

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE**

Before Shri George George K, JM & Ms.Padmavathy S, AM

IT(TP)A No.1513/Bang/2013 : Asst.Year 2009-2010
IT(TP)A No.1514/Bang/2013 : Asst.Year 2010-2011
IT(TP)A No.1515/Bang/2013 : Asst.Year 2011-2012
IT(TP)A No.1516/Bang/2013 : Asst.Year 2012-2013

M/s.Google India Private Limited No.3, RMZ Infinity Tower-E 4 th Floor, Old Madras Road Bangalore – 560 016. PAN : AACCG0527D.	v.	The Deputy Commissioner of Income-tax (International Taxation), Circle 1(1) Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.Percy Pardiwala, Sr.Advocate, Sri.Anmol Anand,
Advocate, Miss.Priya Tandon, Advocate & Sri.Vinay Mangla, CA
Respondent by : Sri.K.V.Aravind, Standing Counsel

Date of Hearing : 13.09.2022	Date of Pronouncement : 19.10.2022
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ORDER

Per George George K, JM :

These appeals at the instance of the assessee were originally disposed by the ITAT vide its common order dated 23.10.2017. On further appeal at the instance of the assessee, the Hon'ble High Court vide judgment dated 17.04.2021 in ITA No.883/2017, 897/2017 to 899/2017, restored the matter to the ITAT for *de novo* consideration. The relevant finding of the Hon'ble High Court reads as follows:-

“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 conjecture 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 then 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.”

2. Pursuant to the Hon'ble High Court's judgment, the cases was finally heard on 13.09.2022. The brief facts of the case are recapitulated hereunder.

3. The assessee (Google India Private Limited) (GIPL) is a company engaged in the business of providing Information Technology (IT) and Information Technology Enabled Services (ITES) to its group companies. Further, the assessee also acts as a distributor for Adwords Programme in India. The companies activities are classified into the following segments:-

“IT services : GIPL has entered into a service agreement with Google Inc to render software development services. Google India's research and development units at Bangalore, Hyderabad and Gurgaon provide IT services including application development, maintenance and testing services. For these services, GIPL, is remunerated at cost plus 17.5%.

IT enables services : GIPL has entered into a service agreement with Google Ireland Limited (Google Ireland) to

render IT enabled services. Its service centre at Hyderabad and Gurgaon provide IT enabled services relating to the administration of advertisements in accordance with the guidelines provided by Google Ireland and provide customer support services. For these services, GIPL is remunerated at cost plus 15.5%.

Marketing and distribution services for the AdWords program: *Under the Google AdWords Program Distribution Agreement dated 12.12.2005 (Agreement) entered into between GIPL and Google Ireland, Google India is appointed as a non-exclusive authorized distributor of AdWords program to the advertisers in India.”*

4. The assessee had entered into Google AdWords Program Distribution Agreement dated 12.12.2005 with Google Ireland Limited (GIL). As per the agreement, the assessee was appointed as a non-exclusive distributor of AdWords programme to the advertisers in India. The distribution fees paid by the assessee to Google Ireland as per the agreement for the relevant assessment years are as under:-

Asst.Year	Distribution fee payable (in Rs.)
2009-2010	1,66,58,00,133
2010-2011	1,85,68,92,343
2011-2012	3,72,01,00,047
2012-2013	5,70,74,19,173

5. The Assessing Officer [Deputy Director (International Transaction)] initiated proceedings u/s 201(1) and 201(1A) of the I.T.Act in respect of the above payments made by the assessee to Google Ireland Limited, since, no tax was deducted at source u/s 195 of the I.T.Act. The A.O. called for and examined various details and documents. The statement of the Director of Indian operation and Director (Sales)

relating to the business carried on under the distribution agreement and the service agreement were recorded. The relevant extracts from these recorded statements are reproduced below:-

“Sworn statement of Sri Arijit Sarkar, Director, India operations

Q2 : What are the key functions of ITES?

Ans:- The key functions of ITES (referred as India Operations or India Customers services internally) are:

- a) Outsource Ad reviews*
- b) Outsource Help desk (Advertiser Services)*
- c) Outsource Business Analytics (Optimisation)*

Q3: Explain the function of outsource Ad reviews?

Ans: Advertisers upload Ads which resides in data centers outside of India and these Ads are reviewed in accordance with Google Policies. 94% of these Ads are automatically review by the system. 6% of these Ads comes from manual review which is done through a proprietary web application (Approval Bin) by the Ad Reviews Team. The Ad review team consists of 100 Google employees and 200 vendor employees, they are graduates from various colleges in India.

Q4. Explain the process of use of Approval Bin by the Ad review Team?

Ans: The Manager of the Ad review team after identification of the team members sends request for creation of the user id's to Google Ireland. Once the access is created the Ad Review Team member can see the Ad in the interface and post review conclude whether the Ad is in accordance with the Google policies. The Ad review team member can see the Ad i.e hosted out of data centers outside of India and the review is updated again to the Ad in the data center.

The Ad Review outsourcing function is carried out for all global customers including India. This team handles all the customers across the world and with a small team in the Dub/in, China, Japan, Korea handling specific language Ads.

The reviewer reads the Ad texts and checks the URL and checks the landing page of the Advertiser and then updates the status regarding the compliance in the web application.

The policy guidelines are framed by the global legal team in

California and Dublin. Information regarding these guidelines are disseminated using the Approval Bin and also through training.

Q5 : Explain the process of outsourced help desk?

Ans: When an advertiser has any issue related to Ad words, he can call, write an e-mail or chat with a representative of the help desk team. This support is provided from some of the global English advertisers. We have a team of around 150 Google employees and 40 vendor employees and they are graduates from various colleges in India. The team guides the advertiser to access the right information or helps him to resolve the issue. This is carried out by internal web application (gcases and ICS). The Manager of the help desk team after identification of the team members sends request for creation of the user id's to Google Ireland. Once the access is created, the help desk team member can see the Advertiser issues in Advertiser's account hosted in the data center through the interface.

The process of trouble shooting for issues related to Adwords is a global process and training for the same is provided locally through various means (video conferencing with teams in Ireland and US and web based).

It is clarified that the support / customer services for the accounts managed by the sales team of GIPL is handled by them only using ICS and the remaining ie. Self Signup Advertisers are serviced by the Help desk.

Q6: Explain the process of outsourced Business Analytics?

Ans: The outsourced Business Analytics analysis the performance of the advertiser accounts and market trends and provides the same to the account management team. This service is provided for global English account management team (sales team) of us, UK And Australia base on the request and on the criteria given by them. For example, for a global Advertiser if he has concerns on clicks on his website he approaches the Account Management Team which in turn sends the request to the Business Analytics team. So the Business Analytics team analyses the Account Performance and gets back to the Account Management Team with a report. The analyses could be either of the following:

- a) Changes in bid value*
- b) Change in key words*
- c) Change in budget*

For example. if an Advertiser has issues around the clicks to

his website, he raises the issue with the Account Management Team of that country and he in turn sends the request to the Business Analytics Team. The Business Analytics Team analyses the reason which could involve issues related to key words, budget, bids, quality score etc. For example, if there is a low quality score, the team looks into the following aspects:

- a) key words relevance
- b) landing page relevance in terms of key words
- c) Ad Text in terms of landing page

This report is summarized along with supporting data and sent to the Account Management Team of that country. The report also shows past historical trends of parameters stated above.

The above instances in the case of Advertisers located in India are handled by the Accounts Management Team (Sales Team) of GIPL.

This is not provided for India Account Management Team (Sales Team). I understand that it is performed by the India Account Management Team themselves.

The Business Analytics team constitutes of 300 graduates and MBAs. The Manager of the team identifies the team members and request for access to Google Ireland. Then the team accesses an internal web application called GRM (Internal Google CRM application) to generate reports based on which they perform their analysis. The Business Analytics team accesses the Advertiser's account hosted in the data center through the interface. The account management team also uses the same application for the accounts managed by them.

Q7: How is the deliverable of the outsourced Business Analytics team used by the Account Management Team (Sales team)?

Ans:- The deliverable is used by the Sales team for

- a) To understand the performance of Ad Campaigns run by the Advertisers
- b) To optimize the performance of the Ad campaigns

Q 9 Explain the process of Adword Distribution by GIPL.?

Ans: Even though I am not responsible for AdWord Distribution by GIPL, my understanding of the AdWord Distribution process is as follows:

- a) Advertiser's are of two types i.e self sign up (approximately

95% of the total number of Advertiser's from India) and managed accounts (balance 5% through the sales team of GIPL.

- b) All Advertisers put up their Ads through a web interface
- c) The Ads are hosted in the servers / data center situated outside of India
- d) For the 95% self sign up GIPL's role is limited to invoicing and collections and support if there is an issue raised by the Advertiser.
- e) For the balance 5% managed accounts, GIPL interfaces with the Advertiser's and sells Ads space for display and also invoicing, collection and support issues. The Account Manager is responsible for a set of accounts and provides post sale support for those accounts.
- f) Any self sign up Advertiser qualifies for an Account Management Support after they spend above a certain threshold. The threshold is determined by the country finance team.

Q 15: Clarify whether the confidential information. Intellectual Property, software technology, documentation of Google Ireland is used by GIPL ITES division in carrying out the activities as per the services agreement?

Ans : Yes. the ITES division of GIPL is allowed to use the confidential information Intellectual Property. software technology, documentation of Google Ireland to carry out the activities as per the Services agreement. The examples are:

- a) Confidential Information: Google Ireland Policies related to Ad Review correspondence related to technical issues and sharing and of knowledge. skill and experience by Google Ireland.
- b) Software Technology: Web applications like Approval Bin, GRM, gCases, ICS. Documentation: Training documents describing the process to carry out the activities per the services agreement.

Sworn Statement of Sri Vikas Agnihorti, Director Sales

Q 6: Once the customer agrees to use Google Adwords program how does he get initiated into using the program

Ans: The customer has to agree to the terms and conditions as specified in the account opening/registration process which is online. However, in the case of large clients, at times, credit facility for payment terms towards his consumption of the Adwords program is extended, in such specific cases an additional contract is Signed between GIPL and the customer.

Q7. What are the tools used by the sales team for marketing and distribution of Adwords Program

Ans: GIPL sales team uses cross section of information which is through primary and secondary research proprietary or available in the market. In addition it uses Google Online tools such as Google Trends, Google Adwords for Keywords and in cases where the customer uses Google Analytics in such case the sales team also uses Google Analytic tool. All the Adword related tools used by the sales team. are available online free of cost on the web. In reference to the above the tools that are publicly available irrespective of the user being an advertiser are Google Trends. Google Adwords for Keywords and knowledge around the Adwords policies and the framework there in. For advertiser having a Adwords account the user have access to the Google Analytics too. and within that options like bid optimizer for running his campaigns efficiently.

Q 8: Explain the structure in the GIPL Sales team

Ans: In GIPL customers are classified into three sub-categories; large clients (LCS), small and medium business (SMB). and the long tail set of self service customers. In the case of LCS, the sales process as discussed above. In case of 5MB another team manager a larger act of accounts on similar lines of LCS and in the case of long tail clients, the client manage end to end themselves or may take the help of the calf center.

Q 9: In reference to contract with customer Clause 2 of the contract sub-part as stated "Customer grants Google permission to utilize and automated Software program to retrieve and analysis websites associated with the services for ad quality and serving purposes, unless customer specifically opts out of the evaluation in a manner specified by Google ". What is the program utilized by Google for the above.

Ans: The tool used in the applicable cases is Google Analytics and the same is available online. The same can be access by people who have been given user id and passwords by the respective customer.

Q 10: Under what conditions and circumstances a ad is disabled and what are the tools used for the same:

Ans: Google disables ads which are in non-conformity with the local law and also not in accordance with Google ad policies. The compliance in this context is looked into by a central support team of GIPL and they take appropriate action. I will revert on the exact technicalities of disabling the ad

servicing and the team responsible.

Q 11 : What are the tools available to the sales team for optimization of the ad campaign?

Ans. The sales team uses Google Analytics tools for the optimization as well as Google Adword and Adwords editor.

Q12. What is the policy regarding the usage of trademarks as Keywords?

Ans. GIPL allows advertisers to bid on competitor's key words as well as registered trademark so long as the specific competitor key word or trademark is not a part of the ad text being shown by the said advertiser.

Q 13 What tools is used to achieve the above.

Ans. Google has an internal tool where available registered trademarks information is uploaded. All new ads have to go through the review process and the tool identified such trademarks violations in the ad text and rejects the ad from being served. The tool is integral to the Google operating platform and accessible to the review team in India.

To the best of my knowledge, the said tool is for internal review process and hence not available to the advertisers.

