

# **International Taxation & Technology - Recent Jurisprudence (Google & Godaddy.com cases)**

By

V.Vikram, Advocate

SAPR Advocates

<http://www.saprlaw.com>

# Agenda

- 1. Google Adwords case - (ITAT Bengaluru)**
- 2. Godaddy.com LLC case - (ITAT Delhi)**

## **Google Adwords case**

Let's deep dive into it!

# Google Adwords – Enter the world of advertising!

## A Primer

1) Two types of search engine results advertisers perspective:

- Paid Search (Google Adwords)
- Organic Search (Search Engine Optimization **SEO**)

2) Search Engine Marketing (**SEM**) is the discipline which encompasses both Paid Search & Organic Search Results

The screenshot shows a Google search for "seo audit service". The search bar is at the top with the Google logo. Below the search bar, there are tabs for "All", "Images", "News", "Maps", "Videos", "More", "Settings", and "Tools". The search results are displayed below, starting with "About 988,000 results (0.39 seconds)".

The first result is a paid advertisement for "Free SEO Analysis Report - VirtualEmployee.com". The ad text includes "Hire Remote SEO Analyst from India Get Enhanced Conversion, Free Audit" and "Grab Your Christmas Offer - Services-Over 150 Domains". A red arrow points to the ad with the text "Buy Ad Space with Paid Search Advertizing".

The second result is "SEO Audit Service for your Website. Delivered by Real Person ...". The URL is "https://www.v9seo.com/seo-audit/". The description says "Don't trust your SEO to an online audit tool! Let our team of experts deliver a SEO Audit that will bring you results in 60 days!".

The third result is "SEO Audits | SEO Services | SEO Company | PushFire®". The URL is "https://pushfire.com/seo/". The description says "Tired of SEO services that take shortcuts or attempt to game the latest algorithm? We offer defensible strategies, audits & ongoing services that work."

The fourth result is "SEO Audit Services - Find Out What's Wrong and How to Improve SEO". The URL is "https://kercommunications.com/seo-services/seo-audit/". The description says "Free SEO tools suck. When you get a real SEO audit, you are paying for the expertise to translate data into actions to improve your website's visibility...". A red arrow points to the ad with the text "SEO can get your better rankings".

The fifth result is "SEO Audits | SEO Audit Services | Alan Bleiweiss Consulting". The URL is "alanbleiweiss.com/professional-seo-audits/". The description says "Forensic SEO audits provide a road-map to those tasks most likely to take your business web site to the next level in organic search results...".

The sixth result is "SEO Audit Services | LunaMetrics". The URL is "www.lunametrics.com/services/search-marketing/seo-audit/". The description says "Learn how LunaMetrics' SEO & PPC audit services show you how to increase SEO traffic - from comprehensive technical diagnostics to content strategy and ...".

The seventh result is "SEO Audit Services | SEO Audits - Outspoken Media". The URL is "outspokenmedia.com/services/seo-audit/". The description says "Do you need an SEO audit of your site? Outspoken Media's SEO audits provide detailed recommendations on how you can help improve your search rankings."

The eighth result is "SEO Audit Service - Improve Your SEO in 60 Days or Less". The URL is "https://www.reliablesft.net/seo-audit/". The description says "Our SEO Audits are manual and performed by experienced SEO Experts. Let us help you make your website profitable in the next 60 days. Special Offers for ...".

The ninth result is "Professional Website SEO Audit Services | Website Quality Testing ...". The URL is "www.hobo-web.co.uk/seo-audit/". The description says "Sep 6, 2016 - We provide this strategy, experience, knowledge and my data reports (which I use to coordinate projects) as SEO audit services to businesses ...".

The tenth result is "SEO Audits | SEO Audit Service | ClickSeed". The URL is "www.clickseed.com/Digital-Marketing-Services/". The description says "Our clients love our SEO Audit Service because we don't just provide a list of problems - we provide a prioritized SEO action plan that gets results."

The eleventh result is "How SEO Audits Help Your Company Grow in 2016 | WebpageFX". The URL is "www.webpagefx.com/SEO-Audits.html". The description says "Pricing and plans for SEO audits and services. Detailed SEO audit packages from WebpageFX."

The twelfth result is "SEO Πρώτη Σελίδα - Η Τα Λεφτά Σας Πίσω. Τόσο Άπια". The URL is "www.greekinternetmarketing.com/SEO/". The description says "Ζητήστε δωρεάν Οικονομική Μελέτη Δωρεάν Βήματα AdWords - Βύβλιο Internet Marketing". A red arrow points to the ad with the text "Buy Ad Space with Paid Search Advertizing".

At the bottom of the search results, there is a section for "Searches related to seo audit service". The related searches are: "seo audit company", "seo audit checklist", "what is an seo audit", "website audit service", "seo audit cost", "how to do an seo audit", and "seo audit example", "seo consulting".

At the very bottom, there is a "Go" button with a search bar and a "Next" button.

