advertisement will show formal shoe, sport shoe, black dress shoe, partly shoes etc. However, if the advertiser had only opted for exact word match, then search result would only show a formal shoe."</p>
<p><b>Para 105 page 129 and 139:</b> "The appellanti helps the advertiser with the help of tools of Adword Program to include or delete various variation of keywords in the realm of advertisement campaign and similarly the advertiser may with the help of Google tool can avoid the unnecessary traffic on its website.</p>	<p><b>Para 47 page 50 and 51:</b> "Appellant helps the advertiser with the help of tools of Adwards program to include or delete various variation of the key words in the realm of advertisement campaign and similarly the advertiser may with the help of Google tool can avoid the unnecessary traffic on its website.</p>



<p>For example, if an advertiser does not want the visit of a surfer who is searching the service apartment on rent basis and only wants the person surfing to buy the apartment, then the Appellant can help him by putting negative words of rent in the keyword search. Therefore, the only person who is searching for service apartment would be landing on the advertisers website and the person who is searching for rented service apartment, would not be visiting the website of the advertiser i.e., advertisement would not be displayed to him in the searched result."</p>	<p>For example, if an advertiser does not want the visit of the a surfer who is searching the service apartment on rent basis and only wants that the person surfing and the person who is surfing to buy the apartment, then the appellant can help him by putting negative words of rent in the key-word search, therefore the only person who is searching for service apartment would be landing on to the advertiser's web site and the person who is searching on rented service apartment would not be visiting the web site of advertiser i.e., advertisement would not be displayed to him in the searched results.."</p>
<p><b>Para 105 page 130:</b> "Likewise, if the advertiser is selling leather cover for iPhone, then the advertiser may not like that the person who is looking for leather cover for another branch or item may visit the website of the advertiser. For that, negative words can be used to avoid to improve the CTR (clicked through rate) with the help of tools of Google. By using these tools, the Appellant has been giving various suggestions to the advertisers to improve various keywords."</p>	<p><b>Para 48 page 51:</b> " Likewise if the advertiser is selling in leather cover for iphone then the advertiser may not like that the person who is looking for leather cover for another brand may visit the website of the advertiser. Therefore, the negative words can be used to avoid to improve the CTR., with the help of these tools. By using these tools, Appellant had been giving various suggestions to the advertiser to include various key words."</p>
<p><b>Para 106 page 130:</b> " The Google Adword Program is also having Google Analytics which is connected with the Google Adword Program and which is a potential patented tool to target the keywords and the negative keywords. This is the USP of the Google Adword Program, which is maintaining thousands of different keywords used by people to search the website and based on this user behaviour, the Google Analytics suggests the appropriate keywords to be used by the advertiser for encouraging the traffic on the website. Similarly, the Google Analytics also uses the same data to filter out the negative keywords on the basis of which an unattended or unwarranted person have landed on the website of the advertiser. The Appellant is using all these tools in</p>	<p><b>Para 49 page 51 and 52:</b> "The Google Adword program is also having Google analytics which is connected with the Google Adword programme and which is a potential patented tool to target the key words and the negative key words. This is the USP of the Google Adword program, which is maintaining thousands of different key words used by the people to search the web site and based on this user behaviour, the Google analytics suggests the appropriate key words to be used by the advertiser for encouraging the traffic on the website. Similarly the Google analytics also uses the same data to filter out the negative key word on the basis of which an unattended or unwarranted persons have landed on the website of the advertiser.</p>