Q14: Are you aware of any other internal tools used by GIPL for all activities related to Adwords program

Ans: In sales other than the tools mentioned above I am not aware of any other tool that i used and I am not aware of any other tools being used by other teams for activities related to Adwords. I will verify and revert with the details.

Q15: What is the policy of GIPL regarding the Adwords content and the internal tools used for review of Adwords contents.

Ans: Details of Adwords content policy are available online and the information regarding reviewing Adwords content as well as trademark violation is done through the internal tool along with the review support team for monitoring adherence to policies.

Q19: Explain according to you how the billing is done in respect of Adwords accounts?

Ans: Bills are raised by the billing department for consumption of Adwords campaign being run by the Advertisers either directly on them or through the agency through whom the advertisers would be operating.

Q20: According to you how the billing department gets the information regarding consumption of adwords campaign run by the advertisers?

Ans: As I am not part of the billing department I will have to revert with the exact process and manner of generation of bills. However, to the best of my knowledge the billing process is an automated process linked to the Advertisers Adword Account.

Q21: As per your experience of working with GIPL as Director Sales for Adword Program BFSI & Travel vertical, and in light of the above statements is it possible to market, sell and maintain Adword program and accounts without the use of internal tools.

Ans: In continuation of my earlier statements, the internal tools mentioned by the very nature and as the word tool means are there to assist and guide advertisers to better manage their Adwords program. The Advertisers may choose to run the Adword program without using these tools. From the GIPL perspective the internal tool of which the reference was given for trademark and content related question. the said tool is not specifically used for marketing or selling the Adwords program. However, it is used to monitor the policies governing trademarks and related to approvals for the Adword campaign.

Q22: Please explain as to how the process of monitoring the policies governing trademarks and Adwords contents violations can be separated from the process of marketing, sales and maintenance of adwords accounts?

Ans: The process of monitoring the policies governing trademarks and Adwords contents is an integral part of the maintenance/review related activity of the Adwords accounts. The maintenance and review of the Adword account get activated with the establishment of the relationship between the advertiser and GIPL.

Q23: Is there a standard operating procedure or process or methods given by any Google entity to be used by the sales team of GIPL for market aid sale of Adword program?

Ans: As a distributor of Adword program GIPL has a recommended Google sales framework in addition to the training given on adwords program. As part of the training program, among several other things the sales team is made aware of the trademark and adword content violation policies. GIPL sales team are recommended to follow the framework on a best effort basis while advising advertisers on their online Strategy.”

6. Show cause notice dated 8.2.2013 was issued proposing to treat the above payments as Royalty under the Act and the DTAA. Vide reply letter dated 15.2.2013 the assessee explained that the above payments are not in the nature of 'royalty' under the Act and India - Ireland DTAA and is in the nature of advertisement fees. The AO, however, rejected the contentions of the assessee and passed the order under section 201(1) & 201(1A) dated 22.2.2013 for the AY 2007-08 to AY 2012-13. (for A.Y. 2007-2008 , A.Y. 2008-2009, the Tribunal had disposed off the case on 10.08.2022 on short ground that the orders passed u/s 201(1) and 201(1A) of the I.T.Act for A.Y. 2007-2008 and 2008-2009 are barred by limitation). The gist of A.O.'s finding are as follows:

(i) The AO, in Part I of the order passed under section 201(1) & 201 (1 A) of the I.T.Act, held that the activities performed by the assessee under the distribution agreement are complemented by the activities performed by the assessee under the service agreement and they cannot be divorced from each other. As per AO, for the purpose of marketing and distribution activities, the assessee is granted the right to use the valuable business assets of Google Ireland which includes intellectual property in the products and services offered by Google Ireland. It was held by the AO that transfer of distribution rights are itself IP rights covered by 'similar property' as per definition of 'royalty'

under Explanation 2 to section 9(l)(vi) of the I.T.Act.

(ii) In para II, the AO concluded that the assessee has been granted license to sell or make offer for sale of Adwords program by Google Ireland by virtue of the distribution agreement and the same is a copyright within the purview of section 14(b)(ii) of the Indian Copyright Act. It was held that the sums payable by assessee to Google Ireland are covered by clause (v) to Explanation 2 to section 9(1)(vi) of the I.T.Act and hence 'royalty'.

(iii) In part III, the AO held that the assessee has been granted the use of or right to use trademarks and other brand features owned by Google Ireland for the purpose of distribution of Adwords program and consequently the sums payable to Google Ireland are royalty under clause (i), (ii) and (iii) of Explanation 2 to section 9(1)(vi) of the I.T.Act.

(iv) In part IV, the AO held that the assessee is granted the use of right to use the 'process' in the Adwords platform for the purpose of marketing and distribution. Therefore, clause (i), (ii) and (iii) of Explanation 2 to section 9(1)(vi) of the I.T.Act are satisfied and hence amounts payable to Google Ireland are taxable under section 9(1)(vi) of the I.T.Act.

(v) In part V, the AO held that in the process of authorizing the assessee to distribute Adwords

program, know how has also been imparted to assessee. It was held that imparting of training, knowledge, experience and skill to assessee's staff by GIL, sharing of confidential information, results in impart of knowhow for the purpose of marketing, sales of adword programs, maintenance of adword accounts, after sales service, billing etc. Hence, it was held that the sums payable to GIL are covered by clause (iii) and (iv) to Explanation 2 to section 9(l)(vi) of the I.T.Act.

(vi) In Part VI of the order, it was held that grant of distribution rights involves use of industrial, commercial and scientific equipment as the assessee is allowed to access the Adwords platform running on servers for various purposes. According to AO, Adwords platform is similar to a portal running on servers, based on the search engine technology of Google and therefore a commercial cum scientific equipment. Without having access to the servers running the Adwords platform, assessee cannot perform its functions as per the distribution agreement. Hence, it was held that the distribution right also includes the right to use the industrial, commercial or scientific equipment which are the servers.

(vii) In part VII of the order, it was held that as per Article 12 of the India - Ireland DT AA, the payments to GIL is for use of or right to use a copyright right under section 14 of the Indian copyright Act and hence the

payments are in the nature of royalty under the DT AA.

(viii) & (ix) In part VIII and IX, the AO discussed the issue of retrospective amendments to Finance act 2012 not affecting the DTAA and other decisions relied on by the assessee.

(x) In Part X of the Act, the AO concluded that the sums payable under the distribution agreement to GIL are for the (a) right to sell or right to offer for sale adwords program, (b) use of or right to use various IP rights (process, trademarks, brand features, copyright, know how) in adwords program and (c) use of or right to use industrial, commercial or scientific equipment. The AO thus concluded that such sums are covered by the definition of Royalty under the I.T.Act and the DTAA.

7. Aggrieved by the order passed u/s 201(1) and 201(1A) of the I.T.Act, the assessee filed appeals before the first appellate authority. The CIT(A) vide order dated 20.9.2013 confirmed the findings of the AO with regard to right to use intellectual property as well as trademark and copyright. The action of the AO in holding that the distribution fees is actually consideration received for the right to use/ license to use a computer program/process i.e., Adwords program was upheld. However, CIT(A) held that the assessee cannot be said to have gained right to use any scientific equipment since Google Ireland has not parted

with the copyright it holds in the Adwords program and hence it cannot be said that any kind of technical knowhow has been transferred to the assessee company. The CIT(A) was not in agreement with the AO on the above issue without prejudice to his view in holding that the remitted amount is royalty on different grounds. The CIT(A) also confirmed that Google Ireland rendered services to enable the assessee company to market and distribute the Adwords program. The CIT(A) consequently dismissed all the appeals.

8. Aggrieved by the order of the CIT(A), the assessee has filed the present appeals before the Tribunal. The assessee has filed multiple paper books serially numbered (running into 3201 pages) enclosing therein the case laws relied on, the adword program agreement dated 12.12.2005, distribution and service agreement dated 01.04.2004 entered by the assessee with Google Ireland Limited, the show cause notices issued by the A.O. and the assessee's response, submissions made in the earlier round of litigation, etc. The learned Senior Counsel Sri.Percy Pardiwala appearing for the assessee, at the very outset, submitted that the issue in question is squarely covered in favour of the assessee by the following orders of the Co-ordinate Bench of the Tribunal:-

1. *Interactive Avenues Private Limited v. DCIT*, [ITA 3130/Mum/2019, decision dated 07.07.2022, (ITAT – Mumbai)],
2. *ESPN Digital Media (India) Pvt. Ltd. v. DCIT*, [ITA 1070/Chny/2018, decision dated 04.05.2022 (ITAT – Chennai)],
3. *Matrimony.com Limited v. ACIT*, [ITA 1391/Chny/2019, decision dated 20.04.2022 (ITAT – Chennai)],

4. *Play Games 24X7 Private Limited v. DCIT*, [ITA 1533/Mum/2019, decision dated 23.03.2022 (ITAT – Mumbai)],
5. *Myntra Designs Pvt. Ltd. v. DCIT*, [ITA 598/Bang/2020, decision dated 03.09.2021 (ITAT – Bengaluru)],
6. *Urban Ladder Home Décor Solutions Pvt. Ltd. v. ACIT*, [ITA 615/Bang/2020, decision dated 17.08.2021 (ITAT – Bengaluru)],
7. *Inception Business Services v. ITO*, [ITA 2674/Chny/2016, decision dated 18.02.2019 (ITAT – Chennai)],
8. *ITO v. Right Florists Pvt. Ltd.*, (2013) SCC OnLine ITAT 6870 (ITAT – Kolkata),
9. *Pinstorm Technologies (P.) Ltd. v. ITO*, (2012) 54 SOT 78 (ITAT – Mumbai),
10. *Yahoo India (P.) Ltd. v. DCIT*, (2011) 140 TTJ 195 (ITAT – Mumbai).

9. It was submitted that in the above cases, the Tribunal had held that for purchase of online advertisement space cannot be characterized as “royalty” and hence, the same are not chargeable to tax in India, in the absence of PE of the non-resident in India. Further, it was contended that the entire case of the Revenue heavily hinges upon the following judicial pronouncements while characterizing the subject payments to be royalty being payments made for the “use of” or “right to use” of software (copyright):-

1. *Commissioner of Income-tax, International Taxation v. Samsung Electronics Co. Ltd.*, [2012] 345 ITR 494 (Karnataka High Court),
2. *Commissioner of Income-tax v. Synopsis International Old Ltd.*, [2013] 212 Taxman 454 (Karnataka High Court),
3. *CIT v. IBM India Ltd.*, [IT Appeal No. 540 of 2008, judgment dated 21-10-2011 (Karnataka High Court)] and
4. *Citrix Systems Asia Pacific Pty. Ltd., In re*, [2012] 343 ITR 1 (AAR – New Delhi).

10. It is submitted that the above judicial pronouncements relied on by the Revenue has been specifically overruled by the Hon’ble Apex Court in the case of Engineering Analysis

Centre of Excellence Private Limited v. CIT & Anr. reported in (2021) 432 ITR 471 (SC). It was contended by the learned AR that since the DTAA between India and Ireland overrides the definition under the Income-tax Act, the phrase “similar property” being absent in the definition of “royalty” as provided under the DTAA, the entire reasoning and discussion in the impugned order of the A.O. and the CIT(A) to the extent of analysis around distribution right being classified as “similar property” is to be rendered redundant. The learned AR further took us through various clauses of adword programme distribution agreement dated 12.12.2005, the service agreement dated 01.04.2004 to explain the factual background of Google Adword Programme and online Advertisement Review Process (ITeS services) and further it was explained how the A.O. and the CIT(A) has erroneously interlinked the services agreement and the distribution agreement.

11. The learned Standing Counsel, on the other hand, argued that on perusal of the various clauses of the adword program distribution agreement and service agreement, the substance over the form must be seen and the same needs to be interlinked. It was contended that the note of assessee under the distribution agreement does not end with the uploading of online advertisement. It was stated that the obligation of assessee under the distribution agreement, including after sales customers support, necessarily entails use of IPR's, which was provided by Google Ireland under the

service agreement. For this purpose, the learned Standing Counsel placed reliance on various clauses of the distribution agreement and the service agreement. Further, it was contended that the assessee received confidential information from Google Ireland Limited under the adword program service agreement, which was in turn used by the assessee for carrying out its obligation under the distribution agreement, and therefore, the payment made by the assessee to Google Ireland Limited under the distribution agreement tantamount to royalty. It was further argued by the learned Standing Counsel by placing reliance on book written by Benjamin Mangold that online advertisement space through the Google Adwords Programme enabled targeting of advertisement using IPR received by the assessee under the service agreement. In essence, this argument again focused on interlink of distribution agreement and service agreement. It was also argued that the material on working of Google AdWord Programme available online was also in consonance with the content of the above said book and in that manner it was contended that the payment in question must be characterized as royalty. The learned Standing Counsel also argued that the judgment of the Hon'ble Apex Court in the case of Engineering Analysis Centre of Excellence Private Limited v. CIT & Anr. (supra) was distinguished since it dealt with copyright alone. It was argued that since the assessee in the present case was obliged to carry out after-sales services for which it was granted IPRs under the Service Agreement, the judgment of the Hon'ble Apex Court in the case of

Engineering Analysis Centre of Excellence Private Limited v. CIT & Anr. (supra), especially the classic “book” example contained therein, did not apply. The learned Standing Counsel has given the brief written submission in essence reiterating the findings of the A.O.