# Google Adwords – Pay per click (PPC) ads

## Type of ads

- **Search Ads** – These are designed to appear when the consumer is **already looking for a product/answer**.
  - Most common form is a Google Ad ie the paid-for results that show above organic results (or) on the right hand side when you use Google to search for something.
- **Display Ads** – These are the ads that appear at other times. For instance the kind of ads that play before watching a Youtube™ video or the banners that appear alongside the original content on a website.
- Reference/Good intro:  
<http://blog.wsi-emarketing.com/types-paid-search-ads-digital-marketing-basics/>

# 1. Traditional PPC – Pay per click

## Bread and butter of Google Adwords

The image shows a Google search interface for the query "Used Cars Bristol". The search bar is at the top, with the Google logo on the left and search icons on the right. Below the search bar are navigation tabs for "Web", "Maps", "Shopping", "News", "Videos", "More", and "Search tools". The search results indicate "About 19,000,000 results (0.53 seconds)".

The main search results are organic listings:

- Used Cars Special Offer - hartwell.co.uk**  
Ad [www.hartwell.co.uk/Very-Best-Used-Cars](http://www.hartwell.co.uk/Very-Best-Used-Cars) ▼  
Half Price Payments For 6 Months. 0% APR & £1,500 Minimum Part Ex.  
Over 1500 Models In Stock · Nationwide Dealerships · Hartwell Price Promise
- Used Cars In Bristol - BristolStreet.co.uk**  
Ad [www.bristolstreet.co.uk/Used](http://www.bristolstreet.co.uk/Used) ▼  
Free Nationwide Delivery On All Used Cars! Enquire Online Today
- Berkeley Vale Motors - hyundai.co.uk**  
Ad [www.hyundai.co.uk/berkeley-vale-bristol](http://www.hyundai.co.uk/berkeley-vale-bristol) ▼  
Visit your local Hyundai car dealer for great **second hand** car offers  
Ratings: Value 9/10 - Reliability 9/10 - Purchase experience 9/10
- Toyota of Bristol TN | New & Used Car Dealer in Bristol TN ...**  
[www.toyotaofbristol.com/](http://www.toyotaofbristol.com/) ▼  
Toyota of Bristol in Bristol, Tennessee is a Toyota Dealer, serving Kingsport, Johnson City, Abingdon VA, and Marion VA. Large inventory of new & used Toyota ...
- Used Car in Bristol | Used Subaru Dealer | Wallace Subaru**  
[www.wallacesubaru.com/used-inventory/index.htm](http://www.wallacesubaru.com/used-inventory/index.htm) ▼  
Swing by Wallace Subaru in Bristol, Tennessee and check out our inventory of quality **used cars**. We have something for every taste and our financing experts ...

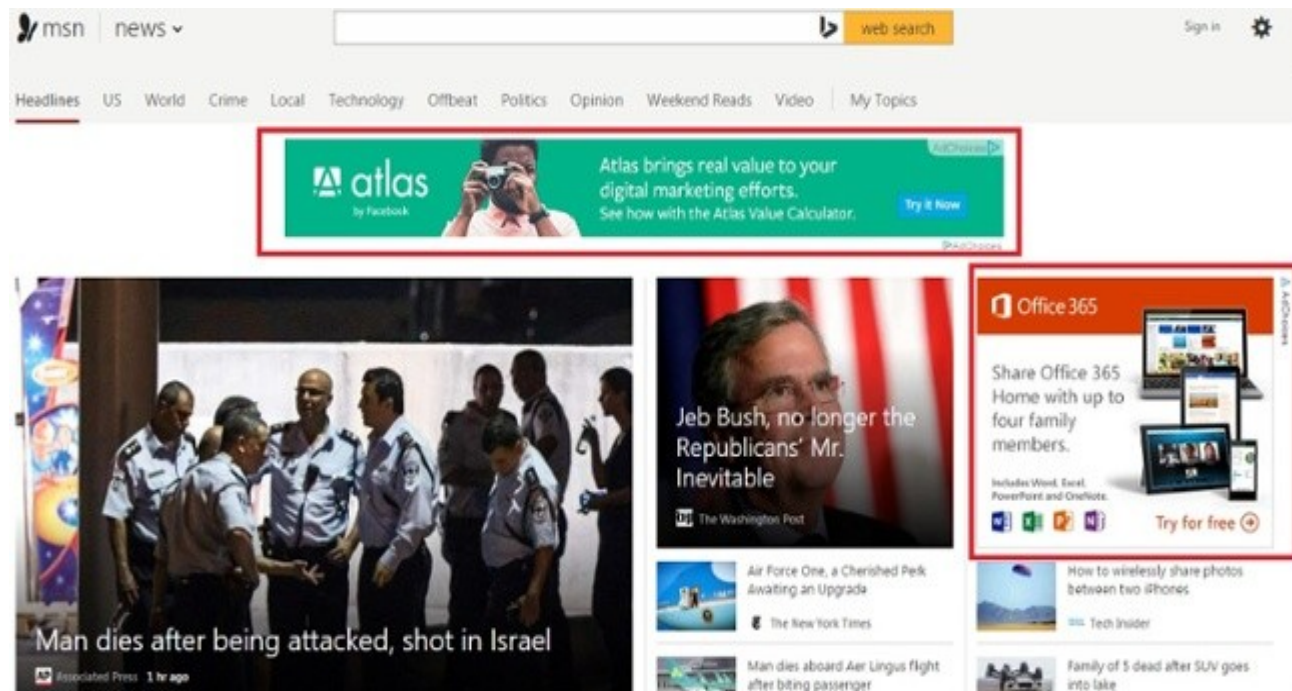
The right sidebar contains paid advertisements:

