

Income Tax Appellate Tribunal - Mumbai

Ebay Internaitonal Ag, Mumbai vs Assessee on 21 September, 2012

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI " L " BENCH, MUMBAI

BEFORE SHRI R.S. SYAL, ACCOUNTANT MEMBER AND
SHRI AMIT SHUKLA , JUDICIAL MEMBER

ITA No.6784/M/2010

Assessment Year:2006-2007

eBay International AG,
C/o. S.R. BatliBoi & Co, 18th
Floor, Express Towers,
Mumbai - 400 021.

PAN:AABCE4327L

(Appellant)

Assistant Director of Income-tax,
Range 3(2), Schindia House,
N M Road,

Vs. Mumbai - 400 038.

(Respondent)

ITA No.7046/M/2010

Assessment Year: 2006-2007

Assistant Director of Income-
tax, Range 3(2), Schindia House,
N M Road,
Mumbai - 400 038.

(Appellant)

eBay International AG,
C/o. S.R. BatliBoi & Co, 18th Floor,
Express Towers,

Vs. Mumbai - 400 021.

PAN:AABCE4327L

(Respondent)

Appellant by : Shri M.P. Lohia
Respondent by : Shri Narender Kumar

Date of hearing: 12.09.2012

Date of order: 21.09.2012

ORDER

PER R.S. SYAL, AM :

These two cross appeals - one by the assessee and other by the Revenue emanate from the order passed by the CIT (A) on 12.7.2010 in relation to assessment year 2006-2007.

2. Briefly stated the facts of the case are that the assessee is a company incorporated under the law of Switzerland and is a tax resident of Switzerland. The return of income was filed declaring Rs. NIL as total income. Such return was accompanied by a note, inter alia, stating that during the previous year relevant to assessment year under consideration eBay AG operated India specific websites providing an online platform for facilitating the purchase and sale of goods and services to users based in India. eBay AG entered into a Marketing Support Agreement with eBay India Private Limited (hereinafter referred to as `eBay India') and eBay Motors India Private Limited (hereinafter referred to as `eBay Motors') which are eBay group companies, for availing certain support services

in connection with its Indian specific websites. The assessee, eBay AG earned revenue amounting to Rs. 4,94,27,530/- from the operations of its websites in India. It was claimed that such revenue is taxable as business profits in India as per the provisions of Article 7 of the Double Taxation Avoidance Agreement between India and Switzerland (hereinafter referred to as `the DTA') only if it has a Permanent Establishment (hereinafter also referred to as `the PE') in India as per the provision of Article 5 of the DTA. It was claimed that eBay AG did not have any PE in India and as such no amount was taxable. During the course of assessment proceedings, the Assessing Officer (hereinafter also referred to as `the AO') observed that the assessee signed agreements with eBay India and eBay Motors for providing certain services to it in respect of its Indian specific operations, which have been reproduced from the clause 3.1 of the Agreements, as under :-

"Service Provider shall at all times during the Term of this agreement:

- a. Suggest to eBay International, all pertinent legal requirements relating to the business for the Service Provider Territory.
- b. Provide market data relating to industry
- c. Provide marketing and promotional services within the Service Provider territory as directed by eBay International.
- d. Perform payment processing and collection activities related to eBay

International's business in the Service Provider Territory, including look box service;

- e. On directions from eBay International, prepare and discuss budgets or other similar matters relation to the Service Provider Territory and provide market data, as may from time to time be requested by eBay International.
- f. Perform local customer support activities as specified by eBay International from time to time.
- g. Furnish such reports and information relating to its activities as may be requested from time to time by eBay International during the Term of this Agreement; and h. Such other administrative and support activities as eBay International shall request."

3. On appreciation of the relevant details furnished by the assessee, the AO came to hold that the assessee during the relevant period had connection in India as eBay India and eBay Motors were group companies rendering services to it in India. It was also found that the entire income of eBay Indian and eBay Motors was derived from such services rendered to the assessee, eBay AG. Further, eBay India and eBay Motors were found to be responsible for collecting the revenue of the assessee from its operations in India. Considering Explanation 2 to section 9(1)(vii) defining the term "Fee for technical services", the Assessing Officer held that the amount received by the assessee from its operations in India was income in the form of `Fee for technical services'. Applying the provisions of section 115A, the Assessing Officer taxed the assessee's gross revenue amounting to Rs. 4.94 crore @ 20%. When the matter came up before the learned CIT(A), the assessee contended that the Assessing Officer simply considered the provisions of the Income-tax Act, 1961 (hereinafter called

