



DEPENDENT AGENT PE | BEPS ACTION 7
PE AS A TAX CONCEPT | PRESENT & FUTURE

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Dependent Agent PE | Present Framework

- An agent in one country acting on behalf of an enterprise will only become a PE of the enterprise in that country if the **agent has, and habitually exercises, authority to conclude contracts** in the name of the enterprise, **unless the agent is an independent agent acting in the ordinary course of its business**
- An agent is regarded as independent where it is legally and economically independent from its principal
- If the agent's activities are devoted wholly or almost wholly on behalf of the non-resident enterprise / group, he will not be considered an agent of an independent status



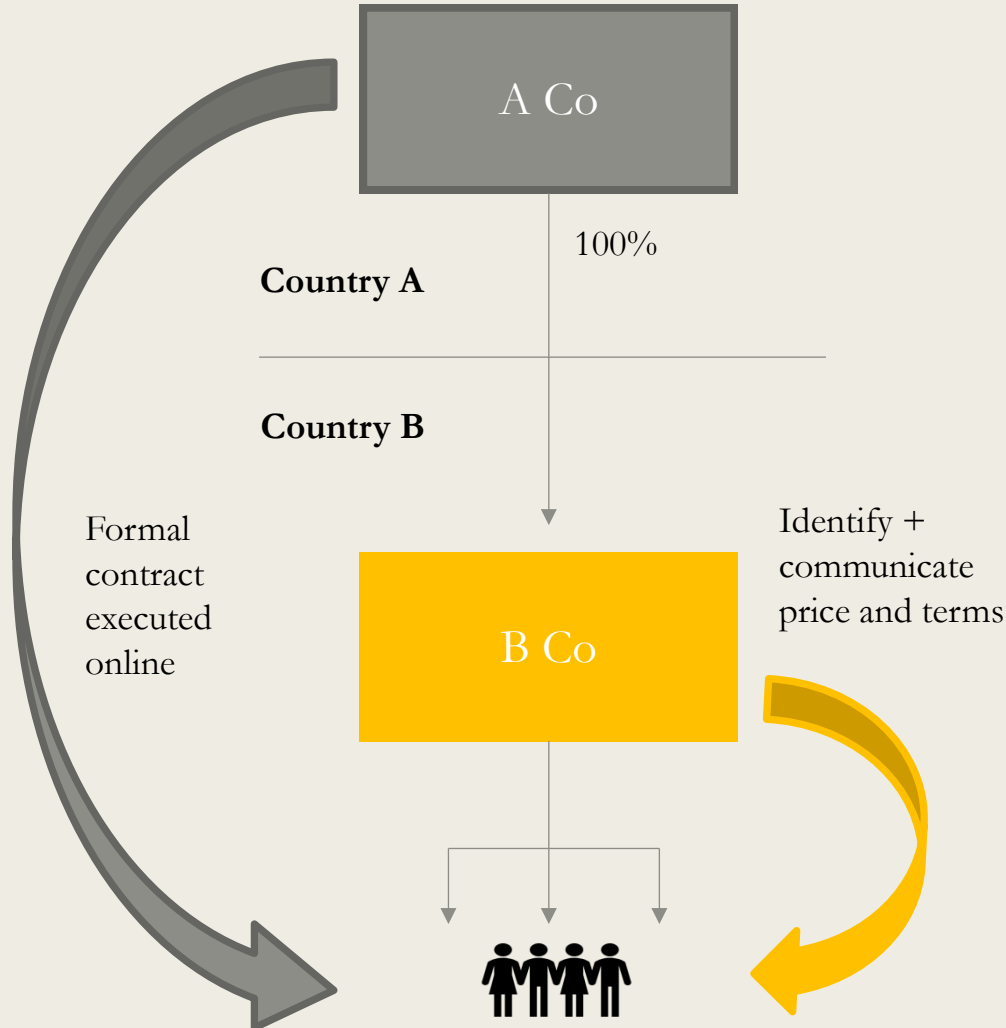
BEPS ACTION 7



Commissionnaire Arrangements & Similar Strategies

- A person sells products in a given State in its own name but on behalf of a foreign enterprise that is the owner of the products
- *Commissionnaire* concludes the sales but does not own the products - therefore, cannot be taxed on profits from sales but only on commission received from the foreign enterprise
- **Recommendation:** Dependent agent PE to be created if agent acts on behalf of a foreign enterprise and habitually exercises an authority to conclude contracts, and in doing so, **habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise**, and these contracts are (i) in the name of enterprise; (b) for the transfer of the ownership of, or grant of right to use property owned by the foreign enterprise; or (iii) for the provision of services by the foreign enterprise