- Used Cars Swindon**  
www.carshop.co.uk/Used\_Cars ▼  
4.8 ★★★★★ rating for carshop.co.uk  
0333 331 5325  
Find 1000s of Used Cars at CarShop.  
Visit Our Swindon Dealership Today.
- Used Cars In Bristol**  
www.bristolusedcar.co.uk/ ▼  
Buy A Used Car In Bristol Today!  
At Affordable Prices-Visit Us Today  
📍 Thornbury Road, Bristol
- Toyota Used Cars Bristol**  
www.motorline.co.uk/Toyota-Used-Cars ▼  
100+ Approved Used Cars - Motorline  
The new name for Toyota in Bristol
- Used Car Dealers in Bristol uk**  
www.motors.co.uk/UsedCars ▼  
3.7 ★★★★★ rating for motors.co.uk  
Motors.co.uk - The Leading Used Car Site. Browse Over 300,000 Cars Now!

# 2. Display ads

- **Display Ads**

- Classic advertisements - started with flashing and scrolling ads at the top/side of a webpage!



# 3. Native ads

## Get used to it!!

### The Latest



#### The 7 Most Powerful Women to Watch in 2014

January 3, 2014

These seven innovators are having a major influence on technology, healthcare and the government. We've got our eye on these powerful women. You should, too.



#### No Apologies: On Hack, Snapchat Founder Says 'We Thought We Had Done Enough'

January 3, 2014 by Geoff Weiss

On the 'Today' show, the 23-year-old discussed the inevitabilities of hacking while reassuring users.



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If 75% of your income was spent on funding a medical condition that could have been prevented in the first place, that would get your attention,...



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January 3, 2014 by Ross McCammon

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- 3 [Zappos Gives Job Titles the Boot](#)
- 4 [Get it Done: 35 Habits of the Most Productive People \(Infographic\)](#)



# 4. Remarketing / Retargeting Ads

- These ads combine Search and Display to an extent.
- **Remarketing is the practice of displaying an ad based on the user's history.**
  - Visit Louvre museum website in the morning; throughout the day see Tickets to France ads in all the sites you browse!
- **And there are many other kind of ads....**
- **Bottomline:** every page, every click, every action you do online is tracked, analyzed, aggregated, sold, bid upon and you are targeted accordingly
  - Remember for the search engines, ***their customer is the advertiser (not you the search engine user!)***

# How does Google Adwords work?

- Simple answer: **Bidding on keywords**
  - Advertiser identify keywords they want to bid on, how much they want to spend
  - Google at time user searches enters keywords from your account it deems most relevant into a real-time auction with the maximum bid you have specified for the keyword (*this is a simplified version...*)
- Complex answer: **Generalized Second-Place Sealed-Bid Auction (GSP)**
- What is a **Second-Place Sealed-Bid Auction?**
  - Special case of GSP
  - Every interested buyers submit his or her bid for the item
  - The buyer with the highest bid wins the auction and is sold the item at the price equal to the second highest bid.
- Also known as a **Vickrey Auction**

# How does Google Adwords work?

## Vickrey Auctions

- Named after **William Spencer Vickrey** (21 June 1914 - 11 October 1996) was a Canadian-born professor of economics and Nobel Laureate.
  - Vickrey was awarded the 1996 Nobel Memorial Prize in Economic Sciences with James Mirrlees for their research into the economic theory of incentives under asymmetric information
- Vickrey auction has two very nice properties:
  - It is truthful, i.e. it's in the best interest of each buyer to bid the exact value of the item to him or her.
  - It maximizes social welfare: the item is sold to the buyer who value it the most.
- Seminal paper on GSP is by Ben Edelman et al
  - [http://zoo.cs.yale.edu/classes/cs455/fall11/gsp\\_presentation.pdf](http://zoo.cs.yale.edu/classes/cs455/fall11/gsp_presentation.pdf)

# How does Google Adwords work?

## Generalized Second Price Sealed Bid Auctions (GSP)

- Generalized Second Price (GSP) auction is very similar to Second Price auction:
  - Every advertiser submits his or her bid for his or her ad to be shown
  - The bid are sorted in descending order
  - If there are  $k$  slots on the page, the  $k$  ads with the  $k$  highest bid win.
  - The ad with the highest bid wins the first slot (since it's more valuable), the one with the second highest bid wins the second slot and so on.
  - Each winning ad pays the bid of the next ad. (plus small increment)
- Unfortunately, the GSP auction does NOT preserve the two nice properties of Vickrey auction i.e *not truthful* and doesn't *maximize social welfare*.
- The true generalization of Vickrey auction, which preserves both property is the **Vickrey-Clarke-Groves (VCG auction)**

