

Google Ireland Ltd, Bengaluru vs Deputy Commissioner Of Income Tax, ... on 28 February, 2023

IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU "C" BENCH, BENGALURU

Before Shri George George K., Judicial Member
and
Ms. Padmavathy S., Accountant Member

IT(IT)A No. 2845/Bang/2017
(Assessment Year: 2007-08)

M/s. Google Ireland Ltd.	vs DCIT (IT), Circle 1(1)
C/o. PricewaterhouseCoopers	14/3, Room No. 441, 4th Floor
Pvt. Ltd.	BMTC Commerical Complex
Building No. 10, Tower -C	80 ft Road, Koramangala
18th Floor, DLF Cyber City	Bengaluru 560095
Gurgaon 122022	
PAN - AADCG7672A	
(Appellant)	(Respondent)

Assessee by: Shri Percy Pardiwala, Sr. Advocate
Shri Anmol Anand, Ms. Priya Tandon
Mr. Mithal Reddy, Advocates
Revenue by: Ms. Neera Malhotra, CIT-DR

Date of hearing: 15.02.2023
Date of pronouncement: 28.02.2023

ORDER

Per: George George K., J.M. This appeal at the instance of the assessee is directed against the final assessment order dated 30.10.2017 passed under Section 143(3) r.w.s. 147 & 144C(5) of the Income Tax Act, 1961 (the Act). The relevant assessment year is 2007-08.

2. The brief facts of the case are that the assessee, Google Ireland Limited (herein after referred as the assessee or GIL) is a foreign company having its registered office at Ireland. The assessee is involved in the business of sale of M/s. Google Ireland Ltd.

online advertisement space to Google India Pvt. Ltd. (GIPL) under distribution agreement dated 12.12.2005. Further the assessee also sells advertisement spaces to other customers in India. The assessee derives more than 97% of its total revenue from advertisement services through its AdWords program worldwide. The AdWords program is used by various business houses to promote their products and services via targeted advertising. The AO on verification of financial statement of GIPL noticed that it had credited an amount of Rs.42,57,53,347/- to the account of the assessee during the relevant assessment year without deducting tax at source under Section 195 of the Act. Further it was noticed by the AO that GIL has also not obtained NIL deduction certificate on

the sum received/payable to it. The AO in the hands of GIPL (Payer) had held that the payments made to the assessee are covered under Section 9 of the Act and also under the provisions of DTAA. The AO in the case of GIPL (Payer) passed orders under Sections 201 & 201(1A) of the Act in respect of payments made to the assessee to the tune of Rs.42,51,53,437/-.

3. Based on the orders passed under Section 201 & 201(1A) of the Act in case of GIPL (Payer) notice under Section 148 of the Act was issued to the assessee on 29.03.2014. The assessee filed Nil return of income on 14.08.2014 pursuant to the notice issued under Section 148 of the Act and sought for the reasons recorded for reopening of the assessment under Section 148 of the Act. In response to the said letter the AO provided reasons recorded for reopening of the assessment for AY 2007-08 vide letter dated 25.07.2015. On receipt of the reasons recorded for reopening the assessment, the assessee raised its objections on 16.09.2015. The objections were rejected by the AO vide his letter dated 04.01.2016. During the course of assessment proceedings the matter was referred to the Transfer Pricing Officer (TPO) and the TPO after considering the submissions passed an order dated 20.10.2016 M/s. Google Ireland Ltd.

determining the transactions between GIL and GIPL to be at arm's length. Thereafter the AO issued a draft assessment order proposing to assess the total income of the assessee at Rs.93,66,27,879/-. The AO considered the amount received/receivable by the assessee towards sale of advertisement space amounting to Rs.42,57,53,347/- from GIPL and also a sum of Rs.51,08,74,532/- from other Indian customers as 'royalty' under the Act and the DTAA.

4. Aggrieved by the draft assessment order the assessee filed objections before the Dispute Resolution Panel (DRP). The DRP vide its directions dated 27.09.2017 rejected all the objections of the assessee. Pursuant to the DPR directions, the impugned final assessment order dated 30.10.2017 was passed. The computation of income and tax thereon as per the final assessment order are as under: -

Add: Receipts from Google India Private Limited 42,57,53,347 Add: Receipts from other Indian customers 51,08,74,532 Assessed income 93,66,27,879 Tax thereon as per DTAA as computed by the 9,36,62,788 assessee Add: 234A(3)(a) 37,46,512 Add: Interest u/s. 234B 11,89,51,71 Gross payable 21,63,61,041