`the Act') without deliberating on the provisions of the DTAA. It was also submitted that the revenue earned by it from its users in India was not in the nature of Fee for technical services in terms of section 9(1)(vii) of the Act. As the Assessing Officer had not considered the provisions of the DTA, the learned CIT(A) required the Assessing Officer to submit a remand report in this regard. The Assessing Officer, vide remand report dated 4.2.2010, held that the assessee was eligible to claim the benefit of the DTAA. In the second remand report dated 28.4.2010, the Assessing Officer held that the assessee had dependent agent PE in India in the form of eBay India and eBay Motors. After considering the submissions advanced on behalf of the assessee, the assessment order and the remand reports, the learned CIT(A) came to hold that the Assessing Officer was not justified in considering the amount of Rs. 4.94 crore as `Fee for technical services'. He, however, upheld the stand of the AO in remand proceedings that the assessee had permanent establishment in India within the meaning of Articles 5(5) and 5(6) of the DTA and accordingly the revenue earned by it was taxable in India under Article 7 of the DTAA. Thereafter, the ld. CIT(A) proceeded to compute the income. In this regard, the assessee filed Annexure-I giving details of revenue earned at Rs. 4.94 crore and expenses incurred under Service agreements to eBay India at Rs. 24.97 crore and eBay Motors at Rs. 2.94 crore. The assessee contended that since the revenue of the assessee was a small fraction of the expenses, leading to a huge loss of Rs. 22.97 crore, there was no income which could be subjected to tax. In the absence of the assessee furnishing any supporting evidence to prove the genuineness of the claim of expenses, the ld. CIT(A) invoked Rule-10 of Income- tax Rules, 1962 and held that 10% of the revenue of Rs. 4.94 crore be taxed as business profits at Rs. 49.23 lakhs, being income of Indian specific operations.

4. The Revenue is in appeal against the direction of the learned CIT(A) to treat the assessee's gross revenue as `Business profits' as against `Fee for technical services'. The assessee is aggrieved against the impugned order on two scores, viz., firstly, the assessee did not have any dependent agent PE in India in the form of eBay India and eBay Motors and, secondly, without prejudice to its claim of not having a permanent establishment in India, against the attribution of income to its operations in India at the rate of 10% of the gross revenue.

5. Firstly, we will take up Revenue's appeal in which the challenge has been made to the treatment of the assessee's revenue as `Business profits' instead of `Fee for technical services'. Before we proceed to vet the Revenue's claim in this regard, it is pertinent to note that eBay India was earlier called Baze.com India Private Limited. The said Baze.com was acquired by eBay AG in the financial Year 2004-2005. eBay Motors came into existence for the first time in the previous year relevant to assessment year under consideration. Prior to acquisition of Baze.com, the assessee did not have any presence in India. It was only thereafter that it operated its Indian specific websites www.ebay.in and www.b2bmotors.ebay.in for providing an online platform to facilitate the purchase and sale of goods and services to users based in India. It would be relevant to consider the modus operandi of the transactions undertaken through the aforementioned websites operated by the assessee. Any seller is entitled to list its products for sale on the website. At the time of listing, the seller is required to provide various details regarding the product that is wished to be sold through the website, such as, photograph, description and price of the product. Any buyer can also register himself for buying of the goods through the assessee's website. While registering, the buyers are required to provide information, such as, their name, age and address. When the buyer accesses the

website, he goes through various products listed by the sellers. Depending on his requirements, he chooses the product which he wants to purchase online, out of the variety of products available on website with all the necessary details available. The buyer is required to choose any of the payment methods for making payment of the product directly to the seller. Once the buyer clicks 'Buy It Now' button after registering itself with the website and agreeing to the terms and conditions of sale as displayed by the seller on the website, an email is sent by the assessee to the seller confirming the sale of his product listed on the website. The seller then delivers the product to the buyer and settles the payment in respect of sale. The sellers registered on the assessee's website are its source of income who are required to pay 'User fee' on every successful sale of their products on the website. If any seller intends his products to be listed more prominently on the assessee's website, then some amount of fee is charged for that purpose as well. Such later payment is charged only once at the time of registration of the seller with its products on the assessee's website. On the successful completion of the sale, the assessee raises periodic invoice on the seller for the "user fee". The sellers are required to make payment of the user fee to eBay India/eBay Motors for the transactions undertaken on the websites of the assessee. After making collection from the sellers, eBay India/eBay Motors remit the user fee, so collected, to the assessee. These two companies, namely, eBay India and eBay Motors have entered into an agreement with the assessee for rendering market support services reproduced above. The assessee, in turn, reimburses the costs incurred by them with 8% mark-up.