# Google Adwords - Simple example

Advertiser	Max Bid	Position
Vikram	Rs. 2	1
Sridhar	Rs. 4	2
Sudarshan	Rs. 6	3
Mathrubootham	Rs. 8	4

Advertiser	Max Bid	Quality Score	Ad Rank	Position
Vikram	Rs. 2	10	20	1
Sridhar	Rs. 4	4	16	2
Sudarshan	Rs. 6	2	12	3
Mathrubootham	Rs. 8	1	8	4

# Google Adwords - Simple example

- But it isn't as simple as that!
  - Google assigns an Ad Rank based on your Maximum Bid & Quality Score
  - "Quality Score" is the secret sauce/magic wand of Google. Depends on Click-Through Rate, Ad relevance & Landing Page). Higher the better!

Advertiser	Max Bid	Quality Score	Ad Rank	Position
Vikram	Rs. 2	10	20	1
Sridhar	Rs. 4	4	16	2
Sudarshan	Rs. 6	2	12	3
Mathrubootham	Rs. 8	1	8	4

• **Ad Rank = Maximum Bid \* Quality Score;** your position is

based on Ad Rank

# Google Adwords - Simple example

Advertiser	Max Bid	Quality Score	Ad Rank	Position
Vikram	Rs. 2	10	20	1
Sridhar	Rs. 4	4	16	2
Sudarshan	Rs. 6	2	12	3
Mathrubootham	Rs. 8	1	8	4

- **It is also called the CPC or Cost Per Click**

- **Actual CPC = (Ad rank of person below you / Your**

Advertiser	Max Bid	Quality Score	Ad Rank	Position	Actual CPC
Vikram	Rs. 2	10	20	1	$16/10 + 0.01 = \text{Rs.1.61}$
Sridhar	Rs. 4	4	16	2	$12/4 + 0.01 = \text{Rs.3.01}$
Sudarshan	Rs. 6	2	12	3	$8/2 + 0.01 = \text{Rs.4.01}$
Mathrubootham	Rs. 8	1	8	4	High CPC

# Alphabet & Google Ad Revenues - For 2017

- Alphabet Inc (Google's parent) Advertising revenue of **\$95.375 billion**, up 24.9% from \$76.383 billion a year earlier.
- **Google-owned sites**, such as its search engine and YouTube, generated **\$77.788 billion** in revenue, up 22.0% from \$63.785 billion.
- Net income of \$12.482 billion, down 40.5% from \$19.478 billion.
- Google's traffic acquisition costs, which is what Google pays to websites that host Google ads, rose to \$21.670 billion, up 29.0% from \$16.793 billion.



Royalty – Adwords program:  
Google ITAT Bengaluru – Facts of the case

- **Google India Pvt. Ltd. vs. ACIT (IT (TP)A 1511 to 1518/Bang/2013 dated 23th Oct. 217)**
- The assessee is a wholly owned subsidiary of Google International LLC, U.S.
- The assessee is appointed as a non-exclusive authorized **distributor of Adword programs** to the advertisers in India by Google Ireland Ltd (GIL)
- The assessee entered into a **Google Adword Program Distribution** agreement (the agreement) on 12 December 2005 with GIL for resale of online advertising space under advertisers program to advertisers in India
- **The assessee held that it was a reseller of the ad space and nothing more; it was akin to placing an ad**

## **Royalty - Adwords program: Google ITAT Bengaluru - Facts of the case**

- Prior to said Distribution agreement, the ITES agreement dated 01.04.2004, provided limited rights to use intellectual property of GIL
  - Assessee pointed out that ITES was mainly for checking the ad content of users across the world
- Main agreement of assessee was related to marketing and distribution rights of “Adword” program to the advertisers in India
  - Included assistance & training to Indian advertisers to understand the features of the “Adword” product
- During AYs 2008-09 to 2011-12, the assessee had paid Rs. 119 crores to GIL without TDS on premise that:
  - **No rights in Google’s IP were transferred to taxpayer from GIL**

# Google India - Workflow of activities

- Enter into resale agreement with GIL and resale advertising space under Adword program under Indian advertisers
- Perform marketing related activities in order to promote the sale of advertising space to Indian Advertisers. After training its own sales force, effectively market the same to advertisers
- Enter into contract with Indian advertisers in relation to sale of space under Adwords Program
- Provide assistance/training to Indian advertisers if needed in order to familiarize with features/tools available as per Adword
- Resale invoice to above advertisers
- Collect payments from aforesaid advertisers
- Remit payment to GIL for purchase of advertising space from it under resale agreement

# Royalty - Google Adwords program

## Facts of the case

- The assessee is mere *reseller of advertising space* made available under the Adword distribution program.
- The assessee being a distributor of ad space **does not have control over the process involved in picking ads for display (or) control of the servers, which are outside India.**
- However, the AO disagreed with assessee's contention and treated the assessee as an assessee in default (S.201) for not withholding tax at source on payments made to GIL
- **The CIT(A) upheld the order of the AO**