5. Aggrieved by the final assessment order the assessee filed present appeal before the Tribunal. The learned A.R. submitted that as regards the stream of income received by the assessee from GIPL is concerned, the issue on merit is squarely covered in favour of the assessee by the order of the Tribunal in the case of Google India Pvt. Ltd. (Payer's case) in IT(TP)A No. 1513/Bang/2013 to IT(TP)A No. 1516/Bang/2013 concerning assessment years 2009-19 to 2012-13 (order dated 19.10.2022). In respect of issue of M/s. Google Ireland Ltd.

taxability of payment received by the assessee on sale of online advertisement space directly from advertisers in India, the learned A.R. submitted that the issue is covered in favour of the assessee by the following coordinate bench orders of the Tribunal: -

i. Interactive Avenues Private Limited v. DCTT, [ITA 3130/Mum/2019, decision dated 07.07.2022, (ITAT - Mumbai)], ii. ESPN Digital Media (India) Pvt. Ltd. v. DCIT, [ITA 1070/Chny/2018, decision dated 04.05.2022 (ITAT - Chennai)], iii. Matrimony.com Limited v. ACIT, [ITA 1391/Chny/2019, decision dated 20.04.2022 (ITAT-Chennai)], iv. Play Games 24X7 Private Limited v. DCIT, [ITA 1533/Mum/2019, decision dated 23.03.2022 (ITAT-Mumbai)], v. Myntra Designs Pvt. Ltd. v. DCIT, [ITA 598/Bang/2020, decision dated 03.09.2021 (ITAT-Bengaluru)], vi. Urban Ladder Home Decor Solutions Pvt, Ltd. v. ACIT, [ITA 615/Bang/2020, decision dated 17.08.2021 (ITAT-Bengaluru)], vii. Inception Business Services v. ITO, [ITA 2674/Chny/2016, decision dated 18.02.2019 (ITAT-Chennai)], viii. ITO v. Right Florists Pvt. Ltd., (2013) SCC OnLine ITAT 6870 (ITAT - Kolkata), ix. Pinstorm Technologies (P.) Ltd. v. ITO, (2012) 54 SOT 78 (ITAT -

Mumbai), x. Yahoo India (P.) Ltd. v. DCIT, (2011) 140 TTJ 195 (ITAT-Mumbai).

6. The learned A.R. submitted that if the issue is decided on merits the other grounds relating to reopening of assessment, etc. may be left open.

7. The learned D.R., on the other hand, strongly relied on the orders of the TPO and DRP. The learned D.R. has filed elaborate written submission, which is reproduced below: -

"GOA Nos. 13 & 15 - TRANSFER PRICING - SALE OF ONLINE ADVERTISEMENT SPACE UNDER THE ADWORDS PROGRAM THROUGH GOOGLE INDIA PVT. LTD./DIRECTLY IS TAXABLE AS "ROYALTY" UNDER THE ACT AS WELL AS UNDER THE DTAA M/s. Google Ireland Ltd.

I. During the course of hearing the Ld.AR of the appellant submitted to the Hon'ble Bench that he is only pressing 2 grounds of appeals i.e. 13 & 15 for adjudication, which are reproduced below :

" 13. On the facts and in the circumstances of the case and in law, the Ld. AO/Hon'ble DRP has erred in holding that the amount receivable by the appellant from the sale of online advertisement space under the AdWords Program from Google India is taxable as 'Royalty' income under the Act as well as under the DTAA.

14. On the facts and in the circumstances of the case and in law, the Ld. AO/Hon'ble DRP has erred in holding that the income from other advertisers amounting to INR 510,874,532 in India towards sale of online ad space is chargeable to tax as 'Royalty' under the Act as well as under the DTAA and without following the decisions by the Hon'ble Kolkata Tribunal in the case of ITO Vs Right Florists (P) Ltd. (154 TTJ)142) and Hon'ble Mumbai Tribunal in the case of Pinstorm Technologies Vs ITO (54 SOT 78) squarely applicable to the facts of the present case."

(emphasis supplied) II. RELIANCE BY Ld. AR ON THE APPEALS DECIDE BY THE HON'BLE ITAT BANGALORE IN THE CASE OF GOOGLE INDIA PVT. LTD. - NOT APPLICABLE TO THE INSTANT APPEAL AS "NOT COVERED" BY DECISION OF HON'BLE SUPREME COURT IN THE CASE OF "ENGINEERING ANALYSIS CENTRE OF EXCELLENCE PVT. LTD." (2021) 432 ITR 471 (SC)

1. During the course of hearing the main argument presented by the Ld. AR that the instant appeal is squarely covered by the decision rendered by the Hon'ble ITAT Bangalore in the case of Google India Pvt. Ltd. in IT(TP)A No. 1513,1514,1515, 1516/B/2013 dated 19.10.2022 and IT(IT)A No. 1190,1295/B/2014 & IT(IT)A No. 97/B/2019 & IT(IT)A No. 949& 950/B/2017 dated 15.12.2022.