12. In the rejoinder, the learned Senior Counsel, specifically rebutted the contentions raised by the learned Standing Counsel and has also filed a written submission with reference to the arguments raised by him.

13. We have heard rival submissions and perused the material on record. The issues involved in these appeals revolve around the taxability of payments received by GIL from the assessee, who is engaged in the business of online advertisement space to advertisers in India. The Revenue had sought to characterize these payments received by GIL to be royalty as defined in section 9(1)(vi) of the I.T.Act r.w. Article 12(3) of the India-Ireland Double Taxation Avoidance Agreement (India-Ireland DTAA) and thus chargeable to tax in India in the hands of GIL. The case of the assessee is that the said payments are in the nature of business profits, which are chargeable to tax in Ireland and not in India. Further, since the Department in these proceedings has never alleged that GIL had a Permanent Establishment (PE) in India in terms of Article 5 and accordingly by virtue of Article 7(1) of the India-Ireland DTAA, the right to tax these profits is solely with Ireland. Consequently, the assessee cannot be held to be

an assessee in default u/s 201 of the I.T.Act for not deducting tax at source u/s 195 of the I.T.Act while making the subject payment to GIL.

14. For a proper adjudication of the above issue, it is necessary to briefly explain / examine the overview of the Google Adword Program, the role of the assessee under Adword Program distribution agreement and the service agreement (ITES). The undisputed fact on record is that Google.com is a search engine developed by Google LLC, USA available freely to the world at large providing information on any subject based on the search made by the user. The link to various websites related to the search are provided in the search result. Additionally, Google LLC, USA has also developed a computerised advertising program known as Google AdWords Program. Google Ireland Ltd (GIL) is the exclusive licensee and principal operator of the computerised advertising program i.e., "Google AdWords Program" for the whole world outside the USA. The Google AdWords program displays advertisements on Google's search engine. It has a separate website in which the advertisers have to agree to certain terms and conditions including the consideration payable for the targeted Advertisements and provide appropriate keywords on searching of which the websites of the advertisers would be displayed on top of the Google search engine with the abbreviation "Ad". For instance, pursuant to the search query "Fresh Flower Delivery", website of "Ferns N Petals" is listed two times

among websites of various other businesses. The listing of the website of "Ferns N Petals" at the top of the list is a sponsored link accompanied by a small abbreviation "Ad", and the other listing is an organic search result as it does not have any such abbreviation. [Page 318 of paper book 1] This is because, "Ferns N Petals" utilised the "Google AdWords Program" to advertise its business on the Google Search Engine. The targeting of advertisement is achieved by using appropriate keywords, which can be selected only by the Advertiser. The Google AdWords Program contains a glossary of keywords together with helpful suggestions for the Advertiser to select appropriate keywords for his targeted advertisement. Google AdWords Program also contains a number of computer commands, by which the proposed Advertiser can achieve a more focused and particularised targeting, such as geographical or area targeting (advertisement to be shown only in a particular area, say the State of Karnataka) or period targeting (advertisement to be shown only in a certain period) or time targeting (advertisement to be shown only at certain fixed times during the day) or duration targeting (to be shown only for a fixed time duration each time). All these types of targeting are over and above the usual subject targeting and are achieved by simple computer commands, given by the proposed Advertiser on the Google AdWords Program. All these facilities are available on the Google AdWords Program to any member of the public, free of charge, to enable him to formulate a suitable draft advertisement for his product or service. The

only requirement is that the proposed Advertiser should have a website of his own / or entity giving particulars about his/ its business. The Google AdWords Program itself gives step-by-step and detailed instructions, so that even a person who has a basic knowledge of computers and internet can create a draft advertisement and target it suitably by using the necessary computer commands (or tools). No payment is made for any use of the Google AdWords Program. After formulating the draft advertisement, the Advertiser is required to upload the same for display on Google Search Engine or other online properties using the Google AdWords Program. No payment is made for the same. Thereafter, the proposed advertisement is stored on the servers of Google Ireland Ltd (GIL) located outside India for undergoing a review process.

15. The review process is undertaken by GIL for advertisements uploaded by Advertisers from all around the world including India. Approximately 94% of global advertisements are reviewed by GIL through its automated system located outside India. Remaining global advertisements, which are not successfully reviewed by the automated system, are subjected to a manual review. For carrying out manual review, the balance 6% (approx.) global advertisements are forwarded to one of service centres of GIL's group entities, located in USA, Dublin, China, Korea, Japan, and India. An advertisement in English by an Indian Advertiser may go for manual review to any of these service

centres. These service centres carry out the activity of manual review on a cost-plus basis. The assessee also carries out this activity under the ITES segment as per the services agreement dated 1.4.2004 entered into with GIL. The relevant terms and conditions of this agreement are as under:

THIS SERVICES AGREEMENT ("Agreement") is entered into as of 1st April, 2004 (the "Effective Date"), by and between Google Ireland Limited, a corporation organized under the laws of Ireland ("Ireland") and having its office at Seagrave House, 19120 Earlsfort Terrace, Dublin 02, Ireland, and Google Online India Private Limited, a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Prestige Sigma, 1st Floor, NO.3 Vittal Mallya Road, Bangalore 560001, India ('Google India') and having a branch office at RMZ Future, Block A, 4th Floor Plot No. 14, Road No.2, Hitec City Layout, Madhapur village, Ranga Reddy District, Hyderabad 500081, Andhra Pradesh.

A. WHEREAS, Google Ireland is in the business of developing, licensing, selling, marketing and supporting certain Internet search, advertising system and information organization and management technology products and services to provide information, advertising, search and related services via the Internet, corporate intranets and private networks (collectively, 'Products '); and

B. WHEREAS, Google Ireland desires to avail services, relating to, information technology. Information technology enabled services and software development related services from Google India as per the terms and conditions of this Agreement; and

C WHEREAS, Google India has expertise in rendering the above services and is willing to render such services for Google Ireland as an independent contractor on the terms and conditions of this Agreement:

NOW THEREFORE, in consideration of the mutual covenants and conditions contained herein the parties agree as follows:

1. DEFINITIONS

1. 1 'Affiliate' shall mean any Person, whether de Jure or de facto, that directly or indirectly participates in the capital. control or management of either party or is under common

ownership with a party to this Agreement or other entity actually controlled by, controlling, or under common control with a party to this Agreement.

1.2 "Confidential Information" shall mean all data and information of a confidential nature, including know-how and trade secrets, relating to the business, the affairs, the products, the development or other projects or services of Google Ireland or its-suppliers or its affiliate, including but not limited to Intellectual Property. Confidential Information may be communicated orally, in writing, or in any other recorded, electronic or tangible form. Data and information shall be considered to be Confidential Information if (i) Google Ireland has marked them as such; (ii) Google Ireland, orally or in writing, has advised Google India of their confidential nature; or (iii) due to their character or nature, a reasonable person in a like position and under like circumstances would treat them as secret and confidential. Confidential Information does not include information: (i) that is in the public domain through no fault of the receiving party, (ii) that was previously known by receiving party, as established by written records of the receiving party prior to receipt of such information from the providing party or (iii) that was lawfully obtained by the receiving party from a third party without any obligations of confidentiality to Google Ireland.

1.3 "Derivative works Work" shall mean (i) for copyrightable or copyrighted material, any modification, derivative works work (as defined in 17 USC. §101), translation, abridgment, revision or other form in which such material may be recast, transformed or adapted, (ii) for patentable or patented material, any improvement thereon, and (iii) for material protected by trade secret, any new material derived from such existing trade secret material, including new material which may be protected to copyright, patent and/or trade secret.

1.4 "Documentation" shall mean any and all information, written or otherwise, provided by Google Ireland to Google India describing the Intellectual Property or the Products and any updated, improved or modified version(s) of such materials including information contained in published written materials, on magnetic media or communicated by electronic means.

1.5 "intellectual Property" shall mean all intellectual, proprietary, and/or intangible property rights constituting, embodied in, pertaining to, used in or with respect to the business of Google Ireland, the Products, or the provision of related services and all tangible embodiments hereof,

wherever located, including but not limited to the following: (i) all trademarks, trade names, service marks, logos or trade dress, including all registrations and applications therefor; (ii) all copyrights. Moral Rights (as defined below), and other rights in works of authorship including all registrations and applications therefor; (iii) all patents and patent applications. patentable Ideas, Inventions, innovations and improvements; (iv) all know-how and trade secrets; v) all design and code documentation, methodologies, processes, design information, design flows, encoding techniques, applications, product information. Formulae, engineering specifications, technical data, testing procedures, drawings and techniques and other proprietary information and materials of any kind; (vi) all software programs in both source code and object code format. including all testing software and software tools: (vii) all documentation, records, databases, drafts, designs, codes, drawings and algorithms: and (viii) all confidential and proprietary information related to any of (i) through (vii) above

1.10 "Software Embodiments" shall mean all designs, discoveries, inventions. Products. procedures, improvements, developments, drawings, notes, Documentation. information. materials, Intellectual Property and Derivative works Works made, conceived or developed by Google India alone or with others which result from or relate to the Services

1.11 "Software Technology" shall mean all Intellectual Property, Confidential Information, Documentation, Derivative works Works and other technical data used by Google Ireland that are required, used or appropriate for the design and development of Products. including the reproduction, use, testing, operation, maintenance and service of such Products.

2. SERVICES

2.1 Request Google India hereby agrees to perform certain information technology, information technology enabled services and software development services, as requested by Google Ireland from time to time, with respect to Products, utilizing Google Ireland Software Technology and other appropriate technology from Google Ireland or third parties which may be properly used for these purposes. Google Ireland will specify the information technology, information technology enabled services and software development services to be performed, the Products to be worked on or used, the time line for completion and the specific results to be achieved (the Services").

2.2 Performance. Upon agreement between Google Ireland and Google India as to the Services and completion date for a particular Services project, Google India will perform the Services. Google India agrees to use commercially reasonable efforts to perform the Services in a timely fashion and as described to it by Google Ireland. Google India may not subcontract work under this Agreement unless specifically and to the extent set forth in the Services. Google India shall, at all times, be responsible for work done by its subcontractors within the scope of this Agreement as it is for work done by its own employees. At the option of Google Ireland, Google India shall make Google Ireland a party to the agreements that Google India may execute with its subcontractors and Google Ireland shall have the right to pre-approve the terms and conditions of such agreements

5. OWNERSHIP

5.1 Intellectual Property. Google India acknowledges the exclusive right, title and interest of Google Ireland and its licensors and/or suppliers in and to any and all Confidential Information, Intellectual Property, Software Technology and Documentation, and Google India will not at any time do or cause to be done any act or thing impairing or tending to impair any part of said right, title and interest. Google India acknowledges and agrees that all such Confidential Information, Intellectual Property, Software Technology and Documentation shall remain the exclusive property of Google Ireland and, as applicable, its licensors and/or suppliers.

5. 2 Ownership of Derivative works Works and Software Embodiments. Google India shall keep Google Ireland promptly informed of Google India's development of any Derivative works Works and Software Embodiments and hereby irrevocably agrees that all such Derivative works Works and Software Embodiments shall forever be the sole and exclusive property of Google Ireland throughout the world from the date of its creation. As between Google Ireland and Google India no additional action shall be required to vest all right, title and ownership of such Derivative works Works and Software Embodiments in Google Ireland. Google India shall furnish to Google Ireland all such Derivative works Works and Software Embodiments developed by Google India as soon as they become available. From time to-time, promptly upon receipt of Google Ireland's request, Google India shall provide Google Ireland with assignments, in substantially the

form of Exhibit B hereto to facilitate Google Ireland's perfection of its rights in the Derivative works Works and the Software Embodiments in any jurisdiction in the world. Google India shall also promptly make available to Google Ireland all Residuals. If Google India has any rights to Derivative works Works or Software Embodiments that cannot be assigned to Google Ireland under law. Google India hereby waives the enforcement of such rights; and if Google India has any rights which cannot be assigned or waived under law, Google India hereby grants to Google Ireland an exclusive, irrevocable, perpetual, worldwide, transferable, fully paid licence, with rights to sub license and assign, to all such rights. Google India shall enter into agreements with its Representatives sufficient to permit Google India to make the foregoing grant of rights.