Formal Conclusion v Negotiation



- A Co distributes various products and services worldwide through its websites
- B Co's employees send emails, make telephone calls to, or visit large organisations in order to convince them to buy A Co's products and services
- B Co's employees remuneration is partially based on the revenues derived by A Co
- When a customer is persuaded to purchase a given quantity of goods or services, B Co employees indicate the price that will be payable, that a contract must be concluded online with A Co, and the standard terms of A Co contracts, **which cannot be varied by B Co**
- Customer subsequently concludes that contract online for the quantity and price structure discussed with B Co's employees

Independent Agent Exception

- The independent agent exception continues to apply albeit with a modified test - a person will not be considered to be an agent of independent status where such person “*acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related.*”
- The test for “closely related” is liberally defined based on the vote and value of a company’s shares or beneficial equity interest therein (directly or indirectly more than 50%) or on *de facto* control
- ***Varian India Private Limited v ADIT [2013] 142 ITD 692*** – Indian branch of VIPL (US), which in turn was a WOS of Varian Inc (US) held not to be “dependent agent” of Varian Inc (US) in respect of pre-sale liaisoning and post-sale customer support services rendered in India. Assessee was not devoted wholly or almost wholly on behalf of any one Varian entity even though % sales on behalf of various Varian entities was as follows:

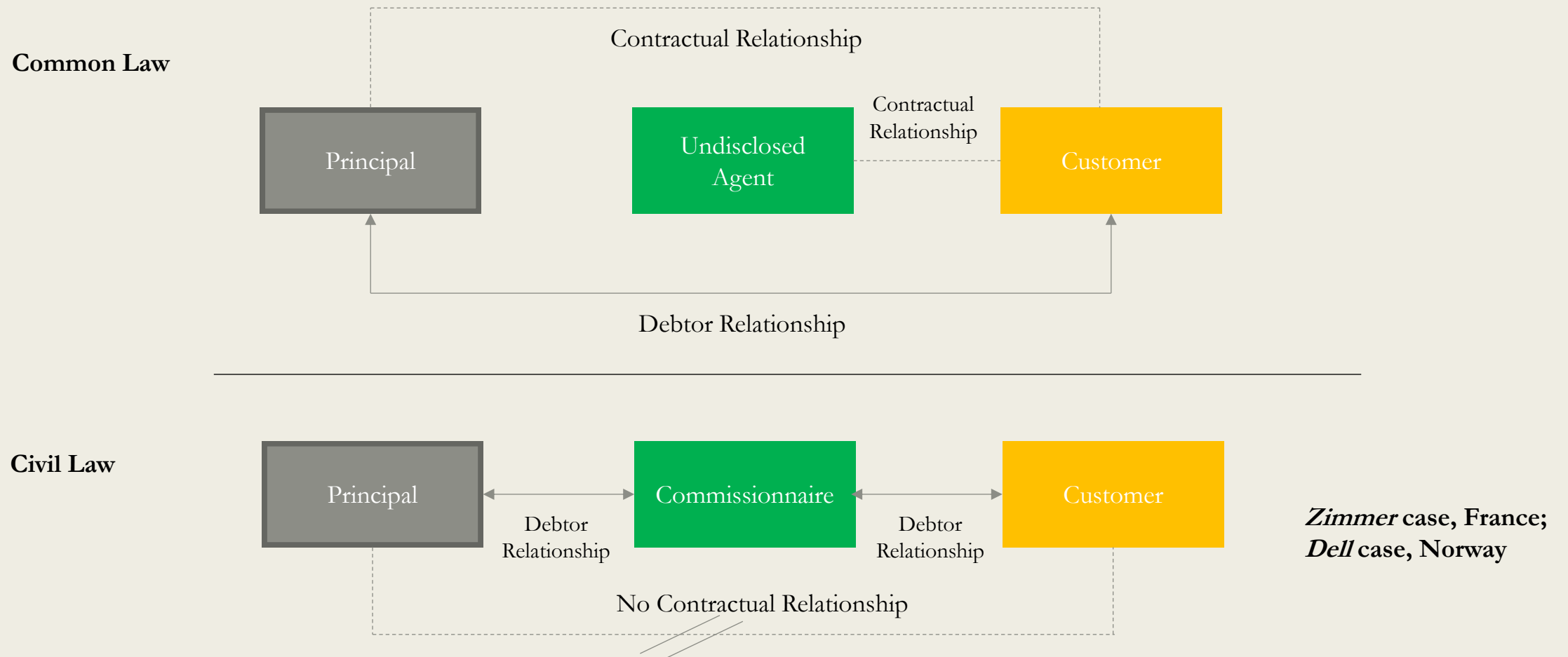
Supplying Entity	Total Sales for 2001 and 2002
Varian Australia	7.7%
Varian Inc, US	5.61%
Varian SPA, Italy	21%
Varian Chrompak International Netherlands	46.28%
Varian AG, Switzerland	19.42%
Total	100%