Firstly, these decisions rendered by the Hon'ble ITAT Bangalore in the case of Google India Pvt. Ltd. were with respect orders passed u/s 201(1) and 201(1A) of the I.T. Act.

Secondly, the Hon'ble ITAT Bangalore, while deciding these appeals in favour of the assessee i.e. Google India Pvt. Ltd, relied upon the decision of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited Vs CIT & Anr. (2021) 432 ITR 471 (SC).

2. In the case of Engineering Analysis Centre of Excellence Private Limited Vs CIT & Anr. (2021) 432 ITR 471 (SC) the Hon'ble Supreme Court has rendered its decision only on 4 categories of cases. The relevant Para 4 of the order of the Hon'ble Supreme Court is reproduced below :

"4. The appeals before us may be grouped into four categories:

i) The first category deals with cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer.

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ii) The second category of cases deals with resident Indian companies that act as distributors or resellers, by purchasing computer software from foreign, non-resident suppliers or manufacturers and then reselling the same to resident Indian end-users.

iii) The third category concerns cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, non-resident seller, resells the same to resident Indian distributors or end- users.

iv) The fourth category includes cases wherein computer software is affixed onto hardware and is sold as an integrated unit/equipment."

(Emphasis supplied)

3. With utmost humility and respect the undersigned wishes to state that the instant appeal, which is against the Final Assessment Order u/s 143(3) rws 147 & 144C (5) of the I.T. Act, 1961 dated 30.10.2017, passed by DCIT (Intl. Taxn), Bangalore, is NOT COVERED by the decision of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited Vs CIT & Anr. (2021) 432 ITR 471 (SC) as the business transaction of the appellant i.e. Google Ireland Ltd. with Google India Pvt. Ltd. and the income earned by the appellant i.e. Google Ireland Ltd. from other advertisers in India towards sale of online ad space DOES NOT fall in any of the 4 categories of cases on which the Hon'ble Supreme Court has rendered its decision in the case of Engineering Analysis Centre of Excellence Private Limited (supra) and the same will be established in the following Para 4.

4. Google Ireland Limited ("GIL"/ "assessee company") is having its registered office at Ireland. The Google Group of companies operates in the USA, UK, Ireland and a number of other countries including India. Google together with its Group Companies referred as "Google" specializes in internet Search engines and related advertising services. Google maintains an index of websites and other online content, which is made available through its search engine to anyone with an internet connection. Its powerful search technology helps people obtain nearly instant access to relevant information from its online index. Google derives more than 97% of its total revenues from advertising services through its AdWords Program worldwide. Business use the Adwords program to promote their products and services via targeted advertising. 4.1 The appellant company entered into an agreement with M/s. Google India Pvt. Ltd.(GIPL) for AdWords Program Distribution Agreement. As per this agreement the assessee company has given the marketing & distribution rights of AdWord programme to the advertisers in India. 4.2 Marketing and distribution services for the AdWords program - Under the Google AdWords Program Distribution Agreement dated December 12, 2005 ('Agreement') entered into between GIPL and Google Ireland, Google India is appointed as a non-exclusive authorized Distributor/Reseller of AdWords program to the advertisers in India 4.3 Under the Amended Google AdWords Program Distribution Agreement dated December 12, 2005 ("Distribution Agreement or Agreement") entered into between Google India Pvt. Ltd. (GIPL) and Google Ireland Ltd., Google India M/s. Google Ireland Ltd.

was granted the marketing and distribution rights of AdWords program to the advertisers in India. GIPL has a distribution team which markets and distributes the AdWords program to the advertisers in India. For these services, GIPL is remunerated on a cost plus mark-up basis for the distribution services under the AdWords program.

4.4. The appellant vide letter dated 07.12.2016 had furnished the following details before the A.O of the amount received/ receivable from India as given below:

Name and address of payer	Nature of receipt	Amount (Rs.)
Google India Private	Sale of online advertisement	42,57,53,347
Limited	space	Other customers in India
Sale of online advertisement	51,08,74,532	space
4.5 The assessee company has received Rs. 51,08,74,532 from Sale of online advertisement space from other Indian Customers also. In Its submissions dated 16.12.2016 before the A.O the assessee has stated that agreements with other Indian customers are similar to those entered by the		

advertisers with Google India Private Limited. The nature of business transactions with other Indian Customers are given below.