6. CONFIDENTIAL INFORMATION

6.1 Access and Use of Confidential Information. During the course of performance of this Agreement, Google Ireland will disclose certain Confidential Information to Google India solely to permit Google India to perform its obligations under this Agreement. Except as otherwise provided in this Agreement, Google India agrees that such Confidential Information shall be kept secret by Google India during the term of this agreement and after the expiration hereof Google India shall refrain from using or exploiting any and all Confidential Information for any purposes or activities other than those contemplated in this Agreement.

6.2 Agreement Not to Disclose Confidential Information. Google India shall not disclose or facilitate disclosure of such Confidential Information to any Person without the prior consent of Google Ireland, except to its Representatives, and then only to the extent necessary for the performance of the activities contemplated by this Agreement. Google India shall cause each of its Representatives with access to the Confidential Information to enter into a nondisclosure agreement in a form approved by Google Ireland. Google India shall use the highest standard of care currently employed by any developer or distributor of high technology products in order to avoid disclosure or misappropriation of such Confidential Information.

6.3 Ownership and Return of Confidential Information. All files, lists, records, documents, drawings, specifications,

equipment and computer programs which incorporate or refer to all or a portion of the Confidential Information shall remain the sole property of Google Ireland or its licensors and suppliers. Such materials shall be promptly returned: (i) upon Google Ireland's reasonable request, or (ii) in accordance with Section 12 upon termination of this Agreement, whichever is earlier.

12.5 Rights and Duties of Termination.

(a) Upon termination or expiration of this Agreement:

(i) Google India shall have the right to retain any sums already paid by Google Ireland under this Agreement and Google Ireland shall pay all sums accrued, but not yet paid, that are due under this Agreement as of the date of such termination;

(ii) Google India shall discontinue all use of the Confidential Information, Documentation, Intellectual Property and other Software Technology and shall have no further right with respect thereto.

(iii) Google India shall (except as specified in subsection (b) below) immediately return to Google Ireland or (at Google Ireland's request) destroy, all copies of the Confidential Information, Documentation and other Software Embodiments, in its possession or control. Google India hereby expressly waives and agrees not to assert any right of detention whatsoever with respect to the foregoing.'

16. Prior to December 2005, an Indian Advertiser could get into a contract with GIL only, for purchasing online advertisement space. However, to accommodate Indian Advertiser(s) desirous to pay in Indian Rupees instead of foreign currency, GIL entered into the Google AdWords Program Distribution Agreement dated 12.12.2005 with the assessee, whereunder the assessee was appointed as a non-exclusive distributor of online advertisement space in India. In terms thereof, the assessee set up its "Distribution Segment" for carrying out purchase and re-sale of online advertisement

space to Indian Advertisers. However, Indian Advertisers who were willing to pay in foreign currency, continued to transact directly with GIL. The Google AdWords Program and its features remains the same whether the Advertiser in India purchases online advertisement space from GIL or its authorised distributor i.e., the assessee. The only difference is where Indian Advertiser purchases from the assessee, it pays in INR whereas where Indian advertiser purchases from GIL, it pays in foreign currency.

17. In a case where the assessee is involved in purchase and re-sale of online advertisement space to Advertiser and if such Advertiser finds it difficult to use Google AdWords Program, he can get guidance and assistance from the employees of the assessee working under the Distribution Segment. However, substantial portion of Indian Advertisers in India prepare their draft advertisements themselves, with the aid of the Google AdWords Program itself. All this is completely free and is open to any member of the public. No payment is made for any use of the Google AdWords Program. In fact, even after using the Google AdWords Program and formulating / displaying an online advertisement, no payment is made by the Advertiser, unless the Ad is clicked by an end-user. Relevant terms and conditions of the Distribution Agreement are as under:-

**'Amended and Restated Google AdWords Program
Distribution Agreement.'**

This Amended and Restated Google AdWords Program

Distribution Agreement ("Agreement") is entered into as of December 12, 2005 (the "Effective Date") by and between Google Ireland Limited, with offices at 1st & 2nd Floors Gordon House, Barrow Street, Dublin 4 Ireland ("Google"), and Google Online India Private Limited, a company incorporated under the Indian Companies Act, 1956 and having its registered office at 1st Floor, Prestige Sigma, No. 3 Vittal Mallya Road, Bangalore 560 001 ("Distributor").

WHEREAS

1. Google wishes to enter into the Distribution Agreement for its AdWords Program with Distributor;

2. Whereas Google Inc., a Delaware corporation, and Distributor entered into a Google AdWords Program Distribution Agreement, dated as of December 12, 2005.(the "Prior Agreement"), and Google Inc. assigned its rights and obligations under the Prior Agreement to Google; and

3. Google and Distributor desire to terminate the Prior Agreement and further desire that this Agreement supersede and replace the Prior Agreement in its entirety;

NOW, THEREFORE, in consideration of the promises and the mutual covenants, agreements, representations and warranties hereinafter set forth, Google and Distributor hereby agree as follows

1. Definitions. The following capitalized terms shall have the meanings set forth below.

1.1 "Advertiser" means an individual or business resident or having its principal place of business located within the Territory (as defined herein), where principal place of business is determined by the place of an entity's registration.

1.2 "AdWords Program" means the advertising program currently offered by Google under the name "AdWords."

1.3 "Brand Features" means the trade names, trademarks, service marks, logos, domain names, and other distinctive brand features of each party, respectively, as secured by such party from time to time.

1.4 "Designated Contact" means those contacts designated by each party as the point of contact or contacts for a particular function area related to this Agreement.

1.5 "Google Brand Features" means the Google trade names, trademarks, service marks, logos, domain names, and other distinctive brand features, with some but not all examples at

“<http://www.google.com/ippermissions/trademarks.html>” (or such other URL that Google may provide from time to time), and such other trade names, trademarks, service marks, logos, domain names, or other distinctive brand features that Google may provide to Distributor for use solely under this Agreement.

1.6 "Intellectual Property Rights" shall mean any and all rights existing from time to time under patent law, copyright law, semiconductor chip protection law, moral rights law, trade secret law, trademark law, unfair competition law, publicity rights law, privacy rights law, and any and all other proprietary rights, as well as, any and all applications, renewals, extensions, restorations and re-instatements thereof now or hereafter in force and effect worldwide.

1.7 "Keywords" means words chosen by an advertiser through the AdWords Program for a given set of one or more advertisements that are used to target those advertisements to potential customers.

1.10 "User Data" means all data and information provided by users via the AdWords Program, including all registration data, names, email addresses, other addresses, contact information, and other identifying information.

2. Appointment of Territory and Distributor Obligations.

2.1 Appointment of Territory. Google appoints Distributor as a non-exclusive authorized Distributor of Google AdWords Program to Advertisers, all under and in accordance with the terms and conditions set forth in this Agreement. Distributor shall conduct its business for its own account, in its own name, and not as an agent, employee, partner, or franchisee of Google. Distributor may not solicit business from and shall not distribute AdWords Program to (even if unsolicited), any entity that does not have a principal place of business within the Territory. For the avoidance of doubt, an entity's principal place of business will be determined by the place of such entity's registration. All inquiries by any such entity for sale of advertising space shall be referred to the designated Google contact within three (3) business days of receipt by Distributor of such inquiry.

2.2 Distribution & Marketing of AdWords Program. Distributor agrees to market and distribute AdWords Program to Advertisers in the designated Territory, within the broad guidelines provided by Google, with its reasonable commercial

expertise and own sales force and customer service infrastructure. Distributor shall not subcontract any of its functions or obligations under this Agreement to any third parties. Distributor shall perform its obligations hereunder in a professional and workmanlike manner consistent with reasonably applicable industry standards and in accordance with this Agreement. Distributor will distribute AdWords Program in accordance with the training provided by Google. Failure to do so would constitute a material breach of this Agreement and shall be grounds for termination under section 9.3.

2.3 AdWords Program Sign Up Process. Distributor shall be responsible for uploading all Advertiser information that is required by Google for participation in the AdWords Program.

2.4 Licences; Approvals. Distributor shall be responsible for obtaining all licences and permits and for satisfying all formalities as may be required to enter into this Agreement and to perform its obligations in accordance with then-prevailing laws and regulations, including without limitation those necessary to enable Distributor to make payments to Google in US dollars. Distributor will promptly secure all governmental approvals as may be required in the Territory or performance of its obligations under this Agreement.

2.5 Compliance with United States and Other Applicable Law; Conduct of Business. Distributor will comply with all United States and local laws and regulations applicable to the distributor of the goods and services, including but not limited to the Foreign Corrupt Practices Act and US regulations of international boycotts. Distributor shall (a) conduct business in a manner that reflects favorably at all times on the AdWords Program and on Google's goodwill and reputation, and (b) agrees to adhere to the minimum levels of service as specified in Exhibit C. Breach of this Section 2. 5 will constitute a material breach of this Agreement.

2. 6 After-Sales Support. Distributor will provide after-sales services to Advertisers in accordance with the broad instructions, training and standards of Google.

3. Google Obligations.

3.1 Advertising Space. Google agrees to provide advertising space through the AdWords Program for distribution by Distributor to Advertisers as set forth herein.

3.2 Training. Google agrees to train Distributor.

3.3 Non-Exclusivity. This Agreement shall constitute a non-

exclusive relationship between Google and Distributor.

5. Reporting Requirements.

5.1 Information Provided by Google. Google will make available to Distributor online information about Advertiser activity, on an aggregate and individual basis. which information shall contain include (i) the total number of Keywords purchased by Advertisers, (ii) the number of impressions of Advertisers' advertisement delivered across the Google network, (iii) the number of clicks delivered across the Google network for Advertisers' advertisement an (iv) the cost of clicks delivered across the Google network for Advertisers' advertisement. Distributor must set up AdWords Program advertising accounts in order to receive such online information. Google reserves the right, but has no obligation, to send reports about an Advertiser's activity directly to such Advertiser. If an Advertiser makes a request to Distributor to receive a user name and password to access such Advertisers individual AdWords Program account activity, Distributor' will grant such request after approval from Google.

6. Brand features. Each party shall own all right, title and interest, including without limitation all Intellectual Property Rights, relating to its Brand Features. Google grants to Distributor nonexclusive and non sub-licensable licence during the Term to display Google Brand Features solely for the purpose of Distributor's marketing and distribution of AdWords Program under the terms and subject to the conditions set forth in this Agreement. Notwithstanding the foregoing, Distributor will submit all materials of any kind containing the Brand Features) to Google for written approval prior to release to the public. Furthermore, Distributor agrees to adhere to Google's then-current Brand Features use guidelines, and any content referenced or included therein, which may be found at the following URL: <http://www.google.com/permissionslguidelines.html> (or such other URL that Google may provide from time to time) and to such other guidelines or restrictions provided by Google in writing to Distributor in connection herewith. Except as set forth in this Agreement, Distributor shall not acquire any right, title or interest in or to the Google Brand Features. All use by Google of Distributor Brand features (including any goodwill associated therewith shall inure to the benefit of Distributor

and all use by Distributor of Google Brand Features (including any goodwill associated therewith) shall inure to the benefit of Google. No party shall challenge or assist others to challenge the Brand Features of the other party (except to protect such party's rights with respect to its own Brand Features) or the registration thereof by the other party, nor shall either party attempt to register any Brand Features or domain names that are confusingly similar to those of the other party.

7. Confidentiality; Limitation on Public Announcements. Disclosure of confidential and/or proprietary information disclosed hereunder, including the User Data (including any aggregated User Data), the existence and content of this Agreement, and any information provided pursuant to this Agreement, shall be governed by the Google Standard Mutual Non-Disclosure Agreement (introductory paragraph and Sections 1 through 12, inclusive), executed by the parties prior to or concurrently with this Agreement (the "NDA"), which is attached hereto as Exhibit B, and which is incorporated by reference herein. Each party acknowledges and agrees that it will obtain the other party's prior written approval, which shall include approval of any proposed text, before making any public announcements or communication, including, but not limited to, any press releases, online publishing or direct mailings concerning or related to the existence or terms of this Agreement. In addition, Distributor agrees to waive all claims against and release Google (and its affiliates, partners and representatives) from any claims or losses in connection with any above publications made by Google.

