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This issue contains:

Kind regards

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FBR concerned over dip in WHT collection

The Federal Board of Revenue (FBR) has expressed concern over a decrease of 5.6 percent in withholding tax collection during July-August (2012-2013) against same period last fiscal, having a direct negative impact on the overall direct taxes collection.

Sources told here on Sunday that the FBR Enforcement and Withholding Taxes Wing conveyed its reservations to the Director General Withholding Taxes about the sudden decrease in withholding tax collection. The FBR apprehended that the decrease would have negative implications during the ongoing fiscal year.

According to FBR"s Enforcement and Withholding Taxes Wing, there is a decline of 5.6% in total withholding taxes collections till August this year when figures (Rs51,879.51 million) are compared with corresponding figures of last year (Rs54,944.966 million).

As withholding taxes comprises about 60 percent of the collection from Income Tax, this decline will ultimately affect the income tax and overall targets of the FBR, officials of the Enforcement Wing said. Experts wondered why such a big dip in withholding tax collection has been witnessed. On the other hand, the withholding tax collection during 2011-2012 has been Rs422.4 billion against Rs357.8 billion during 2010-2011, indicating a healthy growth of 18 percent.

This important area of direct tax collection is simultaneously monitored by several departments. This created confusion in field formations. FBR"s wings engaged in monitoring of withholding taxes are FBR Enforcement and Withholding Taxes Wing; Directorate-General Withholding Taxes; Directorate-General Intelligence and Investigation Inland Revenue and Member Inland Revenue (Domestic Operations).

Experts said that when such a large number of government departments were monitoring withholding taxes, why there was a dip in collection during the period under review. Is there any need for such a large number of departments to monitor the levy? Sources said that the FBR had created the Directorate-General of Withholding Taxes in 2008 with the mandate to operate as a sole authority for their monitoring. Till now, it is a toothless authority which does not have its own expenditure budget since 2008.

The DG Withholding Taxes has the prime responsibility of monitoring/enforcement of withholding taxes, but it has no specific

expenditure budget. In the absence of logistic support, it is very difficult for any government organisation to conduct its duties and functions.

They said that the DG Withholding Taxes remained neglected by the FBR, which is evident from the facts since its creation. DG Withholding Taxes remained as a dumping ground to sideline tax officials or transfer them as Director General of the said institution.

One of the Directors General of Withholding Taxes belonging to Lahore has not attended his office during his tenure ie, from December-January 2011 to July 2012. Initially this directorate was set-up in Islamabad and later to accommodate one DG, the office was transferred to Karachi whereas it was transferred to Lahore to accommodate another DG.

To accommodate another DG the office was again sent to Karachi. Thus, this most important institution does not have a permanent station Headquarters. Now the fifth DG of the same directorate is in the Board. Thus, the FBR has never given importance or priority to the said directorate, having the task to monitor most important component of revenue collection.

Experts further pointed out that all Directors Generals of FBR whether belonging to Customs Service or Inland Revenue Services directly reports to the FBR Chairman. Directorate-General Internal Audit, Directorate General Intelligence Customs, Directorate General IR, Directorate General Training and Research and Directorate-General of Post Clearance Audit directly report to the FBR Chairman. Surprisingly, the DG Withholding Taxes, dealing with major chunk of direct taxes was restricted to report to the FBR Member Enforcement.

This is the only DG who is reporting to a Member as compared to all other directorates. The DG Withholding is a monitoring agency and Member Enforcement is also a monitoring Wing.

Thus, one monitoring department is supervising another monitoring agency. Sources said that the FBR should explore the number of officials and staff working in the directorate. The Director General of Withholding Taxes is working with few staff and there is a lack of human resource in the said directorate. – *Courtesy Business Recorder*

Land Records Management and Information System: implementation of World Bank project to improve economy

According to a spokesman of Board of Revenue (BoR) Punjab said on Sunday, that implementation of World Bank Project(Land Records Management and Information System) will not only secure the records, improve service delivery but will also stabilise and improve the economy and land market throughout Punjab.