4.6 Nature of Business transaction with other Indian Customers by the appellant Google Ireland Ltd.

About Google AdWords • Google AdWords is an auction-based advertising program that lets advertisers deliver relevant ads targeted to search queries or web content across Google sites and through the Google Network (i.e. the network of third websites). These advertisements are word based advertisements. Advertisers describe their product/service using key words and provide those to Google along with its web address for displaying the advertisement on its search engine web page when the user/querist searches for such keywords. In summary, Google's AdWords associated with their advertisement. The main advantage of online advertisement is that it displays advertisement to the relevant User/searcher who is searching for such products/ services. • Outside of USA, Google Ireland is the regional entrepreneur responsible for commercializing the Google AdWords product. It has rights of exploitation of AdWords to customers in the Europe. Middle East & Africa ('EMEA') and Asia Pacific ('APAC') regions. Thus Google Ireland sells/ has the rights to sell online ad space in India.

- Every advertiser wanting to advertise has to provide his communication address, preference of keywords and content describing product/services for display, website link, countries for display etc. online for registering as an advertiser.
- GIL on receipt of the content/keyword description verifies internally that such contents are (i) Permissible for advertising in the respective country/location chosen by the advertisers; and (ii) not infringing any copyright/trade mark registered by other advertisers. This verification process is completely automated.

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- When the contents are found not in accordance with the advertisement policy, the same is communicated to the advertiser. The advertiser then has to modify the content/description and submit the same to GIL. On receipt of the modified content the above verification process is followed for clearance before the display of advertisement.
- Upon clearance of the content/description, the advertisement are uploaded into the system at the data centre and displayed on the webpage. Since the agreements and other transactions are similar to the one entered by GIPL with the appellant company the discussions that are taken for determining the chargeability of receipts from GIPL will apply accordingly for these amounts also.

4.7 The AdWords program is complex computer software that is used by the Advertisers to create, display and maintains advertisements. This aspect also emerges from the description of the Adwords program in the submissions given by the appellant during the course of 201 proceedings before the A.O which is reproduced below for reference:

"AdWords program is an advertising product that specifically relates to a search engine query. For instance, if a user searches the word 'flower', the Google search engine will return the most relevant links to that term. The AdWords program recognizes that a user searching the word "flower" may be interested in purchasing flowers. AdWords provides a mechanism for advertisers to provide search-specific advertising to that user. On the Google website, AdWords ads are located on top and to the right side of the search results. AdWords is an automated, self-serve system through which advertisers independently develop a set of keywords that relate to their business and manage their own account online from the Google website. Advertisers determine a daily or periodic advertising budget for AdWords on "cost-per-click" CPC basis. CPC refers to the unit price or the advertising fee paid each time a user selects or "clicks" the advertisement, represented as a hypertext link to the advertiser's web page.

Advertisers favour the CPC model because they pay nothing to have their link displayed and only pay when a user clicks on the link and visits the advertiser's web page. This is sometimes referred to as performance-based advertising where the viewer engages the advertisement. "

4.8 The AdWords Program is a complex computer software using which an Advertiser is able to publish an advertisement on the "Google Website". The fact that Adwords program is a complex computer program involving a database management system is ascertained from the description of the Adwords program in Wikipedia which is reproduced below:

"The AdWords system was initially implemented on top of the MySQL database engine. After the system had been launched, management "decided to use Oracle instead. The system became much slower, so eventually it was returned to MySQL. Eventually, Google developed a custom distributed Relational database management system (RDBMS) known as Google F1 specifically for the needs of the Ad business, which requires strong consistency, high scalability M/s. Google Ireland Ltd.

across data centers and powerful SQL queries. The interface has also been revamped to offer better work flow with additional new features, such as Spreadsheet Editing, Search Query Reports and better conversion metrics."

4.9 And as discussed above, by virtue of the Distribution Agreement, the original copyright holder, Google Ireland, has granted GIPL the right to use the Adwords Program in India by authorizing GIPL to advertise, market and distribute the Adwords Program to the Advertisers, thereby transferring the copyright right as stipulated in Section 14(a)(iii) and Sec.14(b)(ii) of the Indian Copyright Act. Thus, the transaction in question involves transfer of copyright right to GIPL, though non-exclusive.

4.10 It does not matter if GIPL has been granted an exclusive or non- exclusive right to market and distribute the Adwords Program in India. In fact any right in respect of a copyright can be conferred,

because a copyright is a bundle of rights which may be divided and assigned, or restrained in whole or in parts.