8. User Data. Google owns all right, title, and interest in and to all information and data, including the User Data collected by Google relating to Advertisers in connection with the provision of the AdWords Program. Distributor shall maintain all User Data in accordance with local law and regulation applicable to such data. and shall implement policies and procedures with respect to the User Data that are at least as protective of the rights of the Advertisers as is provided in the Google Privacy Policy set forth at <http://www.google.com/privacy.html> and all relevant policies implied therein

9.4 Effect of Termination. Upon any termination or expiration of this Agreement, (i) all rights and licences granted by one party to the other. including but not limited to rights to use the

other party's Brand Features shall cease immediately, (ii) each party shall promptly return to the other party, or destroy and certify the destruction of all Confidential Information as defined in the NDA and Section 7 of this Agreement) of the other party, and (iii) except for a termination pursuant to Section 9.2 or Section 9.3 above. Google will continue to serve advertisements as provided in this Agreement up to the earlier date to occur of (x) the date that the services provided by Google exhaust any amounts prepaid by Distributor, or (y) the date that is thirty (30) days after expiration or termination of the Agreement. Termination or expiration of this Agreement. in part or in whole. shall not limit either party from pursuing other remedies available to it, nor shall Distributor be relieved of its obligation to pay all charges that have accrued or are otherwise owed under this Agreement. Termination of this Agreement does not prevent Distributor from participating in the AdWords Program pursuant to the general terms and conditions made publicly available by Google from time to time in its sole discretion.

EXHIBIT C

Service Level Agreement

Distributor shall be solely responsible for providing all customer services to Advertisers. according to the procedures, and in compliance with standards, provided by Google. All Advertisers shall be instructed by Distributor to contact Distributor directly for support and not to communicate directly with Google.

Distributor agrees that it shall provide at least the following minimum levels of service: Business hours phone support to all Advertisers.

E-mail queries from Advertisers shall be responded to within one (1) business day with immediate resolution of any issues when possible.

Issues that cannot immediately be resolved by Distributor based on training and procedures provided under the Agreement must be communicated promptly to Google by Distributor and Google will assist Distributor in determining the best solution.

Google agrees that it shall provide at least the following minimum levels of service to Distributor:

Customer Queries (as defined below), up to the E-Mail

Escalation Limit (as defined below), shall be responded to within one (1) business day

"Customer Queries" shall mean e-mails sent from Distributor to Google related to Advertiser issues, but excluding general communications between Distributor and Google (e.g. billing questions, training information) and technical issues that only Google can solve.

"E-Mail Escalation Limit" shall equal five (5) e-mails per month for every one hundred (100) Advertisers serviced by Distributor, provided, however that the E-Mail Escalation Limit shall only apply beginning thirty (30) days after the completion of tile training.

Timing for responses to Customer Queries from Distributor beyond the E-Mail Escalation Limit shall be at Google's sole discretion.

Distributor agrees that Google will have the right, to review samples of communications sent to Advertisers to assess the quality of responses and modify communications accordingly. Google shall also have the right to send questionnaires to Distributor's customers to ensure that Distributor is providing an adequate level of service.

Mutual Non-Disclosure Agreement

This Mutual Non-Disclosure Agreement ("Agreement") is made and entered into between Google Ireland Limited, for itself and its subsidiaries and affiliates ("Google"), and "Participant" identified below, individually referred to as a "Party" and collectively referred to as the "Parties". The Parties wish to exchange Confidential Information (as defined below in Section 2) for the following purpose(s): a) to evaluate whether to enter into a contemplated business transaction; and b) if the Parties enter into an agreement related to such business transaction, to fulfill each Party's confidentiality obligations to the extent the terms set forth below are incorporated therein (the "Purpose"). The Parties have entered into this Agreement to protect the confidentiality of information in accordance with the following terms:

- 1. The Effective Date of this Agreement is December 12, 2005.*
- 2. In connection with the Purpose, a Party may disclose certain information it considers confidential and/or proprietary ("Confidential Information ") to the other Party including, but not limited to, tangible, intangible, visual, electronic, present, or future information such as: (a) trade*

secrets; (b) financial information, including pricing; (c) technical information, including research, development, procedures, algorithms, data, designs. and know-how; (d) business information, including operations, planning, marketing interests, and products; (e) the terms of any agreement entered into between the Parties and the discussions, negotiations and proposals related thereto; and (f) information acquired during any facilities tours.

3. The Party receiving Confidential Information (a "Recipient") will only have a duty to protect Confidential Information disclosed to it by the other Party ("Discloser"): (a) if it is clearly and conspicuously marked as "confidential" or with a similar designation; (b) if it is identified by the Discloser as confidential and/or proprietary before, during. or promptly after presentation or communication; or (c) if it is disclosed in a manner in which the Discloser reasonably communicated, or the Recipient should reasonably have understood under the circumstances including without limitation those described in Section 2 above, that the disclosure should be treated as confidential whether or not the specific designation "confidential" or any similar designation is used.

4. A Recipient will use the Confidential Information only for the Purpose described above. A Recipient will use the same degree of care. but no less than a reasonable degree of care, as the Recipient uses with respect to its own information of a similar nature to protect the Confidential Information and to prevent: (a) any use of Confidential Information in violation of this agreement; and/or (b) communication of Confidential Information to any unauthorized third parties. Confidential Information may only be disseminated to employees, directors, agents or third party contractors of Recipient with a need to know and who have first signed an agreement with either of the Parties containing confidentiality provisions substantially similar to those set forth herein.

6. This Agreement imposes no obligation upon a Recipient with respect to Confidential Information that: (a) was known to the Recipient before receipt from the Discloser; (b) is or becomes publicly available through no fault of the Recipient; (c) is rightfully received by the Recipient from a third party without a duty of confidentiality; (d) is independently developed by the Recipient without a breach of this Agreement; (e) is disclosed by the Recipient with the Discloser's prior written approval; or (f) is required to be

disclosed by operation of law, court order or other governmental demand ("Process"); provided that (i) the Recipient shall immediately notify the Discloser of such Process; and (ii) the Recipient shall not produce or disclose Confidential Information in response to the Process unless the Discloser has: (a) requested protection from the legal or governmental authority requiring the Process and such request has been denied, (b) consented in writing to the production or disclosure of the Confidential Information in response to the Process, or (c) taken no action to protect its interest in the Confidential Information within 14 business days after receipt of notice from the Recipient of its obligation to produce or disclose confidential information in response to the Process

11. No Party acquires any intellectual property rights under II Agreement (including, but not limited to, patent, copyright, and trademark rights) except the limited rights necessary to carry out the Purpose as forth in this Agreement.

12. Each Party acknowledges that damages for improper disclosure Confidential Information may be irreparable; therefore, the injured Party is entitled to seek equitable relief, including injunction and preliminary injunction, in addition to all other remedies available to it.

18. The standard agreement entered into between the assessee and the advertisers is as under:-

Google Advertising Agreement

Customer

Advertising third party

Advertiser

Advertising third party

Invoicing address

Name and address

Customer will promptly notify Google of any change in address and contact name information for billing purpose.

Agreement name.

Agreement type

Agreement Id

Purchase order #

Target start date

End date

Agreement budget

Service tax

Billing Method

Payment Terms (payment due within the following number of days from invoice date)

When applicable, Customer's purchase order number references above is required and must be provided by customer for Google Invoicing

This Adwords Agreement ('SA') shall be governed by terms and conditions ('Terms and Conditions') available at the following URL: <http://www.google.co.in/ladsladwordsterms.html>

All terms contained in the Terms and Conditions are made a part of this SA through incorporation by reference. The signatory of this Service Agreement represents that she has read and agrees to such Terms and Conditions and the terms of SA. There shall be no force or effect to any different or additional terms of any related SA, purchase order or sales document.

Google may decide at any time, in its sole discretion, to change, suspend or discontinue all or any aspect of its advertising programs, including their availability, and shall notify Customer of material changes and discontinuations. Google shall have no liability for such decision.

By signing below, Customer represents and warrants that all client information, including but not limited to credit card information and invoicing information, provided herein is complete and accurate and that no additional information is necessary for payment of Google invoices.

Customer's campaign(s) may go live upon posting. at which time Google shall send Customer an email notifying customer it has 72 hours to modify Customer's campaign keywords and settings as posted. During those 72 hours, Google is only liable to Customer for keywords or settings discrepancies if Customer can certify to Google by its contemporaneous documentary evidence that Google posted keywords or settings other than those requested by Customer.

The account (as modified by Customer, or if unmodified, as initially posted) will be deemed approved by Customer 72 hours after it initially posts.

Terms of Payment. If Google, at any time, deems itself insecure with respect to Customer's ability to meet its financial obligations under this SA, Google shall have the right to

require pre-payment of the total amount due for the SA in advance of the Target Start Date or as otherwise requested by Google. Customer must remit all payments under this SA to Google by the due date indicated on the Invoice(s). In the event of nonpayment, Google reserves the right to immediately terminate this SA upon written notice to Customer and immediately suspend the entire Customer account. Late payments are subject to interest payments as set forth in the Terms and Conditions.

Methods of Billing:

Monthly Invoicing: Customer will be billed at the end of the month, based on the actual number of clicks or other billing methods Customer may choose to participate in as described in the FAQ (e.g. cost per impression programs). Customer's credit must first be approved by Google in order for this billing method to apply.

Prepayment: Customer will pay the total agreement budget prior to any campaign launch. Acceptance and terms of prepayment are at Google's sole discretion. Prepayment does not obligate Google to deliver any Ad Words ads notwithstanding acceptance of prepayment by Google. Unused portions of prepayments will be returned to Customer after the end date to the extent that there are no amounts still due to Google.

Right To Reject Advertisement: All advertisements submitted by Customer are subject to Google's approval. Google reserves the right to review, reject or remove any SA, advertisement, or URL link, except that Google will not cancel placement of an SA, advertisement, or URL link due to inventory demand for other advertisers. Customer pre-authorises Google to modify or rearrange the text elements in advertising creative submitted by Customer.

Please carefully read these Google Advertising Agreement terms and conditions ("Agreement") before selecting 'I Accept' and submitting your selection. By selecting 'I Accept', you agree to be legally bound by the terms of this agreement. If you do not agree to the terms of this agreement please select "I Decline" and submit your selection.

Customer signature

Name

Title

Company

Google Signature

Name

Title
Company.”

19. The Standard Google India Private Limited Advertising Program Terms are as under:

“Google India Private Limited Advertising Program Terms

These Google India Private Limited Advertising Program Terms ("Terms") are entered into by, as applicable, the customer signing these Terms or any document that references these Terms or that accepts these Terms electronically ("Customer") and Google India Private Limited ("Google"). These Terms govern Google's advertising program(s) ("Program") as further described in the applicable Program's frequently asked questions at www.google.com (the "FAQs") and, as applicable, Customer's participation in any such Program (s), Customer's online management of any advertising campaigns ("Online Management") and/or any insertion orders ("IO" executed by and between the parties (together the "Agreement"). Google and Customer hereby agree and acknowledge:

1. Policies. Program use is subject to all applicable Google and Partner ad specification requirements and policies, including without limitation the Editorial Guidelines (adwords.google.com/select/guidelines.html) Google Privacy Policy (www.google.com/privacy.html) and Trademark Guidelines (www.google.com/permissions/guidelines.html), (collectively, "Policies"). Policies may be modified any time. Customer shall direct only to Google communications regarding Customer ads on Partner Properties. Some Program features are identified as "Beta," "Ad Experiment," or otherwise unsupported ("Beta Features"). To the fullest extent permitted by law, Beta Features are provided "as is" and at Customer's option and risk. Customer shall not disclose to any third party any information from Beta Features, existence of non-public Beta Features or access to Beta Features. Google may, at its sole discretion and without any prior consent from the Customer, modify ads to comply with any Policies.

2. The Program: Customer is solely responsible for all: (a) ad targeting options and keywords (collectively "Targets") and all ad content, ad information, and ad URLs ("Creative"), whether generated by or for Customer; and (b) web sites, services and landing pages which Creative links or directs viewers to, and advertised services and products

(collectively "Services"). Customer shall protect any Customer passwords and takes full responsibility for Customer's own, and third party, use of any Customer accounts. Ads may be placed on (y) any content or property provided by Google ("Google Property"), and unless opted-out by Customer (z) any other content or property provided by a third party ("Partner") upon which Google places ads ("Partner Property"). With respect to Adwords online auction-based advertising, Google may send Customer an email notifying Customer it has 72 hours ("Modification Period") to modify keywords and settings as posted. The account (as modified by Customer otherwise as initially posted) is deemed approved by Customer after the Modification Period, and Google is only liable to Customer for discrepancies if Customer can certify by contemporaneous documentary evidence that Google posted ads not approved by Customer. With respect to all other advertising, Customer must provide Google with all relevant Creative by the due date set forth in that advertising Program's applicable FAQ or as otherwise communicated by Google. Customer grants Google permission to utilize an automated software program to retrieve and analyze websites associated with the Services for ad quality and serving purposes, unless Customer specifically opts out of the evaluation in a manner specified by Google. Google or Partners may reject or remove any ad or Target any time for any or no reason. Google may modify the Program or these Terms at any time without liability and your use of the Program after notice that Terms have changed indicates acceptance of the Terms.