He informed that 25 LRMIS service centers have been established and land record of 545 villages is computerised. The progress of its implementation is continuously monitored by the government and World Bank, he adds. The representatives from World Bank, during their previous mission, expressed their satisfaction over the progress and appreciated the professionalism of project staff. Keeping in view the importance and progress, the project which initially started with financing or Rs 2.773 billion from the World Bank for computerisation of land records of 18 districts of Punjab has been expanded to all 36 districts spokesman pointed.

According to a careful estimate, the data of more or less 52 million land owners is being computerised. The information according to him says that World Bank has agreed for additional financing of Rs 7.5 billion and the contract signing, in this regard, is expected during next month. – *Courtesy Business Recorder*

2012 PTR 168 [Trib.]

APPELLATE TRIBUNAL INLAND REVENUE

Mohammad Nawaz Bajwah, Judicial Member and Tabbana Sajjad Naseer, Accountant Member

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EDITOR'S NOTE

Whenever the revenue authorities fail to observe the correct law and procedure, they are made to face humiliation at the hands of the judicial authorities but not before the taxpayer is forced to rush from pillar to post for redressal of his grievance. Such slapstick attitude of taxation officers has rendered miserable, the lives of many law-abiding citizens.

FACTS/HELD

1. Brief facts giving rise to these appeals are that orders u/s 52/86 were cancelled by this Tribunal by holding that limitation for rectification is applicable to orders u/s 52/86 of the repealed Ordinance.
2. The department filed reference applications in Lahore High Court wherein order of this Tribunal was confirmed. On further appeal before the Hon'ble Supreme Court, the orders were remanded by the Honourable Supreme Court of Pakistan to the Tribunal on various grounds.
3. In the instant case, the assessee was treated as assessee in default on the allegation that deduction u/s 50(4) of the repealed Ordinance was not made.
4. The titled appeals pertaining to assessment years 1998-1999 and 1999-2000 were made at the instance of the department.
5. It was submitted- by the AR of the assessee that order u/s 52/86 was not maintainable as the assessing officer had failed to declare the company as assessee in default as no notice to this effect was issued by the assessing officer.

6. Another submission of the AR was that under section 50(4) credit of tax had to be given to the recipient and without specifying the names of the recipients, credit could not be given.
7. It was further submitted by the AR that default had to be established by the assessing officer in clear terms which was missing in this case The assessing officer could not pass exparte/best judgment assessment by alleging any default for not submitting the details of deduction of tax.
8. Next submission of the AR was that if tax deducted under section 50(4) was to be treated as advance tax of recipient, then, order after 30th June could not be passed.
9. The learned DR on behalf of the revenue, controverted the above submissions and supported the order passed by the assessing officer.
10. The Appellate Tribunal Inland Revenue cancelling these orders held:
    a. person responsible for making payment has to deduct the tax and only he can be treated as assessee in default
    b. Default has to be established by the assessing officer in clear terms
    c. The assessing officer can only hold the Principal Officer or person responsible for making payment as assessee in default.

Appeals accordingly rejected.

ITA No. 445/LB/2006 (Assessment Year 1998-99) & ITA No. 446/LB/2006 (Assessment Year 1999-00).

Heard on: 23rd July, 2012.

Decided on: 23rd July, 2012.

Present at hearing: Fouzia Fakhar, DR, for Appellant. Muhammad Iqbal Hashmi, Advocate, for Respondent.

ORDER

Mohammad Nawaz Bajwah, Judicial Member.

The titled appeals pertaining to assessment years 1998-1999 and 1999-2000 have been preferred at the instance of the department.

2. Brief facts giving rise to these appeals are that orders u/s 52/86 were cancelled by this Tribunal by holding that limitation for rectification

is applicable to the orders u/s 52/86 of the repealed Ordinance. The department filed reference applications in the Hon'ble Lahore High Court wherein order of this Tribunal was confirmed. On further appeal before the Hon'ble Supreme Court, the orders were remanded by the Honourable Supreme Court of Pakistan with the following directions:

C.A. Nos 1111 to 1127 & 1435 to 1488/2008 & 229 of 2011

14. The appeals preferred on behalf of Income Tax have been examined and the same are accepted and order impugned set aside for the reasons mentioned herein above and for following further reasoning:–

"1. With reference to each case, facts involving common questions have not been categorized with the result that the submissions made during the course of arguments on facts not dealt by the Income Tax Appellate Tribunal could not be appreciated on the basis of which the contentions have been raised before this Court.