4.11 Therefore it is to be noted that the expression "exclusive right" used in Sec. 14 of the Copyright Act refers to the rights of author/creator and not the "exclusive right" to be given by him to some party to reproduce the copyrighted work or sell the computer programme etc. It also does not mean that non-exclusive right given by the owner of the copyright to some other party to do one or more acts will not have copyright in respect of the property. Even grant of one right in respect of a copyright or work would amount to transfer or the use of copyright.

4.12 Grant of distribution rights in AdWords program amounts to Royalty under clause (vi) to Explanation 2 to Section 9(1)(vi) of the Act As per the Distribution Agreement, GIPL is only authorized (licensed) to use the Ad words Program in India by way of being given the rights to advertise, market and sell the AdWords Program to the Advertisers. Under the Distribution Agreement the Ad words Program is not sold to GIPL. The consideration paid by the GIPL to Google Ireland is for granting of license (authorization) to use the copyright in the Adwords Program as specified in Section 14(a) (iii) and Section 14(b)(ii) and not for the purchase of such software. Obviously, the consideration paid/payable by GIPL for such license or authorization is the consideration paid/payable to GIL for the transfer of certain rights associated with the copyright of the AdWords Program. And, any consideration for the transfer of all or any rights in respect of any copyright is royalty as per the definition of royalty in Sec.9(1)(vi) of the Income Tax Act. 4.13 Therefore whether the license granted is exclusive or non-exclusive does not matter as long as a right is granted to GIPL. Amounts payable for the acquisition of partial rights in the copyright without the transfer fully alienating the copyright rights will represent a royalty. In the instant case, the payments by GIPL to GIL are for the right to use the copyright in the Adwords Program i.e. to exploit the rights that would otherwise be the sole prerogative of the copyright holder i.e. GIL. Therefore, to constitute Royalty under the Income Tax Act it is not necessary that there should be transfer of exclusive right in copyright, it is sufficient if there is transfer of any interest in the right M/s. Google Ireland Ltd.

or if even if a license is granted to any interest in the right. Further the consideration paid for transfer of any interest in the right/grant of a license constitutes royalty for the purpose of the said clause in the Income tax Act. Therefore the term exclusive right used in the copyright act and so relied upon by GIPL cannot be superimposed when the definition clearly provides only for use or the right to use the copyright to as to conclude that only in the event when exclusive rights are transferred, the nature of payment will be deemed to be royalty.

4.14. In the instant case the GIPL has to pay Google Ireland, the appellant for being given the right to use the AdWords Program

a) by virtue of having the rights to the advertising and market the AdWords Program

b) and the right to sell the license to use the Adwords program to the end-user of AdWords Program who are Advertisers.

4.15 The Advertisers in India are the licensees who are allowed to use the Intellectual Property embedded in the Adwords Programs by GIPL. Yet, by giving the Distributor/Reseller (GIPL) the right to distribute and sell the Adwords Program, the licensor (Google Ireland) has parted with the license which the Distributor/Reseller (GIPL) uses in order to sell the Adwords program to the end-user (Advertisers). The Distributor/Reseller (GIPL) may not be licensed for use of the intellectual property (except the right to market and resell) but nevertheless it has paid the consideration for its use. There is nothing in the royalty definition to suggest that the consideration for use of intellectual property will be consideration for royalty only if the payee itself is the user of the right. Hence the sums received/receivable by Google Ireland are covered by clause (v) of Explanation 2 to Section 9(1)(vi) of the Act. 4.16 Grant of distribution rights in AdWords program amounts to Royalty under clause(i) and clause (iii) to Explanation 2 to Section 9(1)(vi) of the Act; Vide the Distribution Agreement dated 12.12.2005, Google Ireland has agreed to provide advertising space to GIPL through its "AdWords" program for distribution to Indian advertisers (Clause 3.1 of the agreement). Clause 3.2 specifies that Google Ireland will train Google India. Further at Clause 6 of the agreement, Google Ireland has granted GIPL a non-exclusive and non-sub licensable license to display 'Google Brand Features' for the purpose of its marketing and distribution activities. It is clear from Clause 2 of the Agreement that GIPL has been appointed by Google Ireland as the Distributor/Reseller of the AdWords Program.

4.17 The Adwords program basically relies on the powerful search engine technology of Google which in itself is a process. Signing up on Adwords program in effect allows the advertiser to access the auction pricing mechanism of the Adwords program which is based on the search engine technology. Google Ireland as per the service agreement with Google India owns the Intellectual property for the search engine technology and Adwords program. GIPL has been granted the right to distribute the Adwords program to Advertisers in India i.e. GIPL has been granted certain rights connected to the process i.e. distribution rights. GIPL is entrusted with the work of explaining the M/s. Google Ireland Ltd.

