

**IN THE INCOME TAX APPELLATE TRIBUNAL
“L” BENCH: MUMBAI**

**BEFORE SHRI I.P. BANSAL, JUDICIAL MEMBER
AND SHRI P.M. JAGTAP, ACCOUNTANT MEMBER**

ITA No.4332/Mum/2009
(Assessment year: 2006-07)

Pinstorm Technologies Pvt. Ltd.,
Ground Floor, Swati building,
North Avenue,
Santacruz West,
Mumbai -400 054
PAN: **AADCP 4854 B**

..... Appellant

Vs

ITO-9(2)(4),
Aayakar Bhavan,
4th Floor, M.K. Marg
Mumbai

..... Respondent

Appellant by: Shri P.J. Pardiwalla
Respondent by: Shri M. Murali
Date of Hearing: 28.06.2012
Date of Pronouncement: 18.07.2012

ORDER

PER P.M. JAGTAP, A.M.:

This appeal filed by the assessee is directed against the order of Ld. CIT (A)- 9, Mumbai dated 02.06.2009.

2. Ground no.1 of this appeal involve the issue relating to disallowance of ₹ 1,09,35,108/- made by the A.O. and confirmed by the Ld. CIT (A) on account of Advertisement expenditure by invoking provisions of sec.40(a)(i) for non-deduction of tax at source.

3. The assessee in the present case is a company which is engaged in the business digital advertising and internet marketing. It utilises the internet search engine such as Google, Yahoo etc. to buy space in advertising on the internet on behalf of its clients. The search engine carries out its own programme whereby the assessee books certain words called “key words”. Whenever any person searches through the net for a specific “key word”, the advertisement of the assessee or its

client is displayed. For example, if the “key word” “Hotels in Mumbai” is searched for, the advertisement of ‘Taj Hotel’ may be displayed among sponsor links on the search engine page. The price charged for such booking depends on type of phrase, its popularity, usage etc. The search engine renders this service outside India through internet. Google does such online advertising business in Asia from its office in Ireland. The search engine service is on a worldwide basis and thus is not relatable to any specific country. The entire transaction takes place through the internet and even the invoice is raised and payment is made through internet. During the year under consideration, the assessee company had made a payment of ₹ 1,09,35,108/- to Google Ireland Ltd. and the said amount was claimed as ‘advertisement expenditure’. While making the said payment, no tax at source was deducted by the assessee on the ground that the amount paid to Google Ireland Ltd. constituted business profits of the said company and since the said company did not have a permanent establishment (PE) in India, the amount paid was not chargeable to tax in India. According to the A.O., the services rendered by the Ireland company to the assessee company was in the nature of ‘technical services’ and hence the assessee company was liable to deduct the tax at source from the payment made against the said services. Since no such tax at source was deducted by the assessee, the deduction claimed by the assessee on account of expenditure incurred on payment of ‘advertisement charges to M/s. Google Ireland Ltd. was disallowed by the A.O. by invoking the provisions of sec.40(a)(i).

4. The disallowance of advertisement expenses made by the A.O. by invoking the provisions of sec.40(a)(i) was challenged by the assessee in an appeal filed before the Ld. CIT (A) who confirmed the said disallowance made by the A.O. for the following reasons given in paragraph No.9

“....I am unable to accede to the argument of the appellant. It is not in dispute that the payment has been made for the comprehensive services rendered for digital data display in their server and that the same will fall within the meaning of royalty

as has been envisaged u/s.(1)(vi) of the Act. From the facts it is clear that the said Google or for that matter yahoo etc. allot the space to the appellant company and its clients in their server and that whenever any internet user search for certain webs the appellant's or its client's name would appear and its contents be displayed on the computer screen. Thus in the instant case the payment made to the foreign company is for advertising services rendered through the search engine would fall within the definition of royalty as defined u/s.9(1)(iv) of the Act. since the payment is termed as royalty in nature the amount paid on such account would be liable to be taxed in India and such the appellant company was liable to deduct the tax on such payment and since no tax was deducted at source the AO was right in invoking the provisions of section 40(a)(i) of the Act."