6. The initial case of Assessing Officer was that the assessee's revenue sourced solely from the sellers in India, constituted 'Fee for technical services', in terms of section 9(1)(vii) of the Act, which has been negated by the learned CIT(A). From the discussion made about the factual scenario prevailing in this case, it is manifest that the assessee earns revenue from sellers registered on its websites at the time of the successful completion of the sale. A small portion of the assessee's revenue also comes from the sellers at the time of initial registration, if they intend to list their products more prominently on the website of the assessee. Now, let us see as to whether the assessee's revenue is Fee for technical services, which has been defined in Explanation 2 to section 9(1)(vii) of the Act, as follows:

"Explanation 2.--For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

7. From the above definition of 'fee for technical services', it can be seen that the same has certain positives, making the consideration as fees for technical services and certain negatives, not making the consideration as fees for technical services. The positives, talk of any consideration for rendering of any managerial, technical or consultancy services and also the provision of services of technical or other personnel. The negatives exclude any consideration for construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries", from the scope of 'fees for technical services. It is nobody's

case that the assessee's revenue is akin to any of the negatives in the definition.

8. We will focus on the positive list to ascertain whether the revenue received by the assessee is consideration for rendering managerial or technical or consultancy services. The term 'managerial services' refers to managing certain affairs, a quid pro quo for which will be described as fees for technical services. We have noticed above that the assessee becomes entitled to the user fee when there is a successful completion of sale between the buyer and seller through its website. The assessee has no role, much less the provision of any managerial services, in the process of completion of successful sales, which entitles it to user fee. The products of the sellers are displayed on the assessee's website. When some purchaser intends to purchase a particular product, he accesses the assessee's website and on finding a suitable product, clicks 'Buy It Now' button. It concludes the transaction of sale between the buyer and seller, entitling the assessee to its fee. The assessee is in no way responsible either to the buyer or the seller if there arises any dispute between them as regards the quality or suitability of product. The assessee's websites are analogous to a market place where the buyers and sellers assemble to transact. By providing a platform for doing business, the assessee can, by no standard, be considered as having rendered any managerial services either to the buyer or to the seller, for which it received fee from the seller.

9. Coming to the second component of the definition, being 'technical services', we are again at loss to appreciate as to how the assessee can be said to have rendered any technical services. The products along with necessary details are displayed on its websites. Neither the buyer nor the seller is required to avail any technical service from the assessee so as to enter into transaction. Simply because the transactions of purchase and sale of products are routed through the assessee's website, which, in turn, came into existence through necessary technical input, will not make the users of the website as availing any technical service. It is a case of use of the standard facility. Services are said to be technical when special skill or knowledge relating to a technical field is required for the provisions of such service. Where, however, technology is used in developing or bringing out any standard facility, and the provider of such standard service receives some consideration in lieu of allowing its use, the users cannot be said to have availed any technical service from the provider by the mere act of using such standard facility.

10. In the like manner, there is no question of considering the fees received by the assessee as a consideration for rendering any 'consultancy services'. There is no point at which the assessee renders any consultancy, either to the buyer or to the seller, as regards the goods to be purchased or sold. It is neither open nor possible for the buyers to consult the assessee before making any decision as regards the product to be purchased by them. The whole varieties of goods are displayed on the website. Any buyer, finding a particular product displayed on the website as fulfilling his requirement, clicks the 'Buy It Now' button. With the pressing of this button, the transaction between the buyer and seller is concluded and the assessee becomes entitled to its user fee. There is no consultancy whatsoever, which is provided by the assessee at any stage, either to the buyer or the seller.

11. The last of the positives of the definition of 'fees for technical services', is consideration for the provision of services of technical or other personnel. It is axiomatic that there is nothing of the sort

of provision of technical or other personnel in the entire process, for which the sellers pay user fees to the assessee. This fees accrues to the assessee on successful completion of transaction between buyer and seller.

12. Thus, it can be seen that apart from making its websites available in India on which various products of the sellers are displayed, the assessee has no role to play in effecting the sales. The fee received by the assessee from the sellers, in our considered opinion, cannot be designated as a consideration for rendering managerial, technical or consultancy service within the meaning of Explanation 2 to section 9(1)(vii).

13. The Id. CIT(A) has also referred to High Powered Committee (HPC) on "Electronic Commerce Taxation" constituted by the Central Board of Direct Taxes, which has stated in its report that such amount would be in the nature of payment for business activities. He also referred to The Technical Advisory Group (TAG) formed by OECD, which, vide its report on Tax Treaty Characterized Issues Arising From E-Commerce issued in February, 2001, has also opined that revenue earned by operating online facility are in the nature of business profits falling under Article 7 of the Treaty. These findings recorded by the Id. CIT(A) have remained uncontroverted by the Id. DR.