# Royalty - Adwords program

## Google ITAT Bengaluru ruling

- The agreement between the assessee and GIL was **NOT in the nature of providing space for ad and display of ad** to the consumers.
  - Reference to “Adword” program in the agreement, it can be observed that it is an agreement for facilitating the display and publishing of an advertisement to the targeted customer.
- The advertiser selects some key words and on the basis of key words, the advertisement is displayed on the website or along with the search result as and when the customer selects the key words relatable to the advertisement

Market does not extend beyond providing the necessary

# Google Adwords - Suo moto....

- **Para 38:** *“Besides filing 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.....the Bench, had gone through the books available in public domain on Google Adword and Google Analytics and also gone through the website of Google and Adword links therein. **On the basis of the above, our understanding....”***
  - In our opinion, the overarching methods of Google Adwords has been discussed fairly well in the judgment. It is good research but it seems like while the foundation is strong, the conclusions are weak.

# Royalty – Adwords program

## Google ITAT Bengaluru **ruling**

### **(contd.)**

- Google is able to target consumers/users as per the requirement of the advertiser by using the search tool/software
  - ITAT observed If only service rendered by the taxpayer was for providing the space then there was no need of directing the targeted consumers to the advertisement of the advertiser
- **Truncated search results are displayed keeping in mind the commercial needs of the advertisers.**
- The assessee has access to various data with respect to the age, gender, region, language, taste habits, food habits, cloth preference, the behavior on the website, etc.

# Google Adwords decision Analysis Continued

- **Page 55:** *“Thus the activities of the assessee are not merely restricting to display of advertisement but is extended to various other facets as mentioned herein above”*
  - *“Had it been merely providing the space then the other features... would not be required. Moreover in our view, **the space on search engines / websites are readily available** and therefore there was no occasion to market and sell it. **Any person with the help of buying the static IP addresses** can upload the data/advertisement in the endless web world”*
  - In our opinion, unfortunately, this seems to be conflating web hosting space and search engine “space” - also static IP has nothing to do with upload data/advertisement.



# Royalty – Adwords program

## ITAT's findings

- **Use of tools is Royalty: Para 55:** *“In our view IP of Google vests in the search engine technology, associated software and other features, and hence use of these tools for performing various activities mentioned herein above, including accepting advertisements, providing before or after sale services clearly falls within meaning Royalty”*
- **Assessee has access to user data:** Agreements analyzed by ITAT and concluded that assessee is providing before/after sale services, after having access to user data, IPRs, secret formula, process, software and confidential information of GIL, in its own capacity under the agreement
- **Assessee has not sold the storage space** on the server outside India nor has it sold the identified/demarcated ad on the web site/search engine
- **Not merely selling space but rendering of the services by making available technology permitted by Google to the appellant and the same to be used by the advertiser.**
  - **It is a continuous targeted advertisement campaign to the focused consumer which clearly falls under Royalty**

# Royalty – Adwords program

## Google ITAT Bengaluru **ruling**

### **(contd.)**

- Assessee uses this information for maximizing impression and conversion of the customers to the ads of advertisers.
  - Hence activities of the assessee are not merely restricting to display of advertisement
- By using patented algorithm, assessee decides which advertisement is to be shown to which consumer visiting millions of website/search engine.
  - Therefore it is not advertisement of the space; it is focused targeted marketing by assessee/Google with the help of technology
- **Bottomline:** While the technology is understood well in this judgment there seems to be, in our opinion, a confusion in the ITAT decision between role Google Ireland plays, Google India plays and the end advertiser?

# Royalty – Adwords program

## Google ITAT Bengaluru **ruling**

### **(contd.)**

- **ITES & Distribution agreement linked ITAT in Para 62 rules:** *“Under the advertisement distribution agreement, it is the prime responsibility of the Appellant to give post and prior sales service for resolving the issues of the advertisers, and to ensure due compliance of applicable laws. **All these functions are to be discharged by the Appellant through ITES Segment. Further inputs from ITES are always required in the business model of the Appellant,** without which there cannot be any target marketing...”*
  - In our opinion, this seems to be a WRONG understanding of facts by ITAT.
  - ITES agreement seems to indicate a Google BPO division which vets google ad copy – and apparently global ad copy at that.
  - Even if it were the Indian ad copy, it would not mean they will use those (anonymized) keyword data for any auction purposes. That doesn't add up technically or factually.