3. Cancellation. Customer may independently cancel advertising itself online through Customer's account. if any, or, if such online cancellation functionality is not available, with prior written notice to Google, including electronic mail. AdWords online auction-based advertising cancelled online will cease serving upon cancellation. All other advertising may be subject to Google's ability to re-schedule reserved inventory or cancel advertisements already in production. Cancelled advertisements may be published despite cancellation if cancellation of those ads occurs after any applicable commitment date as set forth in advance by the Partner or Google in which case Customer must pay for those ads. Google may cancel immediately any 10, any of its advertising Programs, or these Terms at any time with notice, in which case Customer will be responsible for any ads already run. Google may modify any of its advertising Programs at any time without liability. Sections 1, 2, 3,5, 6, 7, 8, and 9 will survive any expiration or termination of this Agreement.

4. *Prohibited Uses; License Grant; Representations and Warranties.* Customer shall not, and shall not authorize any party to: (a) generate automated, fraudulent or otherwise invalid impressions, inquiries, conversions, clicks or other actions; (b) use any automated means or form of scraping or data extraction to access, query or otherwise collect Google advertising related information from any Adwords website or property except as expressly permitted by Google; or (c) advertise anything illegal or engage in any illegal or fraudulent business practice. Customer represents and warrants that it holds and hereby grants Google and Partners all rights (including without limitation any copyright, trademark, patent, publicity or other rights) in Creative. Services and Targets needed for Google and Partner to operate Google's advertising programs for Customer (including without limitation any rights needed to host, cache, route, transmit, store, copy, modify, distribute, perform, display, reformat, excerpt, analyze, and create algorithms from and derivative works of Creative or Targets) in connection with this Agreement ("Use"). Customer represents and warrants that LV) all Customer information is complete, correct and current; and (z) any Use hereunder and Customer's Creative, Targets, and Customer's Services will not violate or encourage violation of any applicable laws, regulations, code of conduct, or third party rights (including, without limitation, intellectual property rights). Violation of the foregoing may result in immediate termination of this Agreement or customer's account without notice and may subject Customer to legal penalties and consequences.

5. *Disclaimer and Limitation of Liability.* To the fullest extent permitted by law. GOOGLE DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION FOR NONINFRINGEMENT, SATISFACTORY QUALITY, MERCHANTABILITY AND FITNESS FOR ANY PURPOSE. To the fullest extent permitted by law, Google disclaims all guarantees regarding positioning or the levels or timing of (i) costs per click, (ii) click through rates, (iii) availability and delivery of any impressions, Creative, or Targets on any Partner Property, Google Property, or section thereof, (iv) clicks (v) conversions or other results for any ads or Targets (vi) the accuracy of Partner data (e.g. reach, size of audience, demographics or other purported characteristics of audience), and (vii) the adjacency or placement of advertisements within a Program. EXCEPT FOR indemnification AMOUNTS PAYABLE TO THIRD PARTIES HEREUNDER AND CUSTOMER'S BREACHES OF SECTION 1, to the fullest extent permitted by law: (a) NEITHER PARTY

WILL BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INDIRECT, EXEMPLARY, OR PUNITIVE DAMAGES (INCLUDING WITHOUT LIMITATION LOSS OF PROFITS, REVENUE, INTEREST, GOODWILL, LOSS OR CORRUPTION OF DATA OR FOR ANY LOSS OR INTERRUPTION TO CUSTOMER'S BUSINESS) WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE) OR ANY OTHER LEGAL THEORY, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY; AND (b) EACH PARTY'S AGGREGATE LIABILITY TO THE OTHER IS LIMITED TO AMOUNTS PAID OR PAYABLE TO GOOGLE BY CUSTOMER FOR THE AD GIVING RISE TO THE CLAIM. Except for payment obligations, neither party is liable for failure or delay resulting from a condition beyond the reasonable control of the party, including but not limited to acts of God, government, terrorism, natural disaster, labor conditions and power failures.

6. Agency. Customer represents and warrants that (a) it is authorized to act on behalf of and has bound to this Agreement any third party for which Customer advertises (a "Principal") (b) as between Principals and Customer, the Principal owns any rights to Program information in connection with those advertisements, and (c) Customer shall not disclose Principal's Program information to any other party without Principal's consent.

7. Payment Customer shall be responsible for all charges up to the amount of each 10, or as set in an online account, and shall pay all charges in Indian Rupees or in such other currency as agreed to in writing by the parties. Unless agreed to by the parties in writing, Customer shall pay all charges in accordance with the applicable 10 or Program FAQ. Late payments bear interest at the rate of 1.5% per month (or the highest rate permitted by law, if less). Charges are exclusive of taxes, cesses or other applicable levies. Customer is responsible for paying (y) all applicable taxes, cesses and levies, government charges, and (z) reasonable expenses and attorneys fees Google incurs collecting late amounts. To the fullest extent permitted by law, Customer waives all claims relating to charges unless claimed within 60 days after the charge (this does not affect Customer's credit card issuer rights). Charges are solely based on Google's measurements for the applicable Program, unless otherwise agreed in writing. To the fullest extent permitted by law, refunds (if any) are at the discretion of Google and only in the form of advertising credit for only Google Properties. Nothing in these Terms or an 10 may obligate Google to extend credit to any

party. Customer acknowledges and agrees that any credit card and related billing and payment information that Customer provides to Google may be shared by Google with companies who work on Google's behalf, such as payment processors and/or credit agencies, solely for the purposes of checking credit, effecting payment to Google and servicing Customer's account. Google may also provide information in response to valid legal process, such as subpoenas, search warrants and court orders, or to establish or exercise its legal rights or defend against legal claims. Google shall not be liable for any use or disclosure of such information by such third parties.

8. *Indemnification.* Customer shall indemnify without limit and defend Google, its Partners, agents, affiliates, and licensors from any third party claim or liability (collectively, "Liabilities"), arising out of Use, Customer's Program use, Targets, Creative and Services and breach of the Agreement. Partners shall be deemed third party beneficiaries of the above Partner indemnity. Without limitation to the generality of the foregoing, Customer shall indemnify Google against any Liabilities or losses arising out of any claim based on any act or allegation of infringement of intellectual property, misrepresentation or defamation.

9. *Arbitration.* The parties agree that they will try in good faith to settle within thirty (30) days any dispute, controversy or claim arising out of relating to or in connection with this Agreement ("Dispute"). If the Dispute is not resolved within thirty (30) days after such Dispute arose, such Dispute must be referred to and finally resolved by arbitration, to which the Parties hereto expressly agree and submit. The arbitration will be submitted to the International Centre for Dispute Resolution of the American Arbitration Association ("AAA") and conducted in accordance with the Commercial Arbitration Rules of the AAA in force as of the date of this Agreement ("Rules"). Pre-hearing information exchange shall be limited to the reasonable production of relevant, non-privileged documents and carried out expeditiously. There will be one arbitrator selected by mutual agreement of the Parties. The arbitrator will not act as amiable compositeur or ex aequo et bono. It is the intent of the parties that, barring extraordinary circumstances, arbitration proceedings will be concluded within 60 days from the date the arbitrator is appointed. The arbitrator may extend this time limit in the interests of justice. Failure to adhere to this time limit shall not constitute a basis for challenging the award. The arbitration will be conducted in English and the place of arbitration will be Bangalore, India.

Either party may, without waiving any remedy under this Agreement, apply to the arbitrator and/or any court having jurisdiction any interim, provisional, injunctive or conservatory relief that is necessary to protect the rights or property of that party until the arbitration award is rendered or the Dispute is otherwise resolved. Any decision rendered by the arbitrator will be final and binding on the parties, and judgment thereon may be entered by any court of competent jurisdiction, including, but not limited to, any court that has jurisdiction over either of the parties or any of their assets. The parties expressly agree that the arbitrator will be empowered to award and order equitable or injunctive relief with respect to matters brought before him, provided however, that such remedy or relief is consistent with the remedies and limitations set forth in this Agreement. The parties agree that all arbitral proceedings conducted pursuant to this Section, including the existence of any arbitral proceedings, information disclosed in the course of such arbitral proceedings, and any settlements, negotiations, discussions, proposals, and awards related thereto shall be considered confidential information and shall not be disclosed to third parties except as required by law or otherwise provided herein. The parties may, however, disclose such information to an appropriate court, as is necessary to seek enforcement of any award rendered by the arbitrator or to seek any interim, provisional, injunctive or conservatory relief pursuant to the terms hereof

10. Miscellaneous. The Agreement must be construed as if both parties jointly wrote it, governed by Indian law. The Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes and replaces any other applicable agreements, terms and conditions applicable to the subject matter hereof. Any conflicting or additional terms contained in additional documents (e.g. reference to a purchase order number) or oral discussions are void. Each party shall not disclose the terms or conditions of these Terms to any third party, except to its professional advisors under a strict duty of confidentiality or as necessary to comply with a government law, rule or regulation. Customer may grant approvals, permissions, extensions and consents by email, but any modifications by Customer to the Agreement must be made in a writing executed by both parties. Any notices to Google must be sent to Google India Pvt. Ltd., No.3, RMZ Infinity - Tower E, Old Madras Road, 4th Floor, Bangalore, 560016, India with a copy to Legal Department, via confirmed facsimile, with a copy sent via first class or air mail or overnight courier, and are

deemed given upon receipt. Notice to Customer may be effected by sending email to the email address specified in Customer's account, or by posting a message to Customer's account interface, and is deemed received when sent (for email) or no more than 15 days after having been posted (for messages in Customer's account interface). A waiver of any default is not a waiver of any subsequent default. Unenforceable provisions will be modified to reflect the parties' intention and only to the extent necessary to make them enforceable, and remaining provisions of the Agreement will remain in full effect. Customer may not assign any of its rights hereunder and any such attempt is void. Google and Customer and Google and Partners are not legal partners or agents, but are independent contractors. In the event that these Terms or an Advertising Program expire or is terminated, Google shall not be obligated to return any materials to Customer.

11. Term: Unless terminated earlier under the terms of this Agreement This Agreement shall have a term of 1 year from the latest of the signature dates below. Customer acknowledges and agrees that if this Agreement expires or is terminated any Customer campaigns in effect as of the date of such expiration or termination or any new campaigns commenced after such expiration or termination shall run thereafter subject to Google's then standard terms and conditions for the Program.”

20. Under the Distribution Agreement, the assessee acted as a distributor of online advertisement space to Indian Advertisers. The assessee was ensured a specified margin over its cost from GIL. If in case, the revenue recorded by the assessee from the sale of online advertisement space to Indian Advertisers was less than its cost (incurred in connection with its distribution function) plus the specified margin, GIL was required to compensate the assessee for the difference. However, where the revenue recorded by the assessee from the onward sale of online advertisement space to Indian Advertisers was more than the cost plus the

specified margin of the assessee, the assessee was required to make the payment to GIL.

21. In the present case, it is not in dispute that the DT AA between India - Ireland is applicable in respect of the payments made by the assessee to Google Ireland. The Hon'ble Supreme Court in Engineering Analysis Centre of Excellence (P) Ltd v CIT (supra) at para 108 of its judgment held as under:-

"108. Fourthly, the High Court is not correct in referring to section 9(1)(vi) of the Income-tax Act after considering it in the manner that it has and then applying it to interpret the provisions under the Convention between the Government of the Republic of India and the Government of Ireland for the Avoidance of Double Taxation and for the Prevention of Fiscal Evasion with respect to Taxes on Income And Capital Gains, "India-Ireland DTAA". Article 12 of the aforesaid treaty defining "royalties" would alone be relevant to determine taxability under the DTAA, as it is more beneficial to the assessee as compared to section 9(1)(vi) of the Income-tax Act, as construed by the High Court. Here again, section 90(2) of the Income-tax Act, read with explanation 4 thereof has not been properly appreciated."

22. Thus, the definition of the term "royalty" in Article 12(3) of the India - Ireland DT AA override the definition of "royalty" as provided in Explanation 2 to section 9(1)(vi) of the Act by virtue of section 90(2). Therefore, the definition of the term "royalty" under the India - Ireland DTAA being more beneficial to the assessee must only be considered in these appeals. The findings of the AO and CIT(A) as regards the characterisation of the payments to Google Ireland as 'Royalty' under section 9(1)(vi) of the Act is therefore not relevant and consequently correctness of these findings need

not be adjudicated in these appeals. Similarly, we do not think it is necessary to decide whether the services agreement and distribution agreement are interlinked or complementary to each other. ITES services are enabling the overall business and not directly related to generating revenue from Adword Program in India. Revenue is generated by end customers clicking on link and not because of ITES services. Even if it is interlinked, the internal tools / intangibles / software of Google Ireland are admittedly not transferred to assessee. The assessee has only right to use these for rendering ITES services. Applying ratio of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited (supra), this cannot result in royalty. We proceed to examine whether the definition of 'Royalty' as per Article 12 of India-Ireland DT AA is satisfied in the present case considering the distribution agreement, services agreement and the facts on record.