<p>conjecture with the advertisers at the time of granting the backhand services to advertisers, as the Appellant is having access to all these data, information, etc.,</p>	<p>Appellant is using all these tools in conjectures with advertisers at the time of granting the back hand services to the advertisers, as the Appellant is having access to all these data, information etc."</p>
<p><b>Para 107 page 131:</b> "If we look into the advertisement module of the AdWord Program, we will come to an irresistible conclusion that it is not merely an agreement to provide advertisement space but it is an agreement for facilitating the display and publishing of an advertisement to the targeted customers."</p>	<p><b>Para 53 page 54:</b> "If we look into the advertisement module of Adword program stated herein above, then we will come to an irresistible conclusion that it is not merely an agreement to provide the advertisement space but is an agreement for facilitating the display and publishing of an advertisement to the targeted customer."</p>
<p><b>Page 108 page 131 (paraphrased):</b> "We have also examined the obligations cast upon the appellant under the agreements and found the obligation cast upon the appellant under the Google Adword distribution agreement can only be discharged with the help of the ITES division. Therefore, the Google Adword distributor agreement and the service agreement are to be read together as they are interconnected with the <u>naval cord</u> and without resorting to the service agreement the terms and conditions under the Google Adword Distribution Agreement cannot be complied with. Therefore, in order to understand the function of Google Adword program, we have to read both the agreements together."</p>	<p><b>Page 63 page 62:</b> "Therefore, the services rendered under ITES agreement cannot be divorced with the activities undertaken by the assessee under the distribution agreement. Both the agreements are connected with <u>naval chord</u> with each other. The assessee was duty-bound to provide as per the distribution agreement various ITES services, which the assessee had wrongly claimed to have been provided not under the distribution agreement, but under the service agreement. This is only a design/structure prepared by the assessee to avoid the payment of taxes."</p>

31. Sri.Aravind, learned counsel for the department has filed written submissions also and his contention is that the material on the basis of which the subsequent order of the Tribunal dated 11.5.2018 was passed had been supplied to the assessee and was also on record. He has stated that AdWord program training material was submitted by the assessee before

the Tribunal in a paper book form and the extracts of the learning Google AdWord and Google Analytics written by Benjamin Mangold was submitted by the Revenue in its paper book.

32. The fact remains that the documents which were supplied either by the assessee or by revenue were certainly looked into, but the research material on the basis of which the so-called research was carried out by the Tribunal, was not brought on record. The subsequent order is based upon the first order passed by the Tribunal and there is word by word repetition in some of the paragraphs. It has also been stated by the Revenue in the written synopsis that the scope of interference in a case where violation of principles of natural justice are alleged unless it causes prejudice is quite limited.

33. Reliance has also been placed on a judgment rendered by the Hon'ble Supreme Court in the case of State of U.P vs. Sudhir Kumar Singh and Ors., Civil Appeal No.3498/2020, decided on 16.10.2020.

34. This Court has carefully gone through the aforesaid judgment. However, the facts of the present cases are distinguishable. In the present cases, in the first round of litigation the Tribunal has relied upon the material which was

never given to the assessee. It is undisputed fact that based upon the first order dated 23.10.2018 the second order has been passed in another batch of cases. Therefore, the proper course of action for this Court is to remand all the cases for fresh hearing as directed earlier.

35. In the considered opinion of this Court as the order in the present batch of appeals has been passed by repeating the earlier orders, complete material was not handed over to the appellant-assessee before the Tribunal based on which the order has been passed by the Tribunal and in light of the fact that this Court has remanded the first batch of appeals, the second batch of appeals are also deserve to be remanded back to the Tribunal for deciding it afresh on merits without being influenced by its earlier orders dated 23.10.2017 and 11.5.2018.

36. Net result is, ITA Nos.502/2018, 505/2018, 549/2018, 550/2018, 504/2018, 503/2018, 507/2018, 560/2018, 562/2018, 561/2018, 563/2018, 564/2018 and 506/2018 are allowed. The order passed by the Tribunal in the said appeals are set aside and the matters are remanded back to the Tribunal to decide the appeals afresh in accordance with law. The parties will appear before the Tribunal on **3.5.2021** and

within a period of 15 days the appellant shall be free to file the documents/additional documents in support of his contentions and the revenue shall also be free to file documents/additional submissions in support of their contentions. In case any other material is being relied upon by the Tribunal, the same shall also be made available to the assessee/appellant as well as to the counsel for revenue before passing a final order. The Tribunal is requested to make all possible endeavour to decide the matters at an earlier date.

37. ITA.No.125/2020 which is in respect of assessment year 2008-09 has been filed by the department. It relates to penalty proceedings and therefore, as in respect of the assessment year 2008-09 this Court has already remanded ITA.882/2017 for fresh adjudication, the order impugned dated 6.9.2019 is set aside and the matter is remanded back to the Tribunal to decide it afresh in accordance with law. ITA.No.125/2020 also stands allowed accordingly.

Pending IAs, if any, in the appeals stand disposed of.

Sd/-  
JUDGE

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