Royalty - Adwords program  
Google ITAT Bengaluru **ruling (contd.)**  
**Whether there is use of patent of trademark?**

- The ITAT distinguished the decisions of *Sheraton International Inc v. DDIT [2009] 313 ITR 267 (Del)*, *Formula One World Championship Ltd. v. CIT [2016] 76 taxmann.com 6 (Del)* by holding that
  - Use of trademark for advertising marketing and booking in the cases were incidental activities of the taxpayer
- **Use of trademarks (S.9(1)(vi) Explanation 2(ii))**: ITAT after analyzing the Agreement clauses and that “without use of Google”, appellant cannot undertake these activities, payments made by the assessee was not only for marketing and promoting Adword programmes **but was also for the use of Google brand features and trademarks**

Royalty – Adwords program  
Google ITAT Bengaluru **ruling (contd.)**  
**Whether Adwords program is a secret process?**

- ITAT seems to hold that grant of distribution rights involved transfer of rights in process
  - Assessee had contended that Adwords programme is not a process leave alone a *secret* process
- The Tribunal held that though Adwords programme along with associated videos are available in public domain but how this programme functions for focused marketing campaign, promoting advertisements are only possible with the use of secret formula, confidential customer data only
- **Transfer of rights in respect of secret process (S.9(1)(vi) Explanation 2(i)):** The ITAT held that since this secret process of targeting the customers, is not in public domain, **assessee was using secret process for marketing /promoting displaying of the advertisement**
  - Again, in our opinion, there seems to be a projection of what Google Ireland does into the assessee Google India and an incorrect mixing of roles.

# Google Adwords - Analysis of other decisions on this issue

- In **Yahoo India** decision (***Yahoo India (P.) Ltd. v. CIT [2011] 46 SOT 105 (Mum)***) – for display of banner ads - the thrust of the argument of AO was S.9(1)(vi) Explanation (iva) which is use of any industrial, scientific, commercial equipment
  - Weak case under this limb prima facie which was thrown out by the ITAT
  - “use” of equipment has to be read appropriately – reference is made to ***Isro Satellite Centre 307 ITR 59*** and ***Dell International Services (India) P Ltd 305 ITR 37*** which is good reading reference
- In **Pinstorm** decision (***Pinstorm Technologies (P.) Ltd v. ITO - 154 TTJ 173 (Mum)***) the Tribunal blindly followed Yahoo India decision
  - Interestingly AO held it as technical services (FTS), overturned by CIT(A) who held it as Royalty which was dismissed by the ITAT following Yahoo India
  - This was for Search Engine Marketing payments made by Pinstorm to Google Ireland (GIL) – in a sense closely matching the Google ITAT case currently being analyzed

# Google Adwords – Right Florists

## **ITO vs. Right Florists (ITA 1336/KoI/2011 AY 05-06)**

- Detailed decision unlike Yahoo India, Pinstorm
- Starts with PE discussion - decides website can't be PE
- S.9(1)(vi) skirted by agreeing with Pinstorm, Yahoo!
- S.9(1)(i) is dwelled upon - Rejected
  - (Peculiarly) Decides there is no business connection demonstrated.
  - No Indian entity supports, services or has any connection with the advertising revenue (*Notes: Not true in Yahoo India's case? Neither is it a good test for projecting a Force of Attraction like test using 9(1)(i)?*)

# Google Adwords – Right Florists

## **ITO vs. Right Florists (ITA 1336/KoI/2011 AY 05-06)**

- S.9(1)(vii) – Fees for Technical Services - angle is considered unlike other cases
  - Human intervention aspect discussed at length and based on Delhi HC in CIT vs. Bharti Cellular (319 ITR 139 ) and CIT vs. Bhati Cellular (330 ITR 239 SC) decisions wherein **“technical services with a human interface”** was considered to be the test- not so in impugned case and so FTS rejected
    - No human touch at all in Google’s case
    - Also gives ‘make available’ benefit to payments for Yahoo which is a USA based Delaware Company
- **Held in favour of the assessee considering all angles**



Royalty - Adwords program  
Google ITAT Bengaluru **ruling (contd.)**  
**Distinguishing precedents**

- The Tribunal distinguished the decisions in the case of HPC on Electronic Commerce and Taxation, **Pinstorm Technologies (P.) Ltd v. ITO [2013] 154 TTJ 173 (Mum)** and **Yahoo India (P.) Ltd. v. CIT [2011] 46 SOT 105 (Mum), ITO v. Right Florists (P.) Ltd [2013] 143 ITD 445 (Kol)** :
  - Payments have been made for use of patented technology, secret process and use of trade mark. The assessee's case is not merely a case of displaying or exhibiting of advertisement by the advertiser on the website.
  - ITAT held *"In the present case, the Google India has been provided access to the IPR, Google Brand features, secret process embedded in Adwords Programme as tool of trade for generation of income"*
  - DR had sought to distinguish that in Right Florists that payments were made directly by user to foreign advertising platform and hence not Royalty.
- **Accordingly, since payments made by assessee to GIL falls within ambit of Royalty, assessee is required to withhold tax at source on such payments**