23. The definition of 'Royalty' as per Article 12(3)(a) of India - Ireland DTAA is as under:-

"3. (a) The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph film or films or tapes for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process or for the use of or the right to use industrial, commercial or scientific equipment, other than an aircraft or for information concerning industrial, commercial or scientific experience. "

24. The first limb of the above definition treats consideration for the use of or the right to use any copyright of literary, artistic or scientific work including cinematograph film or films or tapes for radio or television broadcasting as royalty. The computerised advertising program i.e., "Google AdWords Program" is essentially a computer program i.e., a computer software. As per Explanation 3 to section 9(l)(vi), a computer software means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data. It is not in dispute that the Adwords Program is used by the assessee in the present case be it for the purpose of discharging its functions under the distribution agreement or under the services agreement. However, the question for our consideration is whether the copyright in "Google AdWords Program" is used by the assessee or not? In order to attract definition of 'Royalty', there has to be use or right to use, inter alia, any copyright. The issue as to whether usage of computer software tantamounts to royalty, is now resolved by the Supreme Court decision in the case of Engineering Analysis Centre of Excellence Private Limited (supra). The Supreme Court grouped the various appeals on the aspect of royalty issue on software payments into four categories as under:-

Category 1: Computer software purchased by an end-user, resident in India, from a foreign non-resident supplier/manufacturer.

Category 2: Purchase of computer software by resident Indian companies that act as distributors/resellers, from foreign non-resident suppliers for the purpose reselling the same to resident Indian users.

Category 3: Purchase of software by foreign non-resident distributor from a foreign non-resident supplier for the purpose of reselling the same to Indian distributors or end-users.

Category 4: Computer software affixed onto a hardware and sold as an integrated unit/equipment by foreign non-resident suppliers to Indian distributors or end-users.

25. The Supreme Court made a reference to the relevant provisions of the Copyright Act and on the interpretation of the same, it accepted the difference between a copyright right and copyrighted article. The important observations of the Supreme Court are summarized as follows:-

"71. The transfer of "all or any rights (including the granting of a licence) in respect of any copyright", in the context of computer software, is referable to sections 14(a), 14(b) and 30 of the Copyright Act. As has been held hereinabove, the expression "in respect of" is equivalent to "in" or "attributable to". Thus, explanation 2(v) to section 9(1)(vi) of the Income Tax Act, when it speaks of "all of any rights ... in respect of copyright" is certainly more expansive than the DTAA provision, which speaks of the "use of, or the right to use" any copyright.

72. However, when it comes to the expression "use of, or the right to use", the same position would obtain under explanation 2(v) of section 9(1)(vi) of the Income-tax Act,

inasmuch as, there must, under the licence granted or sale made, be a transfer of any of the rights contained in sections 14(a) or 14(b) of the Copyright Act, for explanation 2(v) to apply. To this extent, there will be no difference in the position between the definition of "royalties" in the DTAA's and the definition of "royalty" in Explanation 2(v) of section 9(1)(vi) of the Income-tax Act.

73. Even if we were to consider the ambit of "royalty" only under the Income-tax Act on the footing that none of the DTAA's apply to the facts of these cases, the definition of royalty that is contained in explanation 2 to section 9(1)(vi) of the Income-tax Act would make it clear that there has to be a transfer of "all or any rights" which includes the grant of a licence in respect of any copyright in a literary work. The expression "including the granting of a licence" in clause (v) of explanation 2 to section 9(1)(vi) of the Income-tax Act, would necessarily mean a licence in which transfer is made of an interest in rights "in respect of" copyright, namely, that there is a parting with an interest in any of the rights mentioned in section 14(b) read with section 14(a) of the Copyright Act. To this extent, there will be no difference between the position under the DTAA and Explanation 2 to section 9(1)(vi) of the Income-tax Act.

..... 97. When, under a non-exclusive licence, an end-user gets the right to use computer software in the form of a CD, the end-user only receives a right to use the software and nothing more. The end-user does not get any of the rights that the owner continues to retain under section 14(b) of the Copyright Act read with sub-section (a)(i)-(vii) thereof. Thus, the conclusion that when computer software is licensed for use under an EULA, what is also licensed is the right to use the copyright embedded therein, is wholly incorrect. The licence for the use of a product under an EULA cannot be construed as the licence spoken of in section 30 of the Copyright Act, as such EULA only imposes restrictive conditions upon the end-user and does not part with any interest relating to any rights mentioned in sections 14(a) and 14(b) of the Copyright Act.

100. Also, any ruling on the more expansive language contained in the explanations to section 9(1)(vi) of the Income-

tax Act would have to be ignored if it is wider and less beneficial to the assessee than the definition contained in the DTAA, as per section 90(2) of the Income-tax Act read with explanation 4 thereof and Article 3(2) of the DTAA. Further, the expression "copyright" has to be understood in the context of the statute which deals with it, it being accepted that municipal laws which apply in the Contracting States must be applied unless there is any repugnancy to the terms of the DTAA. For all these reasons, the determination of the AAR in Citrix Systems Asia Pacific Pty. Ltd (supra) does not state the law correctly and is thus set aside.

108. Fourthly, the High Court is not correct in referring to section 9(l)(vi) of the Income-tax Act after considering it in the manner that it has and then applying it to interpret the provisions under the Convention between the Government of the Republic of India and the Government of Ireland for the Avoidance of Double Taxation and for the Prevention of Fiscal Evasion with respect to Taxes on Income And Capital Gains. ["India-Ireland DTAA"]. Article 12 of the aforesaid treaty defining "royalties" would alone be relevant to determine taxability under the DTAA, as it is more beneficial to the assessee as compared to section 9(l)(vi) of the Income-tax Act, as construed by the High Court. Here again, section 90(2) of the Income-tax Act, read with explanation 4 thereof has not been properly appreciated

117. The conclusions that can be derived on a reading of the aforesaid judgments are as follows:

(i) Copyright is an exclusive right, which is negative in nature, being a right to restrict others from doing certain acts.

(ii) Copyright is an intangible, incorporeal right, in the nature of a privilege, which is quite independent of any material substance. Ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embodied. An obvious example is the purchaser of a book or a CD/DVD, who becomes the owner of the physical article, but does not become the owner of the copyright inherent in the work, such copyright remaining exclusively with the owner.

(iii) Parting with copyright entails parting with the right to do any of the acts mentioned in section 14 of the Copyright Act. The transfer of the material substance does not, of

itself, serve to transfer the copyright therein. The transfer of the ownership of the physical substance, in which copyright subsists, gives the purchaser the right to do with it whatever he pleases, except the right to reproduce the same and issue it to the public, unless such copies are already in circulation, and the other acts mentioned in section 14 of the Copyright Act.

(iv) A licence from a copyright owner, conferring no proprietary interest on the licensee, does not entail parting with any copyright, and is different from a licence issued under section 30 of the Copyright Act, which is a licence which grants the licensee an interest in the rights mentioned in section 14(a) and 14(b) of the Copyright Act. Where the core of a transaction is to authorize the end-user to have access to and make use of the "licensed" computer software product over which the licensee has no exclusive rights, no copyright is parted with and consequently, no infringement takes place, as is recognized by section 52(l)(aa) of the Copyright Act. It makes no difference whether the end-user is enabled to use computer software that is customised to its specifications or otherwise.

(v) A non-exclusive, non-transferable licence, merely enabling the use of a copyright product, is in the nature of restrictive conditions which are ancillary to such use, and cannot be construed as a licence to enjoy all or any of the enumerated rights mentioned in section 14 of the Copyright Act. or create any interest in any such rights so as to attract section 30 of the Copyright Act.

(vi) The right to reproduce and the right to use computer software are distinct and separate rights, as has been recognized in State Bank of India (supra) (see paragraph 21), former amounting to parting with copyright and the latter, in the context of no exclusive EULAs, not being so."

26. Having considered the above principles in the context of copyright royalty, we proceed to examine the applicability of the above principles to the facts of the present case particularly with reference to distribution agreement, services agreement and other facts on record. As per para 2.1 of the distribution agreement, assessee is appointed as a non

exclusive authorised distributor of Google Adwords program to Advertisers. Para 2.2 of the agreement states that the distributor agrees to market and distribute Adwords program to advertisers within the broad guidelines provided by Google with its reasonable commercial expertise and own sales force and customer service infrastructure. It also provides that the Distributor will distribute the AdWords program in accordance with the training provided by Google. As per para 2.3, distributor shall be responsible for uploading all Advertiser information that is required by Google for participation in the Adwords Program. As per para 2.6, distributor will provide after sales services to Advertisers in accordance with the broad instructions, training and standards of Google. The advertising space is provided by GIL through the Adwords program and GIL also agreed to train the distributor. It is specifically agreed that the agreement shall constitute a non exclusive relationship between Google Ireland and distributor. Google Ireland owns all right, title and interest in and to all information and data including the user data collected by it in connection with the provision of the Adwords Program.

27. As per the service level agreement - Exhibit C to distribution agreement, assessee distributor shall be solely responsible for providing all customer services to Advertisers, according to the procedures, and in compliance with standards, provided by Google. All Advertisers shall be instructed by Distributor to contact Distributor directly for

support, and not to communicate directly with Google Ireland. Distributor agrees that it shall provide minimum levels of service like Business hours phone support to all Advertisers, E-mail queries from Advertisers shall be responded to within one (1) business day with immediate resolution of any issues when possible. It was decided that the issues that cannot immediately be resolved by Distributor based on training and procedures provided under the Agreement must be communicated promptly to Google Ireland by Distributor / assessee, and Google Ireland will assist assessee / Distributor in determining the best solution. It was also agreed that the distributor agrees that Google Ireland will have the right, to review samples of communications sent to Advertisers to assess the quality of responses and modify communications accordingly. Google Ireland shall also have the right to send questionnaires to Distributor's customers to ensure that Distributor is providing an adequate level of service.

28. As per the standard Advertising program terms, the advertiser is solely responsible for all ad targeting options, keywords and all ad content. The advertiser represents and warrants that it holds and hereby grants Google and Partners all rights (including without limitation any copyright, trademark, patent, publicity or other rights) in Creative, Services and Targets needed for Google and Partner to operate Google's advertising programs for Customer (including without limitation any rights needed to host, cache, route,

transmit, store, copy, modify, distribute, perform, display, reformat, excerpt, analyze, and create algorithms from and derivative works of Creative or Targets) in connection with this Agreement ("Use"). The advertiser represents and warrants that (y) all Customer information is complete, correct and current; and (z) any Use hereunder and Customer's Creative, Targets, and Customer's Services will not violate or encourage violation of any applicable laws, regulations, code of conduct, or third party rights (including, without limitation, intellectual property rights). Violation of the foregoing may result in immediate termination of this Agreement or customer's account without notice and may subject Customer to legal penalties and consequences.

29. As per the services agreement, the assessee was providing information and information technology enabled services to Google Ireland. As regards ownership of intellectual property and ownership of derivate works, it was agreed that all intellectual property shall remain the exclusive property of Google Ireland. The confidential information provided by Google Ireland was to be employed by the assessee in performance of its services under the agreement and it shall remain the sole property of the Google Ireland. The statements recorded from the employees also confirms that the confidential information, software technology and the training documents for providing services under the services agreement are provided by Google Ireland to the assessee.

30. On a consideration of all the above agreements and the facts on record, we find that none of the rights as per section 14(a)/(b) and section 30 of the Copyright Act, 1957 have been transferred by Google Ireland to the assessee in the present case. As held by the Hon'ble Apex Court in the case of Engineering Analysis Centre of Excellence Private Limited v. CIT & Anr. (supra), mere use of or right to use a computer program without any transfer of underlying copyright in it as per section 14(a)/(b) or section 30 of the Copyright Act, 1957 will not be satisfying the definition of Royalty under the Act / DTAA. Similarly, use of confidential information, software technology, training documents and others are all 'literary work' with copyrights in it owned by the foreign entity and there was no transfer or license of copyrights in favour of the assessee company. Hence, the impugned payments cannot be characterised as 'Royalty' under the DTAA.