2. It appears after hearing the learned counsel from both the sides that I. T Appellate Tribunal in the judgment rendered by it discussed and dealt with the cases as "Regular Assessee in default, which are confined to some cases only out of the whole lot when I. T Returns were filed by the assessee.

3. The cases in which section 50 of the Income Tax Ordinance, 1979 for deduction of the advance Income Tax on source could be made applicable have not been specifically dealt with.

4. It has not been shown as to how and in what manner liability imposed by the Revenue was lawfully imposed and that if no limitation was provided on the subject; the Revenue whether in a reasonable time confronted the liability by issuance of notices/letters for the recoveries of demand so raised.

5. On assumption/presumptions the conclusions appeared to have been drawn by the I.T Tribunal for enforcement of the liability by the Revenue.

6. The question of law involved in the cases arisen out of liability being enforced by the Revenue have not been attended to and dilated upon by the Appellate Tribunal.

15. These appeals are remanded to learned Income Tax Appellate tribunal Islamabad to decide the same afresh after affording proper opportunity of hearing to all concerned and in the light of observations as made herein above".

3. In the light of orders passed by the Honourable Supreme Court these appeals have been fixed for hearing. In the instant case, the

assessee has been treated as assessee in default on the allegation that deduction u/s 50(4) of the repealed Ordinance was not made. For reference section 50(4) is reproduced below:–

50(4) Notwithstanding anything contained in this Ordinance:–

(a) any person responsible for making any payment in full or in part (including a payment by way of an advance) to any person [being resident] (hereinafter referred to respectively as "payer" and "recipient") on account of the supply of goods or for service rendered to, or the execution of a contract with the Government, or a local authority, or [a company], [or a registered firm] or any foreign contractor or consultant or consortium shall, [ ] deduct advance tax, at the time of making such payment, at the rate specified in the First Schedule, and credit for the tax so deducted in any financial year shall, subject to the provisions of section 53, be given in computing the tax payable by the recipient for the assessment year commencing on the first day of July next following the said financial year, or in the case of an assessment year, if any, in which the said date as referred to therein, falls, whichever is the later.

As is clear from above sub-section (4) of section 50, it is over riding provision. Sub section (4) mentioned three ingredients i.e:

(a) any person responsible for making payment

(b) On account of supply of goods or the execution of contract etc. with the Government .... Local Authority or company .....

(c) Deduction of tax from recipient

4. This means that contracting parties are two different persons among whom contract has been executed and the person responsible for making payment is a third person who is making payment on behalf of the contracting party which may be Government Local Authority or company In the present case assessee in default has been treated the contracting party i.e. company, whereas person responsible for making payment has to deduct the tax and only he can be treated as assessee in default.

5. As per order under section 52/86 of Income Tax Ordinance, 1979, the assessing officer charged tax on account of non- deduction of tax on account of Gases and Clinical Expenses, Repair and Maintenance, legal and professional expenses, medical equipments, medicines. Relevant portion from the orders u/s 52/86 dated 25-06-2005 for assessment years 1998-1999 and 1999-2000 is reproduced below:–

The assessee a Private Limited Company, derives income from running a hospital in the name and style "Asghari Begum Hospital (new Hameed Latif). During the

examination of assessment record, it was noticed that the assessee company had not deducted tax properly which attracted the provisions of section 52/86 of the repealed Income Tax Ordinance, 1979 read with section 161/205 of the Income Tax Ordinance, 2001. A specific show cause notice u/s 52/86 of the Income Tax Ordinance, 1979 (repealed) read with section 161/205 of the Income Tax Ordinance, 2001 was issued vide this office letter No. 3906025/C-13 dated 31-05-2005, requiring the assessee to provide proof of tax deduction on various payments made during the years under consideration. In response to the notice, Mr. Shahbaz, AR of the assessee attended the proceedings and filed supporting details/documents. Case was discussed with him in detail.

Examination of details/documents reveals that the assessee company either deducted tax wherever applicable or provided copies of exemption certificates. Certain purchases/payments are found below taxable limit except the partly following heads. As this default attracts the provisions of section 161/205 of the Income Tax Ordinance, 2001 as such assessments under the said provisions of law are finalized by treating the company as "Assessee-in-default" as under:–

As is evident from above, the assessing officer received the supporting details / documents from the assessee.

6. In the light of above facts, it is submitted- by the AR of the assessee that order u/s 52/86 is not maintainable as the assessing officer has failed to declare the company as assessee in default as no notice to this effect was issued by the assessing officer. In this behalf, reliance is placed on the order of this Tribunal recorded in ITA No. 740/LB/2002 to 744/LB/2002 dated 22-12-2011. Another submission of the AR is that according to section 50(4) credit of tax has to be given to the recipient and without specifying the names of the recipients credit to the recipients cannot be given hence order is liable to be cancelled. Relevant portion from 50(4) reads as under:–

> ***50(4) .....*** *and credit for the tax so deducted in any financial year shall, subject to the provision of section 53 be given in computing the tax payable by the recipient for the assessment year commencing on the first day of July next following the said financial* ***year.*****.....**

It is contended by the learned AR that compliance with above provision of law is not possible without specifying the names of recipients. Reliance is placed by him of the case reported as 2012 PTD 122 = 105 Tax 489.

7. It is further submitted by the AR that default has to be established by the assessing officer in clear terms which is missing in this case The assessing officer cannot pass exparte/best judgment assessment by alleging any default for not submitting the details of deduction of tax. The only provision which permits best judgment assessment is section 63 which reads as under:

> "Best Judgment assessment,- Where any person
>
> a) Fails to furnish a return of total income required to be furnished by him under section 56, sub-section (3) of section 72 or sub-section (3) of section 81; or
>
> b) Fails to comply with any of the terms of a notice issued under section 58 or 61.
>
> The Deputy Commissioner may, by an order in writing, assess the total income of the assessee to the best of his judgment and determine the amount of tax payable by him"

It is asserted by the AR that from the perusal of above, it is clear that any alleged default on the part of assessee does not permit passing of order under section 52/86 of Income Tax Ordinance 1979. It is asserted by him that the assessing officer cannot hold any other person as assessee in default except principal officer. In the under noted case, department had, treated Director Finance WAPDA as assessee in default. The Honourable Lahore High Court Lahore cancelled the order on the ground that Director Finance cannot be held as assessee in default because he was not principal officer vide case law reported as 2000 PTD 3396 (H.C Lahore).

8. Next submission of the AR is that tax deducted under section 50(4) is to be treated as advance tax of recipient. Relevant portion of section 50(4) reads as under:–

> Credit for the tax so deducted in any financial year shall, subject to the provisions of section 53, be given in computing the tax payable by the recipient for the assessment year commencing on the first day of July next following the said financial year, or in the case of an assessee to whom section 72 or section 81 applies, the assessment year, if any, in which the "said date", as referred to therein, falls whichever is the later.

It is asserted by the AR that the interpretation of the statute has to be harmonious and if the tax deducted is to be treated as advance tax then order after 30th June cannot be passed. In this behalf, reliance is placed on PLD 2008 S.C. 779 relevant portion at page 817.

9. On the contrary, the learned DR on behalf of the revenue, controverted the above submissions and supported the order passed by the assessing officer.

10. We have heard the arguments put forth by the learned representatives of both the sides and have carefully gone through the available record and after due consideration to the directions of the Honourable apex court of Pakistan, we find that argument put forth by the learned AR carries substantial weight. Sub-section (4) of section 50 has an overriding effect. Sub-section (4) mentions three (3) parties i.e:

(a) any person responsible for making payment

(b) On account of supply of goods or the execution of contract etc. with the Government Local Authority or company .....

(c) Deduction of tax from recipient

11. This means that contracting parties are two different persons among whom contract has been executed and the person responsible for making payment is a third person who is making payment on behalf of the contracting party which may be a government, local authority or company. In the present case assessee in default has been treated the contracting party i.e. company whereas person responsible for making payment has to deduct the tax and only he can be treated as assessee in default which is missing in this case and other submission of the AR of the assessee is that as per section 50(4) credit of tax has to be given to the recipient which without specifying the names of the recipient credit of tax cannot be given. Reliance is placed on case law reported 2012 PTD 122(Trib) which is "on all fours" applicable.

12. The default has to be established by the assessing officer in clear terms which is missing in this case. The assessing officer has not confronted the assessee for any default after receiving the reply/information from the assessee which defect makes the order void. The assessing officer can only hold the Principal Officer or person responsible for making payment as assessee in default. Reliance in this behalf is placed on case law reported as 2000 PTD 3396 (H.C Lahore) wherein Director Finance (Wapda) was treated as assessee in default. The Honorable Lahore High Court Lahore cancelled the order on the ground that Director Finance cannot be held as assessee in default because he is not principal officer.

13. After due consideration and respectfully following the directions of the Honourable Apex Court of Pakistan, we find that argument put forth by the learned AR carry substantial weight Orders of the assessing officer under section 52/86 of Income Tax Ordinance 1979, the repealed Ordinance are not maintainable in the eye of law and are hereby cancelled by upholding the order of first appellate authority not for the reasoning made by it but for the reasons stated *supra*. Appeals of the department for these years are accordingly rejected.

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2012 PTR 1735 (Trib. Ind.)

INCOME TAX APPELLATE TRIBUNAL
MUMBAI "L" BENCH, MUMBAI

R.S. Syal, Accountant Member and Amit Shukla, Judicial Member

FACTS/HELD

1. **What constitutes a "Dependent Agent Permanent Establishment" & "Place of Management"**

   (i) The fees received by the assessee, a Swiss company, from enabling sellers registered on its offshore website to sell goods to buyers in India is not assessable as "fees for technical services" u/s 9(1)(viii) as the assessee does not render any "managerial, technical or consultancy services" to the payers. 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 is not rendering services either to the buyer or to the seller which can be assessed as "fees for technical services";

   (ii) In order to constitute a "Dependent Agent Permanent Establishment" of the assessee under Article 5(5) of the DTAA, it is essential that the agent should "habitually exercise an authority to negotiate and enter into contracts for or on behalf of' the assessee". On facts, though eBay India & eBay Motors conducted activities exclusively on behalf of the assessee and thus became its dependent agents, they did not constitute a "Dependent Agent Permanent Establishment" because they did not conduct any of the activities set out in the three clauses of Article 5(5) of the DTAA. By simply providing marketing services to the assessee or making collection from the customers and forwarding the same to the assessee, it cannot be said that eBay India entered into contracts on behalf of the assessee. There are also no examples of any contract entered into by eBay India or eBay Motors for or

on behalf of the assessee. Thus the test laid down in Article 5(5)(i) of the DTAA is not satisfied.

(iii) eBay India & eBay Motors also do not constitute a "place of management" so as to be a PE under Article 5 (2)(a) of the DTAA. A "place of management" ordinarily refers to a place where overall managerial decisions of the enterprise are taken. eBay India & 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 business decisions and deals are settled through the assessee's websites. eBay India & 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. Consequently, they are not a "place of management" of the assessee's overall business.

Order accordingly.

ITA No.6784/M/2010 (Assessment Year : 2006-2007) & ITA No.7046/M/2010 (Assessment Year : 2006-2007).

Heard on: 12th September, 2012.

Decided on: 21th September, 2012.

Present at hearing: M.P. Lohia, for Appellant. Narender Kumar, for Respondent in ITA No.6784/M/2010. Narender Kumar, for Appellant. M.P. Lohia, for Respondent in ITA No.7046/M/2010.

JUDGMENT

Per R.S. Syal:– (Accountant Member)

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 Incometax 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 Bazee.com India Private Limited. The said Bazee.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 Bazee.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 aforenoted 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 negatived 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 though 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 ld. 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 ld. CIT(A) have remained uncontroverted by the ld. 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 ld. 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 businessprofits 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 compartmentlized 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 ld. 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 aricle 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 assesee 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 assesee 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.