**Godaddy.com LLC case - ITAT Delhi**  
**Is payment towards Domain Registration Royalty?**

**Let's Deep Dive into this!**

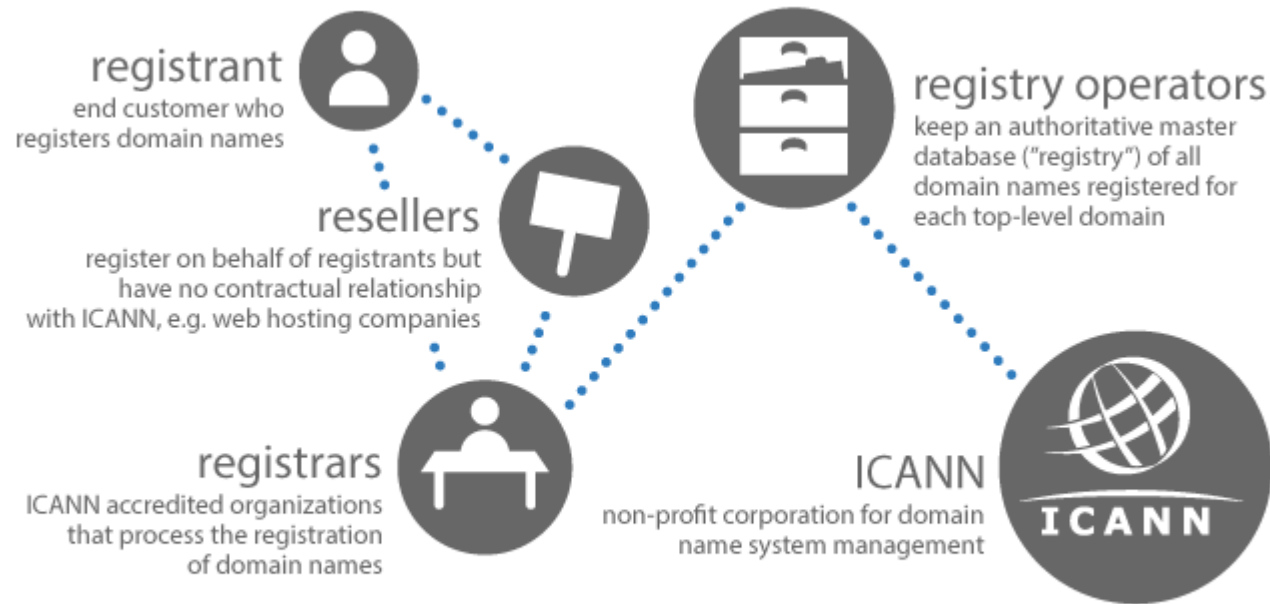
# Royalty – Website Registration

## Let's Deep Dive into this!

- **Godaddy.com LLC vs. ACIT (ITA No.1878/Del/2017, AY 2013-14 dated 3.4.2018)**
  - Whether **payments made for domain name registration** amounting to ~Rs.175 crores **should be treated as Royalty under the Act**
  - Interestingly, website hosting ground as FTS by AO though offered as Royalty by assessee was not pressed
- **Bottomline:** Domain name is an intangible asset which is similar to trademark. Consequently, income from services rendered in connection with such domain name registration is assessable as "royalty" u/s 9(1)(vi) of the Income-tax Act

# Godaddy.com LLC case - Domain Registration Basics!

- Godaddy.com is an accredited domain name registrar authorized by ICANN (Internet Corporation for Assigned Names and Addresses)



domain registry process

# Godaddy.com LLC

## DNS basics!

- A **domain name** or domain is a **structured label which is connected to a specific IP (Internet Protocol) address** address of a server where the web page is being hosted.
  - <https://saprlaw.com> is a domain name example
  - When you visit *http://www.saprlaw.com* in a browser, your computer uses DNS to retrieve the website's IP address of *52.88.200.246*. Without DNS, you would **ONLY** be able to visit any website by visiting its IP address directly
    - Think of it is as an IP address (number) to easily identifiable name mapping
- When you type *saprlaw.com* in your browser a series of events happen
  - **Step 1:** Check your local DNS cache
  - **Step 2:** Check your ISP's recursive DNS servers
  - **Step 3:** Check the "root nameservers"

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## Root Nameservers

- A **nameserver** is a computer that answers questions about domain names, such as IP addresses.
  - The thirteen root nameservers act as a kind of telephone switchboard for DNS. They don't know the answer, but they can direct our query to someone that knows where to find it.
- **Step 4:** The root nameservers will look at the first part of our request, reading from right to left — *www.saprlaw.com* — and **direct our query to the Top-Level Domain (TLD)** for *.com*. Each TLD, such as *.com*, *.org*, and *.us*, have their own set of nameservers, which act like a receptionist for each TLD.
  - These servers don't have the information we need, but they can refer us directly to the servers that *do* have the information.