Other Recommendations

- **Specific Activity Exemptions** – making all exempt activities subject to “preparatory and auxiliary” condition
- **Anti-fragmentation Rule** – to prevent an enterprise or a group of closely related enterprises from fragmenting a cohesive business operation into several small operations in order to argue that each is merely engaged in a preparatory or auxiliary activity
- **Splitting up of Contracts** - (i) incorporation of the principal purpose test rule to address cases where contracts are artificially split up; and (ii) adding connected activities (exceeding 30 days) carried on by closely related enterprises to the period of time on site for the purposes of determining the 12-month period for the creation of a construction / installation PE

Understanding Commissionnaire Arrangements in Civil Law Jurisdictions

Mr Kees Van Raad



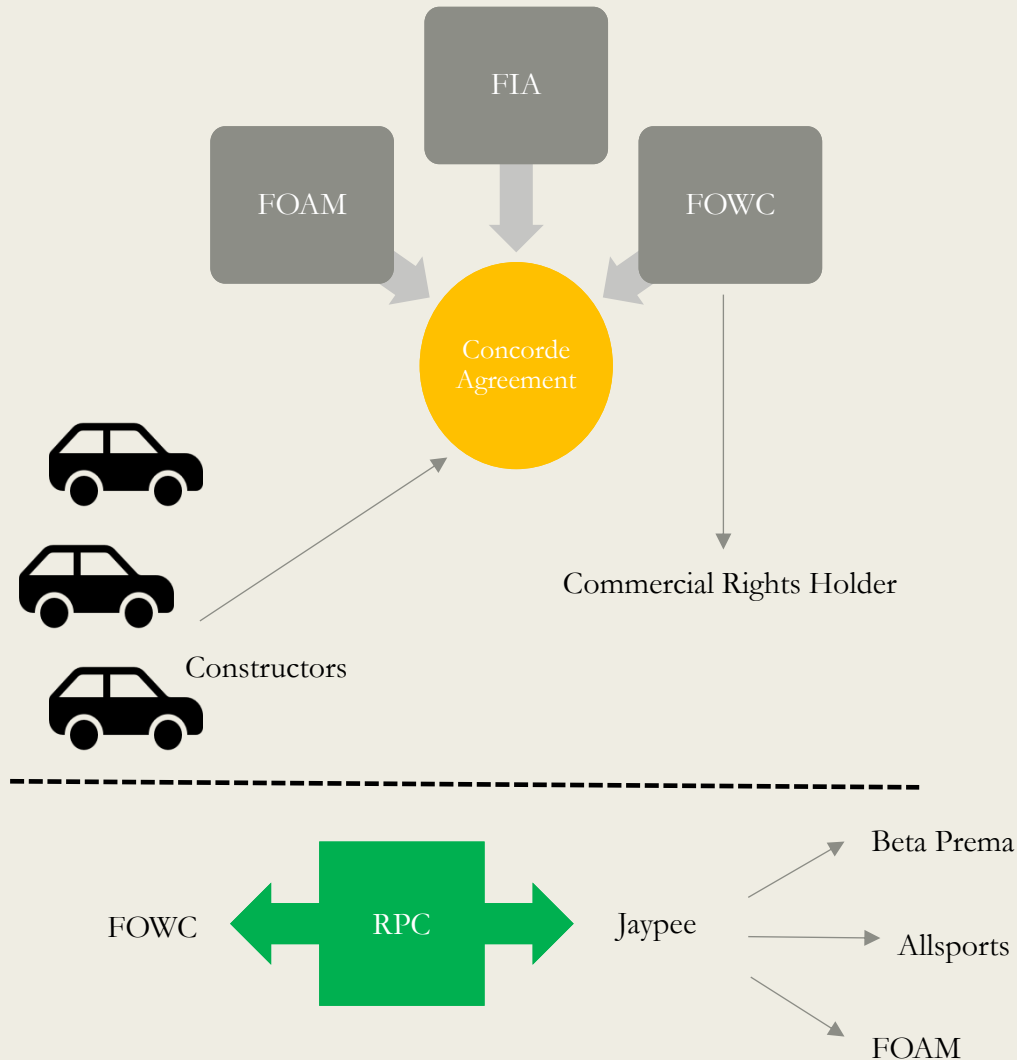
Understanding “Preparatory & Auxiliary” | Historical Perspective