5. The Ld. CIT (A) thus held that the payment made by the assessee to Google Ireland Ltd. for the services rendered was in the nature of 'royalty' chargeable to tax in India and the assessee therefore was liable to deduct the tax at source from the said payment. Since there was failure on the part of the assessee to deduct such tax, the Ld. CIT (A) confirmed the disallowance made by the A.O. u/s.40(a)(i) although on different ground. Aggrieved by the order of the Ld. CIT (A), the assessee has preferred this appeal before the Tribunal.

6. We have heard arguments of both the sides and also perused the relevant material on record. It is observed that a similar issue had come up for consideration before the Tribunal in the case of Yahoo India Pvt. Ltd. and vide its order dated 24th June, 2011 passed in ITA No.506/Mum/2008, the Tribunal decided the same in favour of the assessee for the following reasons given in paragraph No.8 of its order:

"8. As already noted by us, the payment made by assessee in the present case to Yahoo Holdings (Hong Kong) Ltd. was for services rendered for uploading and

display of the banner advertisement of the Department of Tourism of India on its portal. The banner advertisement hosting services did not involve use or right to use by the assessee any industrial, commercial or scientific equipment and no such use was actually granted by Yahoo Holdings (Hong Kong) Ltd. to assessee company. Uploading and display of banner advertisement on its portal was entirely the responsibility of Yahoo Holdings (Hong Kong) Ltd. and assessee company was only required to provide the banner Ad to Yahoo Holdings (Hong Kong) Ltd. for uploading the same on its portal. Assessee thus had no right to access the portal of Yahoo Holdings (Hong Kong) Ltd. and there is nothing to show any positive act of utilization or employment of the portal of Yahoo Holdings (Hong Kong) Ltd. by the assessee company. Having regard to all these facts of the case and keeping in view the decision of the Authority of Advance Rulings in the case of Isro Satellite Centre 307 ITR 59 and Dell International Services (India) P. Ltd. 305 ITR 37, we are of the view that the payment made by assessee to Yahoo Holdings (Hong Kong) Ltd. for the services rendered for uploading and display of the banner advertisement of the Department of Tourism of India on its portal was not in the nature of royalty but the same was in the nature of business profit and in the absence of any PE of Yahoo Holdings (Hong Kong) Ltd. in India, it was not chargeable to tax in India. Assessee thus was not liable to deduct tax at source from the payment made to Yahoo Holdings (Hong Kong) Ltd. for such services and in our opinion, the payment so made cannot be disallowed by invoking the provisions of section 40(a) for non-deduction of tax. In that view of the matter we delete the disallowance made by the A.O. and confirmed by the learned CIT (A) u/s 40(a) and allow the appeal of the assessee.”

7. As the issue involved in the present case as well as all the material facts relevant thereto are similar to the case of Yahoo India P. Ltd. (supra), we respectfully follow the decision rendered by the co-ordinate Bench of this Tribunal in the said case and delete the disallowance made by the A.O. and confirmed by the Ld. CIT (A) by invoking the provisions of sec.40(a)(i) holding that the amount paid by the assessee to M/s. Google Ireland Ltd. for the services rendered for uploading and display of banner advertisement on its portal was in the nature of business profit on which no tax was deductible at source since the same was not chargeable to tax in India in the absence of any PE of Google Ireland Ltd. in India.

8. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on this day of 18th July, 2012.

Sd/-
(I.P. BANSAL
JUDICIAL MEMBER

Sd/-
(P.M. JAGTAP)
ACCOUNTANT MEMBER

Mumbai, Date: **18th July, 2012**

Copy to:-

- 1) The Appellant.
- 2) The Respondent.
- 3) The CIT (A)-IX, Mumbai.
- 4) The CIT -X, Mumbai.
- 5) The D.R. "L" Bench, Mumbai.
- 6) Copy to Guard File

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By Order

Asstt. Registrar
I.T.A.T., Mumbai

*Chavan