14. In view of the above discussion, there remains no doubt whatsoever that the fee received by the assessee can't be described as 'Fee for technical services', but is in the nature of 'Business profits'. In our considered opinion the Id. CIT(A) was fully justified in holding accordingly. The grounds raised by the Revenue in support of this solitary issue in its appeal, are thus not allowed.

15. Now we take up the appeal of the assessee. The learned CIT(A) has held that the assessee's gross revenue is taxable as 'Business profits' as per Article 7 of the DTA, which was earned through its dependent agent Permanent Establishments in India in the form of eBay India and eBay Motors as per Article 5(5) and 5(6) of the DTA.

16. In an earlier para we have held that the revenue of the assessee amounting to Rs. 4.94 crore does not constitute 'Fee for technical services' but is in the nature of 'Business profits'. Now we will examine as to whether such 'Business profits' are chargeable to tax in India.

17. Article 7 of the DTA deals with the chargeability of business profits. At this juncture, it will be relevant to note the prescription of para 1 of Article 7, which reads as under :-

"1: The business profits of an enterprise of a Contracting State, other than the profits from the operation of ships in international traffic, shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is directly or indirectly attributable to that permanent establishment."

18. From the above business profit Article, it is palpable that the business profits of an enterprise of a Contracting State shall be taxable in the other Contracting State only if the enterprise carries on its business in such other State through a permanent establishment. When the business is carried on by the enterprise in the other state through a permanent establishment, then only so much of the profits can be taxed which are directly or indirectly attributable to that permanent establishment. This shows that in order to tax the business profits of an enterprise of one state in the other, it is sine qua non that such an enterprise must have its permanent establishment in the other state. If there is no permanent establishment of the enterprise of the one Contracting State in the other state and there are certain business profits arising to the enterprise from such other state, those profits will escape taxation. So the existence of permanent establishment as per Article 5 of the DTAA is must for bringing to charge any business profits as per Article 7. Let us have a look at the directive of the relevant parts of Article 5 of the DTA, as under :-

"1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of the enterprise is wholly or partly carried on.

2. The term "permanent establishment" shall include especially:

(a) a place of management;

(b) a branch;

(c) an office;

.....

5. A person acting in a Contracting State for or on behalf of an enterprise of the other Contracting State other than an agent of an independent status to whom paragraph 5 applies shall be deemed to be a permanent establishment of that enterprise in the first mentioned State if:

(i) he has and habitually exercises in that State, an authority to negotiate and enter into contracts for or on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or

(ii) he habitually maintains in the first-mentioned Contracting State a stock of goods or merchandise from which he regularly delivers goods or merchandise for or on behalf of the enterprise; or

(iii) in so acting, he manufactures or processes in that State for the enterprise goods or merchandise belonging to the enterprise, provided that this provision shall apply only in relation to the goods or merchandise so manufactured or processed.

6. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a

broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise or for the enterprise and other enterprises which are controlled by it or have a controlling interest in it, he would not be considered an agent of an independent status within the meaning of this paragraph."

19. It can be observed from the Assessing Officer's remand report that he held the assessee's business profits under Article 7 chargeable to tax in India on the ground that eBay India and eBay Motors are its dependent agent PEs. The learned CIT(A) has accordingly held that the assessee has permanent establishment within the meaning of Articles 5(5) and 5(6) of the DTAA. We will therefore, proceed to test the facts of the case on the touchstone of the command of Article 5(5) and 5(6) of the DTA.

20. It was stated by the ld. AR that the ld. CIT(A) erred in concluding that eBay India and eBay Motors were the assessee's PEs in India. Thoroughly elaborating the manner in which the assessee conducts its business, as discussed above, it was stated that the assessee did not have any PE in India, which could trigger the taxability of its business profits earned from the operations in India as per the provisions of the DTA.

21. Sounding a contra note, the ld. DR vehemently argued that the eBay India and eBay Motors are assessee's permanent establishments in India. To fortify his view, he took us through the Agreement entered into between the assessee and eBay India. Both the sides are in agreement that the terms and conditions of agreement between the assessee and eBay Motors are similar to those of with eBay India. In particular, the ld. DR invited out attention towards clause 1.2 of the agreement as per which it has been provided that the actual cost of operations shall include all the cost of operations of the Service Provider, that is, eBay India. Further referring to clause 4.2 of the agreement, the learned Departmental Representative submitted that it has been provided that the Service Provider shall be compensated by the assessee for the performance of the services set forth in clause 3.1 of this agreement by an amount equal to 108% of actual cost of operations. He also invited out attention towards the clause 2.4 as per which eBay India was supposed to provide its exclusive services, as defined in clause 3.1 of the agreement, to the assessee. He also referred to clause 6.2 of the agreement as per which rights in any work product created by eBay India were to vest in eBay AG. He referred to clause 8.14 of the agreement under which any disputes arising between the assessee and eBay India were subject to the jurisdiction of Switzerland and not India. He summed up on this issue by pointing out that eBay India has no independent existence and eBay AG exercises full and direct control over it. As eBay India has no legal or financial independence and it depends solely on the assessee, and further since the entire working of eBay India is devoted exclusively to the assessee, the ld. DR contended that it made eBay India as the dependent agent PE of the assessee in India.

22. He relied on the judgment of Hon'ble Karnataka High Court in the case of Jebon Corporation India Liaison Office vs. CIT(IT) & Anr. (2011) 245 CTR (Kar) 300 in which it has been held that the liaison office of a South Korean company carrying on commercial activities of identifying the buyers, negotiating with the buyers, agreeing to the price, procuring purchase orders and forwarding the

same to the head office and the follow up activities relating to realization of payment from the customers and offering after-sales support is a permanent establishment as defined under Article-5 of the DTAA between India and South Korea and, therefore, the business profits earned in India through its liaison office are taxable in India. For the same proposition, he also relied on Columbia Sportswear Company, IN RE (2011) 337 ITR 407 (AAR) in which it has been held that the liaison office of the applicant foreign company operating in carrying on various activities relating to choosing of quality material, conveying of requisite design, picking out of competitive sellers, ensuring adherence to the policy of the applicant in the matter of procurement and employment, ensuring payments to the suppliers, is actually doing the work of the applicant in the matter of manufacturing the products as per design and quality and hence, its income is covered under the Act and would also constitute permanent establishment within the meaning of Article-5.1 of India-US DTAA.

23. The ld. DR also took assistance from the language of Article 5(2)(a) of the DTA to contend that eBay India and eBay Motors can also be treated as PEs of the assessee in India as its 'Place of management'. He argued that all the costs incurred by eBay India were reimbursed by the assessee with 8% mark-up. It was stated that eBay India incurred expenses in the nature of rent, traveling expenses, marketing expenses etc. Since, the assessee was required to reimburse the entire amount of expenses to eBay India, this, in effect meant that the premises for which rent was paid by eBay India etc., belonged to the assessee and all other expenses, though apparently incurred by eBay India, were, in reality, incurred by the assessee. In the light of the above submissions, it was contended that eBay India and eBay Motors also constitute permanent establishment of the assessee in terms of Article-5(2).

24. In the rejoinder, the ld. AR contended that the ld. DR has no right to argue the case from a standpoint of what has not been done by the AO/CIT(A). It was submitted that as the authorities below have covered the case of the assessee within Article 5(5) and 5(6) of the DTA, the ld. DR cannot set up an altogether a new case by arguing it from the angle of Article 5(2)(a) of the DTA.

25. Before we evaluate and examine the contentions raised by the rival parties, it is relevant to see precisely the nature of services performed by eBay India for the assessee. The functions required to be done by eBay have been enumerated in clause 3.1 of the agreement, which we have reproduced in earlier part of this order. The first function is to suggest the assessee of legal requirements relating to the business of eBay in Indian territory. Next is to provide market data relating to the industry and also providing marketing and promotional services within India as directed by eBay International. eBay India is also required to perform payment processing and collection activities related to the assessee's business in India and thereafter remitting the same. It is further required to prepare and discuss the Budget for other smaller matter as may be requested by the assessee and furnish such reports and information for other administration and support activities as eBay International require. Then, it is also required to perform local customer support activities as specified by eBay International from time to time. It is not the case of the Assessing Officer or the CIT(A) that eBay India performed any services other than those enumerated in clause 3.1 of the agreement. We have also perused the details of expenses incurred by eBay India, which are in the nature of administrative expenses, marketing expenses and technology expenses. Marketing

expenses include advertisement expenses, public relation expenses and market research expenses. On a careful perusal of the responsibilities of eBay India along with the actual expenses incurred by it which have been reimbursed at a mark-up by the assessee, it becomes clear that eBay India is involved in making awareness in India about the websites of the assessee and also in the collection of payments from the Indian sellers on behalf of the assessee and thereafter, remitting the same. All the expenses incurred by eBay India and the nature of activities as provided in the agreement evidently point out that the website of the assessee, through which the actual business operations are carried on, are not directly or indirectly controlled by eBay India in any manner. Though, eBay India makes advertisement in India so as to create awareness amongst the sellers to get attracted towards assessee's websites, it has no role in directly introducing any specific customer to the assessee. The agreements between the sellers of the products and the assessee, which result into user fee, being the source of the assessee's income from Indian operations, are entered online through the assessee's websites directly, without any interference or involvement of eBay India. The transactions between the buyers and sellers of the products are finalized through the assessee's websites operated from outside India. On the successful completion of sale, it is the assessee who raises invoices on the sellers directing them to deposit their due with eBay India so that forward transmission of the same could be made to it, instead of sellers sending the amount to Switzerland. Thus, it can be seen that the agreement between the sellers and the assessee, and the finalization of transactions between the vendors and the buyers, which eventually results into the revenue to the assessee, are done through the assessee's websites situated and controlled from abroad. The role of eBay India, in this regard, is mainly compartmentalized in facilitating the sellers to make the payment to the assessee in India itself. In a way, eBay India is basically providing market support services to the assessee. Under such circumstances, the question arises as to whether eBay India and eBay Motors can be considered as permanent establishment of the assessee.

26. The authorities below and the Id. DR have chiefly harped on the assessee having PEs in India through Article 5(5) and (6) of the DTA. In fact, paras 5 and 6 of Article 5 of the DTA are complementary to each other. Para 5 of Article 5 can come into play to constitute the PE in India, only if it is successfully proved that so called agent is not an independent agent. If the person who carries on business in India for the foreign enterprise, is independent agent as para 6, then one need not look into the mandate of para 5 of Article 5 of the DTA. The issue will close there and then. There can be no question of applying the tests given in para 5 of Article 5 of the DTA to determine as to whether it has resulted into a PE in India. It is only when the person doing activities for the foreign enterprise in India, turns out to be dependent agent, that the case is to be further scrutinized on the touchstone of para 5 of Article 5 of the DTA for determining as to whether it has resulted into PE or not.

27. Let us first examine para 6 of Article 5 of the DTA to find out as to whether eBay India constitutes dependent agent or not. As per this para, an enterprise of one of the Contracting States shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where that person is acting in the ordinary course of its business as such a broker or agent. However, when the activities of such a broker or agent are carried on wholly or principally on behalf of that enterprise itself or on behalf of that enterprise and

other enterprises controlling, or controlled by or subject to the same common control as, that enterprise, the person will not be considered a broker or agent of an independent status within the meaning of this paragraph.

28. The first sentence of para 6 of Article 5 talks of PE vis-a-vis an Independent Agent. It provides that where business is carried on in another state through Independent agent, it shall not constitute PE. However the second sentence provides that when such activities are done wholly or mainly on behalf of that enterprise itself or on behalf of that enterprise and also other enterprises controlling, or controlled by that enterprise, the person will not be considered as an independent agent. In such a later situation, the person will assume the character of a dependent agent.

29. There is no dispute about the fact that eBay India and eBay Motors are providing their exclusive services to the assessee. It has been fairly admitted that these two entities have no other source of income except that from the assessee in lieu of the provision of service as set out above. In view of the fact that eBay India and eBay Motors are exclusively assisting the assessee in carrying on business in India, they definitely become dependent agents of the assessee.

30. Now, we need to examine as to whether or not these dependent agents constitute permanent establishments of the assessee. If any of the conditions given in para 5 of Article 5 of the DTA is satisfied, then such dependent agents will constitute dependent agent PEs of the assessee in India. In the otherwise case, the test of PE will fail.

31. Clause (ii) of para 5 of Article-5 of the DTA refers to the dependent agent habitually maintaining a stock of goods or merchandize for or on behalf of the enterprise. This clause has no application in this case because the goods or merchandize are delivered by seller to the buyer directly who enter into contract through the assessee's website. There is no requirement on the part of eBay India or eBay AG to maintain any stock of goods or merchandize on behalf of the sellers. As such, it becomes crystal clear that the second condition is not satisfied as eBay India does not maintain any stock of goods for delivery for or on behalf of the eBay AG. Clause (iii) applies where the dependent agent manufactures or processes the goods or merchandize in that State for the enterprise. Obviously, this clause is also not applicable because eBay Motors is not required to manufacture or process the goods or merchandise on behalf of the assessee. Rather, there is no question of goods or merchandise passing hands through the involvement of the assessee or eBay India. Now, we see clause (i) of para 5 of the DTA as per which, the dependent agent "has and habitually exercises in that State, an authority to negotiate and enter into contracts for or on behalf of the enterprise, unless his activities are limited to purchase or goods or merchandize for the enterprise". As per this clause, a dependent agent will be treated as a permanent establishment of the enterprise if he has and habitually exercises authority to negotiate and to enter into contract for or on behalf of the enterprise. The exception contained in clause (i) starting after the word `unless', thereby ousting dependent agent from the purview of the permanent establishment, provides that where the activities of such dependent agent are limited to the purchase of goods or merchandize for the enterprise, then it shall not be considered as the PE. Obviously this exception clause is not applicable in our case as eBay India does not purchase any goods or merchandize for the assessee. It brings us to considering as to whether eBay India and eBay Motors do or habitually exercise `an

authority to negotiate and enter into contracts for or on behalf of' the assessee.' If it turns out that they were exercising any such authority, they will be deemed to be the PEs of the assessee, otherwise not. The learned Departmental Representative has referred to various clauses of the agreement to emphasize that eBay India was carrying on the operation on behalf of the assessee in the nature of marketing services and collection of payment etc. He also adverted to certain clauses of the agreement to accentuate that if certain research work done by eBay India results bring into existence an intellectual property, then rights in such intellectual property shall vest in the assessee. We are unable to see from such activities done by eBay India or the functions performed or undertaken to be performed as per the terms of the agreement, as to how they fall within the purview of clause (i) of Article-5(5) of the DTA. By performing the activities as narrated in the agreement, it is seen that eBay India has at no stage negotiated or entered into contract for or on behalf of the assessee. Simply by providing marketing services to the assessee or making collection from the customers and forwarding the same to eBay AG, it cannot be said that eBay India entered into contracts on behalf of the assessee. Neither there is any mention in the assessment order nor the ld. DR has specifically invited our attention towards any contract entered into by eBay India or eBay Motors, during the discharge of their functions or otherwise, for or on behalf of the assessee. Thus the test laid down as per clause (i) of para 5 of Article 5 of the DTA also fail in the present case.

32. We are mentioning even at the cost of repetition that in order to treat any person as permanent establishment within the meaning of paras 5 and 6 of Article-5 of the DTA, it is of utmost importance that such person should first answer to the description of 'dependent agent' and then such dependent agent must perform either of the three activities as mentioned in para 5 of Article 5 of the DTA. Unless the dependent agent carries on any of activities as mentioned in para 5 of Article 5 of the DTA, it cannot be treated as permanent establishment of the enterprise.

33. Coming back to the facts of our case, it is observed that undoubtedly, eBay India and eBay Motors conducted activities exclusively on behalf of the assessee and thus became its dependent agents, but they did not conduct any of the activities as mentioned in three clauses of para 5 of Article-5 of the DTA. There is hardly any need to emphasize that an object must fall within the four corners of the relevant subject to be covered within the relevant provisions governing that subject. As eBay India and eBay Motors, albeit the dependent agents as per para 6 of Article 5, did not perform any of the functions enumerated in clauses (i) to (iii) of para 5 of Article 5 of the DTA, they cannot be described as a 'Dependent agent Permanent Establishments' of the assessee. If eBay India and eBay Motors, being dependent agents, had carried out any of the activities as given in clauses (i) to (iii) of para 5 of Article 5 of the DTA, they would have definitely become 'Dependent agents PEs' of the assessee. None of the functions done by eBay India and eBay Motors for the assessee as per clause 3.1 of the agreement answer to the description given in para 5 of Article 5 of the DTA. As such, eBay India and eBay Motors, though dependent agents, fall short of the being categorized as dependent agent PEs of the assessee as per para 5 read with para 6 of Article 5 of the DTA. Since the assessee has no PE in India, the provisions of Article 7 of the DTA, which aims at taxing the business profits of the enterprise in the other State as are directly or indirectly attributable to that PE, shall cease to operate. The case law relied by the ld. DR in *Jebon Corporation India Liaison Office* (supra) and *Columbia Sportswear Company* (supra) are confined to their own facts and the relevant clauses of the governing treaties. They bear no resemblance to the

facts obtaining before us and the terms of the DTA. Thus we hold that the assessee has no PE in India as per paras 5 and 6 of Article 5 of the DTA.

34. Now we espouse the contention raised by the ld. DR about considering the case in terms of para 2(a) of Article 5 the DTA. Firstly, we shall deal with the objection raised by the ld. AR to the very question of taking up of para 2(a) of article 5 of the DTA for consideration. It was stated by him that this course of action is not open to the ld. DR as it has never been the case of the AO that the assessee has permanent establishment in India under Article 5(2)(a) of the DTA. This argument, in the opinion of the ld. AR, amounted to the ld. DR transgressing the boundaries of his jurisdiction and setting up an altogether a new case. To fortify his view in this regard, he also sought to place reliance on certain decisions.

35. It is observed that the AO in remand proceedings has held the assessee to have earned the revenue from its business operations in India chargeable to tax as 'Business profits' under Article 7 of the DTA. He held so by holding eBay India and eBay Motors to be the assessee's PEs as per paras 5 and 6 of Article 5 of the DTA. The submission of the ld. DR, which has been objected to by the ld. AR, is to treat eBay India and eBay Motors as PEs of the assessee under Article 5(2)(a). We find no force in the submission of the ld. AR on this count. By raising this argument, the ld. DR has simply tried to support the view point of the AO as regards the assessee having permanent establishment in India, though from a different angle. He is also harping on the contention that revenue earned by the assessee is Business profits as per Article 7 and the assessee has PE in India through Article 5. How this argument can be said to make out a new case, contrary to the AO, is beyond our comprehension. He has simply supported the view point of the AO from one more angle by contending the assessee has PE in India as per Article 5(2)(a) in addition to Article 5(5) and 5(6) of the DTA. The situation would have been different if the ld. DR had contended that the revenue earned by the assessee should be considered as chargeable to tax as dividend income under Article 10 or interest income under Article 11 instead of business profit under Article 7, as has been held by the AO. In that situation, it would have amounted to setting up an altogether different case by the ld. DR, not permissible as per law in the light of the precedents cited by the ld. AR. As the extant contention of the ld. DR is merely in support of the AO's point of view, it is only a different plea of the same issue, which in our considered opinion can be validly taken by any party before the tribunal. We, therefore, jettison this objection taken by the ld. AR.

36. Now we proceed to examine this argument of the ld. DR on merits. It has been contended that eBay India and eBay Motors constitute PEs of the assessee under para 2(a) of Article 5 of the DTA, as the assessee's 'Place of management'. Primarily, we find that there is no definition of the term 'Place of management' in the DTA. The same has not been shown to have been defined under the Act as well. Consequently we need to approach this concept as understood in common parlance. A 'place of management' ordinarily refers to a place where overall managerial decisions of the enterprise are taken. When we see the facts of the case as prevailing before us, it is palpable that eBay India and eBay Motors are not taking any managerial decision. They are simply rendering marketing services to the assessee in the form of collection of amount from the customers and remitting the same to the assessee, apart from creating awareness amongst the Indian sellers about the availability of the assessee's websites in India. All the business decisions and deals are settled

through the assessee's websites. eBay India and eBay Motors have no role to play either in the maintenance or the operation of the websites. They have absolutely no say in the matter of entering into online business agreements between the sellers and the assessee or the finalization of transactions between the buyers and sellers resulting into the accrual of the assessee's revenue. As eBay India and eBay Motors are required to perform only market support services for the assessee, it cannot be said that they form 'place of management' of the assessee's overall business. This contention also, therefore, fails.

37. Summing up our conclusion on this issue, it is held that though eBay India and eBay Motors are dependent agents of the assessee, but do not constitute 'Dependent agent PEs' of the assessee in terms of Article 5 of the DTA. Further, these concerns cannot be treated as the PEs of the assessee in terms of Article 5(2)(a) of the DTA. Since the assessee has no PE as per Article 5 of the DTA, there can be no question of computing business profits of the assessee as per Article 7 of the DTA in relation to the revenue generated from India.

38. Before parting with this aspect of the matter, we want to make it clear that we have desisted from examining the case under section 9(1)(i) of the Act because there is no finding given by the authorities below on this issue. Even the learned AR has not argued his case in the context of provisions under the Act. Thus, we have restricted ourselves in considering the taxability or otherwise of the revenue earned by the assessee from its Indian operations as per DTA alone. Since the assessee is found to be not taxable as per the DTA, no tax can be charged even if the assessee's revenue is found to be taxable under the provisions of the Act.

39. Ground No.1 raised by the assessee is allowed by upholding that the assessee has no dependent agent PE in India in the form of eBay India and eBay Motors. In that view of the matter, Ground No.2 against the attribution of revenue to the permanent establishment as taxable business profits, becomes academic. We, therefore, overturn the impugned order on this issue and order for the deletion of addition sustained by the learned CIT(A).

40. In the result, the appeal of the assessee is allowed and that of the Revenue is dismissed.

Order pronounced in the open court on this 21st day of September, 2012.

Sd/ -
(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/ -
(R. S. SYAL)
ACCOUNTANT MEMBER

Mumbai.

Dated the 21.9.2012

okk

Copy of the order is forwarded to :

1. Assessee as mentioned in the cause title
2. ADIT, Range 3(2), Mumbai.
3. CIT-Concerned
4. D.R. ITAT 'L' Bench, Mumbai
5. Guard File

By order
Assistant Registrar
I.T.A.T, Mumbai

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