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## Authoritative Nameservers

- **Step 5:** Authoritative nameservers
  - The TLD nameservers review the next part of our request — *www.saprlaw.com* — and direct our query to the nameservers responsible for this *specific* domain.
  - These **authoritative nameservers** are responsible for knowing all the information about a specific domain, which are stored in **DNS records** (“A” records if you want the name, “MX” records for mail etc etc.)
- Voila! You have the mapping that saprlaw.com maps to 52.88.200.246
- For reference/further reading:
  - <https://dyn.com/blog/dns-why-its-important-how-it-works/>
  - [https://www.webopedia.com/TERM/D/domain\\_registration.html](https://www.webopedia.com/TERM/D/domain_registration.html)

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## TLDs and Domain Registrars

- As of Jan 2017, 2943 domain name registrars like Godaddy.com exist
  - See <https://www.icann.org/registrar-reports/accredited-list.html>
- In fact, there are actually two types of TLDs:
  - generic TLDs (gTLDs), such as .com, .net and .org, and
  - country code TLDs (ccTLDs), designating countries and territories.
  - For many years, the number of gTLDs was limited to 22.
  - In 2012, ICANN launched the New generic Top-Level Domain Program, opening up the DNS beyond this number. Under the new programme, any organisation could apply for a new gTLDs, as long as it complied with a series of criteria established by ICANN. Since then, the DNS expanded to more than 1000 gTLDs.



# Godaddy.com LLC – AO’s findings

- **Page 7:** *“Instant case customers of Godaddy are using the server of the assessee and paying the fees for the same. Right to use server is Royalty”*
  - *“Web hosting charges are ancillary and subsidiary to application of enjoyment of right, property or information for which payment of domain registration fee is received.”*
  - **In our opinion , this view of AO is incorrect as there is no relevance between web hosting and name registration.**
- *“Assessee has not distinguished how domain name services are different from web hosting.”*
  - *Domain registration partakes character of web hosting charges since without domain registration being in place, web hosting is not possible . **WRONG!***
- **Conflates web hosting and domain name registration - according to AO former is FTS (as it “high technique” and make available condition) is fulfilled and latter is Royalty as it is use of server equipment)**
  - DRP seems to have rubber-stamped the AO’s findings

# Godaddy.com LLC – Arguments before ITAT

- Assessee submitted before ITAT IT Act only to decide as assessee not tax resident of USA
  - Submitted two services of web hosting & domain name registration are independent
  - Domain name registration is just for services of getting a domain name and can't be Royalty under Explanation 2
  - Relies on ***Asia Satellite Telecommunications Co Ltd vs IT (197 Taxman 263 Delhi HC)*** and AAR ruling in ***Dell International Services India Pvt Ltd (218 CTR 209 AAR)***
- Department's view is that *ICANN owns domain extensions but has granted registrar all rights and risks relating to the assignment, allocation, transfer and management of specific domain names with specific extensions.*
  - ***“Appellant registrar has right to own, allocate, register, transfer, cancel/deactivate, renew, suspend, auction and exploit domain names under accreditation agreement between ICANN”***

# Godaddy.com LLC – ITAT findings

- Relied on Hon'ble Apex Court in the case of ***Satyam Infoway Ltd. Vs. Siffynet Solutions Pvt.Ltd. - [2004] Supp (2) SCR 465 (SC)*** stating that in that case SC held that the domain name is a valuable commercial right and it has all the characteristics of a trademark and accordingly, it was held that the domain names are subject to legal norms applicable to trademark.
- Relied on Hon'ble Bombay High Court in the case of ***Rediff Communications Ltd. Vs. Cybertooth AIR 2000 Bombay 27*** which held that domain names are of importance and can be a valuable corporate asset and such domain name is more than an internet address and is entitled to protection equal to a trademark.
- Relied on Hon'ble Jurisdictional High Court in the case of ***Tata Sons Ltd. v. Manu Kosuri, (2001) PTC 432 (Del.)***, which held that domain names are entitled to protection as a trademark because they are more than an address.
- Distinguished Asia Satellite Delhi HC case on grounds it had no relevance to present facts of the case
- ITAT Delhi thus concluded that , the charges received by the assessee for services rendered in respect of domain name is royalty within the meaning of **Clause (vi) read with Clause (iii) of Explanation 2 to Section 9(1) of Income-tax Act.**

## Godaddy.com LLC – ITAT findings Our prima facie analysis

- While website ie domain name is indeed an intangible asset and can be the basis of a trademark dispute i.e., passing-off, in our opinion that cannot be the basis for bringing payments under Royalty (S.9(1)(vi) of the IT Act)
- What S.9(1)(vi) of IT Act envisages is payment for the use of a trademark ie say an Indian company using a foreign trademark via a trademark license agreement; the payment here is for *registering* assessee's domain name (which may be construed as its trademark) with an *online directory*. This online directory can be changed – we can move to another online directory at will (from Godaddy.com to gandi.net)
  - Akin to a Yellow Pages registration?
  - Analogy might paying Copyright Board in Kolkata to obtain copyright registration certificate which would be claimable as business expenditure for residents and business profits in case of a non-resident
- If the website name (say saprlaw.com or hotstar.com) is to be used in some promotional activity or licensing deal then it can be use of trademark
- So, prima facie, while there maybe a *probable case* for the payment to have *embedded in it a Royalty component* (given this is the only way to register a

# Thanks!

V. Vikram

[vvikram@gmail.com](mailto:vvikram@gmail.com)

[vvikam@saprlaw.com](mailto:vvikam@saprlaw.com)