Adwords product, its functions and auction-pricing mechanism to the advertisers in India. GIPL has also to perform the task of billing and collecting payment from Indian advertisers. GIPL also has to perform functions which involve approving and administering advertisements to conform to the Google editorial guidelines and responding to customer queries. Like any other web based platform Adwords program has a front-end portion and a back-end portion. The front-end portion is what the Advertiser or the end-user sees while the back-end portion is accessible only by Google Ireland and GIPL. Without access to the back end GIPL cannot perform its activities of marketing and distribution. The back-end Includes databases, software tools, documents etc which are used by GIPL to distribute and sell the Adwords program and maintain the Adwords account of the advertisers. In order to perform these activities GIPL will have to access the data centres running the Google Adwords platform which are located outside India. GIPL can have access to the processes running on these data centres based on the distribution rights granted to it by Google Ireland. Without access to such process GIPL will not be in a position to carry out the tasks as per the Distribution Agreement. In the submission dated 22nd August 2013 before the A.O it was stated that AdWords Program is operated on the servers located outside India, which are not owned and controlled by GIPL. 4.18 As per the submission made before the A.O, GIPL is involved in performing

back office functions for Adwords program which include:

- a) Response to the queries of client's customers: The queries generated by the customers of Google entities flow from customers through a workflow based on pre-determined parameters. On receiving the query, the team responds to the query. The response to is routed through Google Ireland; and
- b) Reviewing advertisements for the purpose of running the same on the Google website: These services mainly involve IT enabled data processing work. The data comes from the customer and is routed to GIPL through a workflow based on language and tier. On receiving the data, the team reviews the advertisement to ensure that the advertisement conforms with the Google editorial guidelines. If the advertisement does conform, the customer's advertisement can then be viewed on the websites of Google or its partners located outside India.

GIPL reviews the advertisement on accordance with the company law and the local law regulation, through various software. These are automated software which provides assistance by filtering the content of the ads with specified keywords and helps GIPL in reviewing the content of the ads. 4.19 It is evident from the above description of activities that GIPL is allowed to access various features, software tools, databases which are running on the servers located outside India in order to perform the various activities and to carry out the tasks assigned to it. Hence GIPL has been granted

- a) The right to distribute to Advertisers the licence to use the process of Adwords program for the purpose of online advertisement.

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- b) The right to access platform for purpose of the maintaining the Advertisers account and servicing the Advertisers.

4.20. Hence GIPL is granted the use of or the right to use the process in the AdWords platform for the purpose of marketing and distribution. Therefore clauses (i) and (iii) of Explanation 2 to Section 9(1)(vi) are satisfied and hence the amounts paid/payable to Google Ireland are taxable under Section 9(1)(vi) of the Act.

4.21 Grant of distribution rights also involves use of Industrial, commercial and scientific equipment The following are the facts which emerge from the Agreements regarding the Adwords Program:

- a. That Adwords program is operated on servers outside India located in data centres which are not owned and operated by GIPL. b. The details of the advertiser activities are available online on the server located outside India and Google Ireland has online access to view the same and GIPL is also granted access to details for the purpose of distribution. c. GIPL provides services relating to the administration of advertisements in accordance with the guidelines provided by Google Ireland and

provide customer support services.

d. GIPL has to review of the search results to ensure the outcome of the desired results or to improve upon the quality of search results; e. GIPL is involved in the Data processing work i.e. once the advertiser registers for the AdWords through an online process, the advertisement is sent to the IT enabled services team to review for conformation with the editorial guidelines.

f. As per the reply of Mr. Vikas Agnihotri, Director Sales - BFSI of GIPL, the billing information of Advertisers from India is available on the servers located outside India which is then accessed by the billing department to issue invoices to its customers.

g. GIPL is given exhaustive training on all activities related to Adwords program and also on the software (tools) and systems to be used for the purpose of marketing, for maintenance of adwords accounts, for purpose of billing etc. Clause 3.4 of the distribution agreement requires Google Ireland to render services so that GIPL is able to utilize the distribution rights to market, distribute Adwords program and for maintenance of Adwords accounts, billing etc. Since such services are in connection with activities which are covered by Clauses (i) to (iv), (iva) and (v), the sums paid/payable to Google Ireland are also covered by clause(vi) to explanation 2 to section 9(1)(vi) of the Act. Therefore, the sums payable under the Distribution agreement would also be covered by clause (iva) of Explanation 2 to Section 9(1)(vi). 4.22 Further, the sums receivable by Google Ireland from GIPL falls squarely within the purview of royalty as defined in Article 12 of the DTAA.