31. The lower authorities have held that the assessee has been granted the use of or right to use trademarks, other brand features and the process owned by Google Ireland for the purpose of distribution of Adwords program and consequently the sums payable to Google Ireland are royalty. As per Article 12 of India - Ireland DTAA, consideration for the use of or right to use any patent, trade mark, design or model, plan, secret formula or process is regarded as royalty. In the present case, as per the distribution agreement, "Google Brand Features" means the Google trade names, trademarks, service marks, logos, domain names, and other

distinctive brand features, with some but not all examples at “<http://www.google.com/permissions/trademarks.html>” (or such other URL that Google may provide from time to time), and such other trade names, trademarks, service marks, logos, domain names, or other distinctive brand features that Google may provide to Distributor for use solely under this Agreement. As per para 6 of the distribution agreement, each party shall own all right, title and interest, including without limitation all Intellectual Property Rights, relating to its Brand Features and Google Ireland grants to the assessee / distributor nonexclusive and nonsublicensable licence during the Term to display Google Brand Features solely for the purpose of distributor's marketing and distribution of AdWords Program under the terms and subject to the conditions set forth in this Agreement. It is thus evident that the trademark and other brand features are not used independently or de hors the distribution agreement but they are incidental or ancillary for the purpose of carrying out the marketing and distribution of Adword program. The Delhi High Court in *DIT v Sheraton International Inc* [2009] 313 ITR 267 held that when the use of trade mark, trade name etc are incidental to the main service of advertisement, publicity and sales promotion and further when there is no consideration payable for such use of trade mark, trade name etc, the consideration cannot be characterised as royalty. Applying the said principle, in the present case, use of Google Brand Features etc are de hors any consideration payable to Google Ireland and further they are incidental and ancillary

for achieving the main purpose of marketing and distributing the Google Adwords Program. Hence, the lower authorities were not right in treating the payments as Royalty.

32. As regards the applicability of 'use of or right to use industrial, commercial or scientific equipment' the CIT(A) held that the assessee cannot be said to have gained right to use any scientific equipment, since, Google Ireland has not parted with the copyright it holds in the Adwords program and hence it cannot be said that any kind of technical knowhow has been transferred to the assessee company. The CIT(A) was not in agreement with the AO on the above issue without prejudice to his view in holding that the remitted amount is royalty on different grounds. The revenue has not challenged the said finding of CIT(A). Hence, the impugned payments cannot be regarded as made for 'use of or right to use industrial, commercial or scientific equipment'. The remaining portion of definition of 'Royalty' under the India - Ireland DT AA is consideration for information concerning industrial, commercial or scientific experience. The AO has not characterised the impugned payments as a consideration for the above. In any case, CIT(A) has given a finding that it cannot be said that any kind of technical knowhow has been transferred to the assessee company. This has not been challenged by the revenue.

33. Thus on an overall analysis of the entire facts on record, we hold that the impugned payments cannot be regarded as royalty under the India - Ireland DTAA. It is true that the

Google Adword program was commercially and profitably exploited in a commercial sense and profitable manner in India to generate revenues from Indian customers or advertisers. This is the business or commercial aspect of the transaction. However, the stand of the lower authorities that the impugned payments are in the nature of Royalty cannot be upheld especially under Article 12 of the India - Ireland DTAA merely because the marketing, distribution and ITES activities are carried out in India and revenues are generated from India or from Indian Advertisers. As held by the Supreme Court in the case of UOI v Azadi Bachao Andolan [2003] 263 ITR 706, at page 763:

"We are unable to agree with the submissions that an act which is otherwise valid in law can be treated as non est merely on the basis of some underlying motive supposedly resulting in some economic detriment or prejudice to the national interests, as perceived by the respondents."

34. Before concluding, it is to be mentioned that the taxability with respect to payments made for purchase of online advertisement has been decided by the following Co-ordinate Bench orders of the I.T.Act:-

(i) **Yahoo (supra):** Department of Tourism of India hired the services of Yahoo India for uploading, displaying, and hosting its banner advertisement on the Yahoo portal, which was operated by Yahoo Hong Kong. For the said purposes Yahoo India engaged Yahoo Hong Kong for uploading and displaying the said banner advertisement. Pursuant to such arrangement, Yahoo India received consideration from Department of Tourism of India and after retaining its margin, the balance was remitted to Yahoo Hong Kong. The

payment remitted by Yahoo India to Yahoo Hong Kong was the subject matter of dispute before the Tribunal. The AO as well as CIT(A) held such payments to be royalty and in that manner, disallowed the expenditure in the hands of Yahoo India under section 40(a) of the Act. The Tribunal, in second appeal, held that banner advertisement hosting services did not involve use or right to use any industrial, commercial, or scientific equipment and no such use was granted by Yahoo Hong Kong. In that manner, the Tribunal set aside the findings of the AO and CIT(A), wherein the subject payments were characterised as royalty.

(ii) **Pinstorm (supra):** Pinstorm was engaged in buying online advertisement space for onward re-sale to an advertiser, much like GIPL in the present case. For such purpose, Pinstorm made payments to GIL, which were disallowed by the AO and CIT(A) under section 40(a)(i) of the Act, on the premise that the said payments were taxable in India. While the AO held the said payments to be fees for technical services (“FTS”), the CIT(A) held them to be royalty. The Tribunal relied on the decision in Yahoo (supra) to delete the disallowance. It was also observed by the Tribunal that the said payments were business profits, which were not taxable in India, since GIL did not have a PE in India.

(iii) **Right Florists (supra):** Right Florist was a florist who used Google Search Engine for online advertising, to generate more business for itself. In this case again, the AO had disallowed the payments made by Right Florist for online advertising under section 40(a)(i) of the Act. However, the CIT(A) reversed the said decision on the ground that none of the recipients of the payments had a PE in India. The Tribunal, in Department’s appeal, upheld the order of the CIT(A), while observing that the decisions in Yahoo (supra) and Pinstorm (supra) were authorities in support of the proposition that payment by the Indian arm of a foreign owner of search engine portal, in connection with online advertising, is not in the nature of royalty as per section 9(1)(vi) of the Act. In this decision, the Tribunal also discussed the modalities involved in the online advertising business, in the context of Google Search Engine.

(iv) **Inception Business (supra):** In this case the assessee was engaged in the business of brand management as well as posting advertisements in the social portal on behalf of their clients. The AO held the payments made by it for that purpose to Facebook Ireland Ltd., a non-resident, to be taxable in India. The CIT(A) upheld the order of the AO. The Tribunal relied on the decision in Yahoo (supra), Pinstorm (supra), Right Florists (supra), while setting aside the order of the AO/ CIT(A) and holding that the payments for purchase of online advertisement space were not taxable in India.

(v) **Urban Ladder (supra):** The assessee in this case, made payments to Facebook Ireland Ltd., for online advertising. The AO held the said payments to be royalty. The CIT(A) upheld the order of the AO. However, while doing so, the CIT(A) relied upon certain functional aspects of advertisement system qua Patent Number US20040059708A1 as well as US7778872B2. These two patents are held by Google LLC., USA in connection with the Google AdWords Program hereto. The Tribunal, set aside the order of the CIT(A), while following the decision of the Hon'ble Supreme Court in Engineering Analysis (supra). The Hon'ble Tribunal also relied on the decisions in Yahoo (supra), Pinstorm (supra) and Right Florists (supra).

(vi) **Myntra Designs (supra):** Myntra in this case, made payments to Facebook Ireland Ltd., for online advertising. The AO held the said payments to be royalty and in the alternate, as FTS. The CIT(A) upheld the order of the AO. The Tribunal followed the decision in Urban Ladder (supra), while setting aside the order of the CIT(A).

(vii) **Play Games (supra):** Play games is engaged in the business of providing a platform for online gaming. It had made payments to Facebook Ireland Ltd. for online advertising. The AO and CIT(A) in this case as well, held that payments to be taxable in India. The Hon'ble Tribunal observed that Play Games did not get any right to modify/ deal with the servers, which belonged to Facebook Ireland

Ltd., in any manner. It was also observed inter alia that the said servers, which hosted online advertisements, were located outside India and that Facebook Ireland Ltd. did not have a PE in India. In that manner, the Tribunal set aside the order of the CIT(A) and held the payments in question to be neither royalty, nor FTS.

(viii) **Matrimony.com (supra):** Matrimony.com in this case, made payments to Facebook Ireland Ltd. for online advertising. The AO in this case as well, disallowed the said payments under section 40(a)(i) of the Act, which action was upheld by the CIT(A). The Tribunal followed the decision in Urban Ladder (supra), while deleting the said disallowance.

(ix) **ESPN Digital Media (supra):** ESPN India in this case, entered into a re-seller agreement with ESPN UK, for the resale of online advertisement space. In terms thereof, ESPN India purchased online advertisement space for re-sale to Indian advertisers. For this purchase, it made payments to ESPN UK, which were characterised as royalty by the AO. The CIT(A) upheld the order of the AO. The Tribunal, in second appeal, set aside the order of the CIT(A), while observing that ESPN India was merely making payment under the re-seller agreement towards purchase of online advertisement space. It was also observed that a website is not a tangible property and is certainly not a high-tech equipment. It was also observed that the reliance of the AO and CIT(A) on the decision in Verizon Communications Singapore Pte Ltd. v. ITO, (2014) 361 ITR 575 (Madras High Court) was misplaced, since the same had been overruled by the Hon'ble Supreme Court in the decision in Engineering Analysis (supra).

(x) **Interactive Avenues (supra):** Interactive Avenues is an internet advertising agency, which places online advertisements on behalf of its clients. The payments in this case were made to Facebook Ireland Ltd., which were disallowed by the AO and the CIT(A). The Tribunal observed that Interactive Avenues was utilising Google Search Engine amongst others, to buy online advertisement space on behalf of its clients. Be that as it may, the Tribunal set aside the

order of the CIT(A) and held that the payments in question could not be characterised as royalty, while relying on the decisions in *Urban Ladder* (supra) and *Play Games* (supra).

35. It is also relevant to point out that in the context of interpreting Article 12(3) of India – Ireland DTAA, it is relevant to take note of the existing international jurisprudence. The Technical Advisory Group (“TAG”) set up by the Organisation for Economic Co-operation and Development (“OECD”), in its Report (2001) on treaty characterisation of electronic commerce payments analysed various e-commerce transactions and suggested suitable characterisation for consideration flowing thereunder. One of the transactions analysed by TAG was advertising. In the context of online advertisements, including advertisements where the payment is based on number of clicks (i.e., CPC basis), TAG recommended taxability of such payments under Article 7 of the relevant DTAA. The said Article 7 deals with “business profits” and not royalty. Business profits under Article 7 are taxable only where the non-resident has a PE in India.

36. It is important to note that TAG was set up by OECD and its recommendation on changes to the OECD commentary were accepted by OECD. As per the recent decision of the Hon’ble Supreme Court in *Engineering Analysis*, (supra), OECD commentary is a necessary aid for the interpretation of provisions contained in DTAA. In fact, the High-Powered Committee (“HPC”) on electronic commerce and taxation, set up by the Central Board of Direct Taxes

("CBDT") had also accepted the view taken by TAG and recommended taxing consideration flowing for online advertisement under Article 7, and not Article 12 of the relevant DTAA.

37. Therefore, in terms of the international guidance as stated herein, the position regarding taxability of receipts from sale of online advertisement space is clear. Unless the non-resident, who is engaged in sale of online advertisement space, has a PE in India, no portion of receipts earned by it from sale of online advertisement space in India can be brought to tax in India as Act read with the relevant DTAA.

38. The above view is also supported by insertion of provisions related to Equalisation Levy (EL) by Finance Act, 2016. The root for the emergence of the EL can be traced to the dynamic business models that have the ability to transcend the link between an income producing activity and a specific location since these business are carried in the cyber place. The PE definition presently is based upon the physical presence criteria. The new business models also created challenges in characterizing the nature of payment – whether the payment is for services or for any IPR and hence royalty or whether it represents pure business profits. Various ITAT decisions, as discussed above, have held that income from sale of advertisement space on a website is not taxable in India if there is no PE of the foreign enterprise in India. It was held that such income is not to be regarded as

royalty or FTS. Such tax challenges is addressed by the introduction of EL. Section 165 of the Finance Act, 2016 provides for charge of EL at 6% on consideration for specified services. Section 164(i) of Finance Act, 2016 provides that *“specified service” means online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement and includes any other service as may be notified by the Central Government in this behalf.* Thus, online advertisement is now covered under EL. If online advertisement was already covered under definition of royalty, then bringing it as part of EL scheme would not arise.

39. In view of the aforesaid discussion and the judicial pronouncements, cited supra, we hold that the impugned payment cannot be characterized as royalty under the India-Ireland DTAA. It is ordered accordingly.

40. In the result, the appeals filed by the assessee are allowed.

Order pronounced on this 19th day of October, 2022.

Sd/-
(Padmavathy S)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 19th October, 2022.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Bengaluru.
4. The Pr.CIT, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore