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[2023] 149 taxmann.com 8 (Article)

## Would Non Resident escape precedent set by SC after bypassing High Court directions



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### Round 1 of litigation

Under the Google Adword Program Distribution agreement dated 12/12/2005, the assessee in *Google India (P.) Ltd. v. Addl. CIT* [2017] 86 taxmann.com 237 (Beng. – Trib.) was granted the marketing and distribution rights of Adword program to the advertisers in India. The assessee is also given to have been engaged in rendering information technology (IT) and IT enabled service (ITES) to its overseas group companies. The assessee made payments to Google Ireland Ltd for purchase of advertising space as advertising fee/distribution fee. No taxes were withheld on such payments by the assessee.

Against the arguments and submissions made for and against tax withholding with rebuttals and upon reading and understanding of the functionalities of the Google Adword program functions, tools and space and from the perusal of information /books available in public domain on Google Adword and Google analytics and the website of the Google and the Adword links and upon further review of the Adword program distribution agreement, ITES agreement and reseller agreements entered with the advertiser all the three authorities from AO, CIT(A) and the Income-tax Appellate Tribunal unanimously decided on merits in favour of the department the issue of withholding of taxes on payment of advertising/distribution fees to Google Ireland qua access to user/customer data in the course of rendering functions under the distributor agreement to promote and sell Google AdWords programme to the customers in India.

Against the ITAT order the assessee went to Karnataka High Court in *Google India (P.) Ltd. v. CIT (International Taxation)* [2021] 127 taxmann.com 36/435 ITR 284 with the plea that the ITAT carried out their research and google/internet study and while using such material or evidence against the assessee did not confront/provide the same with the assessee appellant which amounted to violating natural justice principle 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 and a liberty be granted to all the parties to place all documents before the Tribunal enabling the Tribunal **to decide the matter afresh on the merits**.

The High Court remanded the appeals for de novo consideration with the following directions:

"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 of 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 I. T. A. No. 879 of 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 May 3, 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 the 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 I. T. A. No. 879 of 2017, the connected appeals, i.e., I. T. A. Nos. 882 of 2017, 883, 897, 898 and 899 of 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." (emphasis supplied)

## Round 2 of litigation

Interestingly now before the Tribunal in *Google India (P.) Ltd. v. Dy. CIT, International Taxation* [2022] 143 taxmann.com 302/197 ITD 604 (Bang. - Trib.) in the second round the appellant took the preliminary argument on the limitation period over merits of the case despite the fact that the High Court has kept open to them and not to the Tribunal the ground of limitation. Essentially speaking such action amounts to bypassing the course and pattern of justice rendered by the Hon'ble High Court who only did remand the appeals to the Tribunal with a direction on the basic question of violation of the principles of natural justice so much so that this case sets a wrong precedence in the jurisprudence fora.

## Supreme Court Dicta

Importantly under the Act chargeability and computation go hand in hand so much so that the Supreme Court in *CIT v. Eli Lilly & Co. (India) (P.) Ltd.* [2009] 178 Taxman 505/312 ITR 225 Held, that the payment of home salary abroad by the foreign company to the expatriates had a connection or nexus with their rendition of services in India, and, therefore, such payment constituted income which was deemed to accrue or arise to the recipient in India as salary earned in India in terms of section 9(1)(ii) of the Act and in the context of failure to deduct tax u/s192 directed the AO to examine and ascertain whether the employee assessee (recipient) has paid the tax due on the home salary /special allowance received from the foreign company. It held that in case taxes due on the home salary /special allowance stand paid then the Assessing

Officer shall not proceed u/s [201\(1\)](#). In cases where the tax has not been paid, the Assessing Officer shall proceed under section 201(1) to recover the shortfall in the payment of tax.

On this settled law, stare decisis (to abide by precedents) therefore even if Google India before the Tribunal escaped tax deduction liability *Google India (P.) Ltd's.* case (*supra*), there is appropriate remedy available to revenue ipso jure to reopen assessment in case of Google Ireland (payee non-resident) and if, that, does not happen then it is futile jurisprudence and incites profound apprehension considering large sums of revenue involved in multiple years in this case and all such cases.

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