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4.23 Business Transaction of appellant company with other Indian Customers:

The appellant company has developed the AdWord software programme and it allows Customers worldwide to 'use' or give them the rights to use the AdWord software programme for which the Customers are charged based on the number of users and the nature of user (high end user/low end user). 4.24 In the case of receipts from other Indian Customers even if they were not the licensee, the payment received from the other Customers would not have escaped the definition of royalty under the DTAA because, the appellant has received the payment from the these Customers for the use of copyright in the computer programme (Adword software programme). In other words, the mere fact that the appellant has allowed the Customers to 'use' or has given them the right to use the copyright in the computer programme (AdWord software programme) and has received payments for the same is enough to treat it as royalty payment under DTAA.

4.25 Section 9 which deals with 'Income deemed to accrue or arise in India' applies to all categories of Residents irrespective of their Residential status.

Section 9 serves the sole purpose of including within the tax net certain incomes which under normal circumstances would not be taxed by the Department. It employs a deeming provision whereby through a fiction of law; tax can be levied on certain Incomes of residents / non residents which may be deemed to accrue or arise in India. It includes within its ambit, Income of residents that accrue or arise outside India as well as incomes of non residents that accrue or arise in India. The constitutionality of Section 9 was tested and upheld in numerous cases. Section 9 (v), (vi), and (vii) were inserted by the Finance Act, 1976. Through the abovementioned clauses, income is sought to be taxed by employing the 'Source Rule'. The different types of Income falling within this ambit are Interest, Royalty and Fees for technical services. Income deemed to accrue or arise in India is covered under Section 9 of the Income tax Act of 1961. The proviso to Section 9 (1) (vi) creates an exception for income by way of royalty which is obtained as consideration for the transfer of any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trademark or similar property, if such income is payable in pursuance of an agreement. In addition to this, an exception is created for any income by way of Royalty for transfer of rights for any computer software supplied by a non resident manufacturer along with a computer/ computer based equipment.

4.26 The words 'accrue' and 'arise' must be viewed in contradistinction to the word "receive". Income is said to be received when it reaches the assessee. On the other hand when the right to receive the income becomes vested in the assessee it is said to accrue or arise. Section 9 encompasses all incomes that shall be deemed to accrue or arise in India and it consists of all income accruing or arising, whether directly or indirectly, through or from any business connection in India.

4.27 India began expanding its tax base in 2012, starting with the amendments to section 9(1)(vi) by Finance Act, 2012, by virtue of which inter alia the M/s. Google Ireland Ltd.

definition of royalty under the ITA was broadened. The explanation is extracted as under:

"Explanation - For the removal of doubts, it is hereby declared that for the purpose of this section, income of a non resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub section (1) and shall be included in the total income of the non resident, whether or not -

- The non resident has a residence or place of business or business connection in India

- The non resident has rendered services in India".

4.28 The above explanation has clearly done away with the territorial nexus principle and added more weight age to the Source Rule. Secondly, the word 'rendered', included by the Courts has been removed. It is the situs of the payer and the situs of the utilization of services which will determine the taxability of such services in India.

4.29 Explanation to Section 9 clearly states that for accrual of royalty or FTS, there is no requirement of residence, place of business or business connection in India. If any payment is made by any person resident in India to a non resident person by way of royalty, income is deemed to accrue or arise in India. It was because of this deeming fiction, that the income is taxable in India. It is also observed that the double taxation avoidance agreement between India and Ireland does not come to the rescue of the appellant since this treaty itself provides that the income on account of royalty may be taxed in the source state as well.

The AO has also discussed this issue in detail with the reasons and concluded that sums payable by GIPL to Google Ireland is Royalty within the meaning of DTA as well as within the meaning of section 9(1)(vi) of the Act. The same analogy applies to the amounts receivable by the appellant from direct advertisers in India towards the sale of online ad space are chargeable to tax as 'Royalty' income both under the Act and the India-Ireland DTAA.

5. Finally, in view of detailed discussions on the Para 4 of this written submission, the issues in the case of the appellant company are NOT COVERED by the decision of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited Vs CIT & Anr. (2021) 432 ITR 471 (SC)"

8. We have heard the rival contentions and perused the material on record. The assessee in grounds of appeal has raised 35 grounds. Ground Nos. 13 to 15 relates to taxability of payments received by the assessee from GIPL as per terms of the distribution agreement dated 12.12.2005 as well as the payments received by the assessee directly from Indian advertisers. As regards chargeability of income received from GIPL is concerned we notice that in the hands of GIPL, the AO had show caused why the payment made by it to GIL M/s. Google Ireland Ltd.

(assessee in this case) is not in the nature of royalty. The GIPL vide its reply dated 15.02.2013 explained that the payment made by it to GIL is in the nature of advertisement fees and not royalty under Act and DTAA. The AO, however, rejected the contentions of the GIPL and passed order under Sections 201 & 201(1A) of the Act dated 22.02.2013 for assessment years 2007-08 to 2012-

13. For assessment years 2007-08 and 2008-09, the Tribunal disposed off the case on 10.08.2022 on the short ground that order passed under Section 201 of the Act for AY 2007-08 and 2008-09 are barred by limitation (ITA Nos. 1511 & 1512/Bang/2013 order dated 10.08.2022). As regards assessment years 2009-10 to 2012-13 in IT(TP)A 1513 to 1516/Bang/2013 the issue was decided in favour of GIPL by the Tribunal by holding that the impugned payment made by it to GIL cannot be characterised as royalty under Act or DTAA. The relevant findings of the Tribunal in the case of payer, i.e. GIPL reads as follows: -

"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 M/s. Google Ireland Ltd.

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 M/s. Google Ireland Ltd.

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 ('Go ogle 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, M/s. Google Ireland Ltd.

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.

M/s. Google Ireland Ltd.

1.4 "Documentation" shall mean any and all information, written or otherwise, provided by Goode 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 M/s. Google Ireland Ltd.

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 M/s. Google Ireland Ltd.

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 M/s. Google Ireland Ltd.

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 M/s. Google Ireland Ltd.

"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/ipermisions/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 M/s. Google Ireland Ltd.

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, aid 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 M/s. Google Ireland Ltd.

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.

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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 M/s. Google Ireland Ltd.

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 ***** M/s. Google Ireland Ltd.

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 M/s. Google Ireland Ltd.

everyone 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.

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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 Invoicing address Advertising third party
Name and address Advertiser Advertising third party M/s. Google Ireland Ltd.

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 M/s. Google Ireland Ltd.

documental (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 M/s. Google Ireland Ltd.

"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 M/s. Google Ireland Ltd.

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 I, 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 M/s. Google Ireland Ltd.

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 NON-

INFRINGEMENT, 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 M/s. Google Ireland Ltd.

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 M/s. Google Ireland Ltd.

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 M/s. Google Ireland Ltd.

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 DTAA 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 M/s. Google Ireland Ltd.

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 DTAA 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(l)(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 M/s. Google Ireland Ltd.

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) M/s. Google Ireland Ltd.

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 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 DT AAs 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 M/s. Google Ireland Ltd.

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(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 *****

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 M/s. Google Ireland Ltd.

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(1)(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 M/s. Google Ireland Ltd.

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 M/s. Google Ireland Ltd.

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 M/s. Google Ireland Ltd.

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.

M/s. Google Ireland Ltd.

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 M/s. Google Ireland Ltd.

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 M/s. Google Ireland Ltd.

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 M/s. Google Ireland Ltd.

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 M/s. Google Ireland Ltd.

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."

9. In view of above order of Tribunal, where it is stated that the payment made by GIPL to GIL is not in the nature of Royalty or FTS under the Act and DTAA, a different treatment cannot be taken in the hands of the payee, i.e. the assessee in the instant case. The contentions raised in the written submission of the learned D.R. has been addressed by the Tribunal in the payer's case i.e. GIPL (supra). Hence, we are not dealing with the same in this order. Therefore, we hold that a sum of Rs.42,57,53,347/- cannot be brought to tax in the hands of the assessee.

10. As regards receipt of Rs.51,09,74,532/- on sale of advertisement space from Indian customers other than GIPL we find it is covered in favour of the assessee by the following orders of the Tribunal: -

(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 M/s. Google Ireland Ltd.

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 M/s. Google Ireland Ltd.

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 M/s. Google Ireland Ltd.

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).

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11. The contentions raised by the learned D.R. in her written submission from para 4.6 onwards regarding receipt from other Indian customers has been dealt with in above orders of the Tribunal and the order of the Tribunal in the case of GIPL (supra). Therefore, we hold that the payment on online advertisement is not liable to be taxed as Royalty in view of the aforesaid judicial pronouncements. It is ordered accordingly.

12. In view of the aforesaid reasoning and judicial pronouncements cited supra we allow ground No. 13 to 15. The other grounds raised are left open and not adjudicated. It is ordered accordingly.

13. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 28th February, 2023.

Sd/-
(Padmavathy S.)
Accountant Member

Sd/-
(George George K.)
Judicial Member

Bengaluru, Dated: 28th February, 2023

M/s. Google Ireland Ltd.

Copy to:

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

By Order

//True Copy//

Assistant Registrar
ITAT, Bengaluru

n.p.