Mr Rahul Navin & Mr Michael Kobetsky

- **Preparatory:** Usually precedes core business activity, carried out for a short period
- **Auxiliary:** Support activity, without being part of essential and significant part of enterprise as a whole

Understanding “Preparatory & Auxiliary” | F1

Mr Sunil M Lala

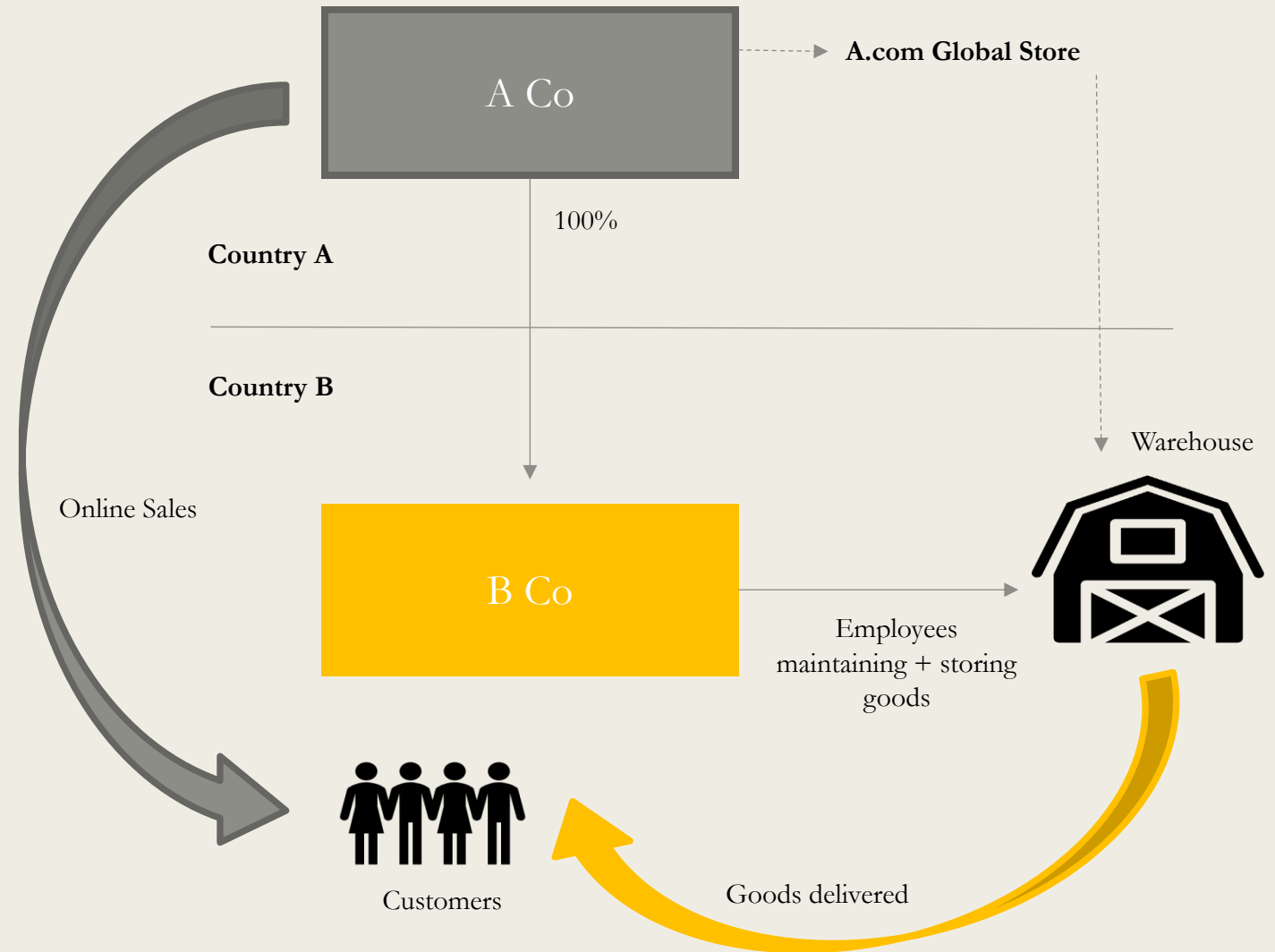


- Jaypee granted right to host, stage and promote F1 Grand Prix of India for USD 40 million
- CPs in RPC required Jaypee to enter into independent contractual arrangements with FOWC’s affiliates
- Accordingly, Jaypee gave back
 - i. Circuit rights, mainly media and title sponsorship, to Beta Prema;
 - ii. Paddock rights to Allsports; and
 - iii. Rights to services such as generation of television feed, licensing and supervision of other parties at the event, travel, transport and data support to FOAM
- **Work carried out by FOWC affiliates “preparatory / auxiliary” for F1 business?**

Understanding “Preparatory & Auxiliary” | Digital Economy

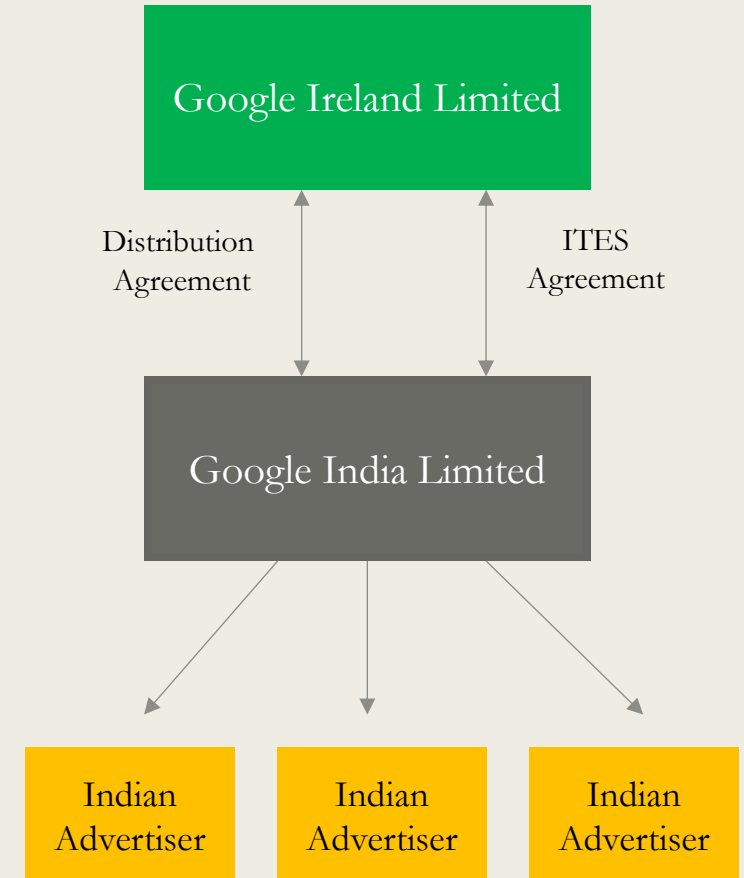
Mr Rajesh Simhan

- Storage and delivery activities for A Co – preparatory/auxiliary?



Relevance of PE Going Forward: Case Study – Google Adwords

- ‘Adwords Program’ is marketed by Google India as a ‘self-serve’ online advertising service
- Information relating to the program is freely available to the public on Google’s website along with explanatory videos
- ‘Adwords’ enables an advertiser to register a search term / phrase as a “key word” which is relevant to the advertiser’s website, so that when the said term / phrase is searched for by any user on the Google search engine, the relevant ad of the advertiser is displayed as a “sponsored link” on the search results page of the user
- Highly automated advertising software; servers for online ad space located outside India
- Role of Google India restricted to pre-sale and after-sale support



Where is the PE?



THANK YOU