

**IDIOT OUTSIDE**

# EQUILIASATION LEVY UNDER FA 2016

Chamber of Tax Consultants

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# UN position

- Committee set up to examine OECD BEPS reports and suggest changes to UN Model / commentary
- Currently concentrating on Actions 2,6,7 and 15
- Focus on Action 1 is currently on hold – resource and capacity constraints
- Also strong debates on new FTS article and service PE inclusion

# Compliance of EL – few Practical issues

- "specified service" means online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement and includes any other service as may be notified by the Central Government in this behalf;
- "online" means a facility or service or right or benefit or access that is obtained through the internet or any other form of digital or telecommunication network;
- ‘advertisement’ not defined

# How E Commerce Industry looks at advertisement

- Internet advertising – Why and How
- Pricing models
- Difference with traditional commerce mode



# Leading types of internet advertising

- Search ads -
  - Advertisers are to bid for key words
  - Depending on the bid value – the ads of the advertisers will be placed at a high or low position in the user search results
  - Predominantly used by companies like Google and Yahoo
  - Players like Right Media Exchange (similar to BOLT)
- Display ads -
  - Usual form of banners that are posted on designated/ agreed websites.
  - With agreement with the advertiser, the websites can be local websites or global websites



# Pricing models

CPM (Cost per Mille –or cost per thousand views)

- **Advertiser pays Google/ Yahoo based on the degree of exposure that user have to the ads**
- **This revenue is shared between Google/ Yahoo with the online publisher (websites) where the website gets paid whenever a user clicks an ad**

CPC (cost per click)

- **Revenue is generated ONLY when the user reacts to an advertisement as opposed to simply viewing it in the earlier model**
- **Small revenue for viewing .. but a significant payment when a product is purchased, registering for a service, through the ad**



Long way to go !



"SORRY, WE CAN'T E-MAIL  
YOUR PIZZA AS ATTACHMENT."

# Definitions

- Oxford Dictionary

A notice or announcement in a public medium promoting a product, service, or event or publicizing a job vacancy:

- Black's Dictionary

Notice given in a manner designed to attract public attention; information communicated to the public, or to an individual concerned, by means of handbills or the newspaper. *Montford v. Allen*, 111 Ga. 18. 30 S. E. 305; *Haffner v. Barnard*, 123 Ind. 429. 24 N. E. 152; *Com. v. Johnson*, 3 Pa. Dist. R. 222. A sign-board, erected at a person's place of business, giving notice that lottery tickets are for sale there, is an "advertisement," within the meaning of a statute prohibiting the advertising of lotteries. In such connection the meaning of the word is not confined to notices printed in newspapers. *Com. v. Hooper*, 5 Pick. (Mass.) 42.



# Issues

- Are following advertisement:
  - Sales Promotion Expenses
  - Marketing Expenses
  - Selling Expenses
- Now deleted s. 37(3A) dealt with disallowance of 20% of advertisement and other expenses
- It provided for exclusion for-

# Issues

- Ad in small newspaper
- Ads for recruitment of personnel
- Statutory advertisements
- Expenditure for mainitnenance of office for ads.
- Salaries to personnel engaged in advertisment
- Holding of press conference, etc.
- Publication of journals, catalogues or price lists

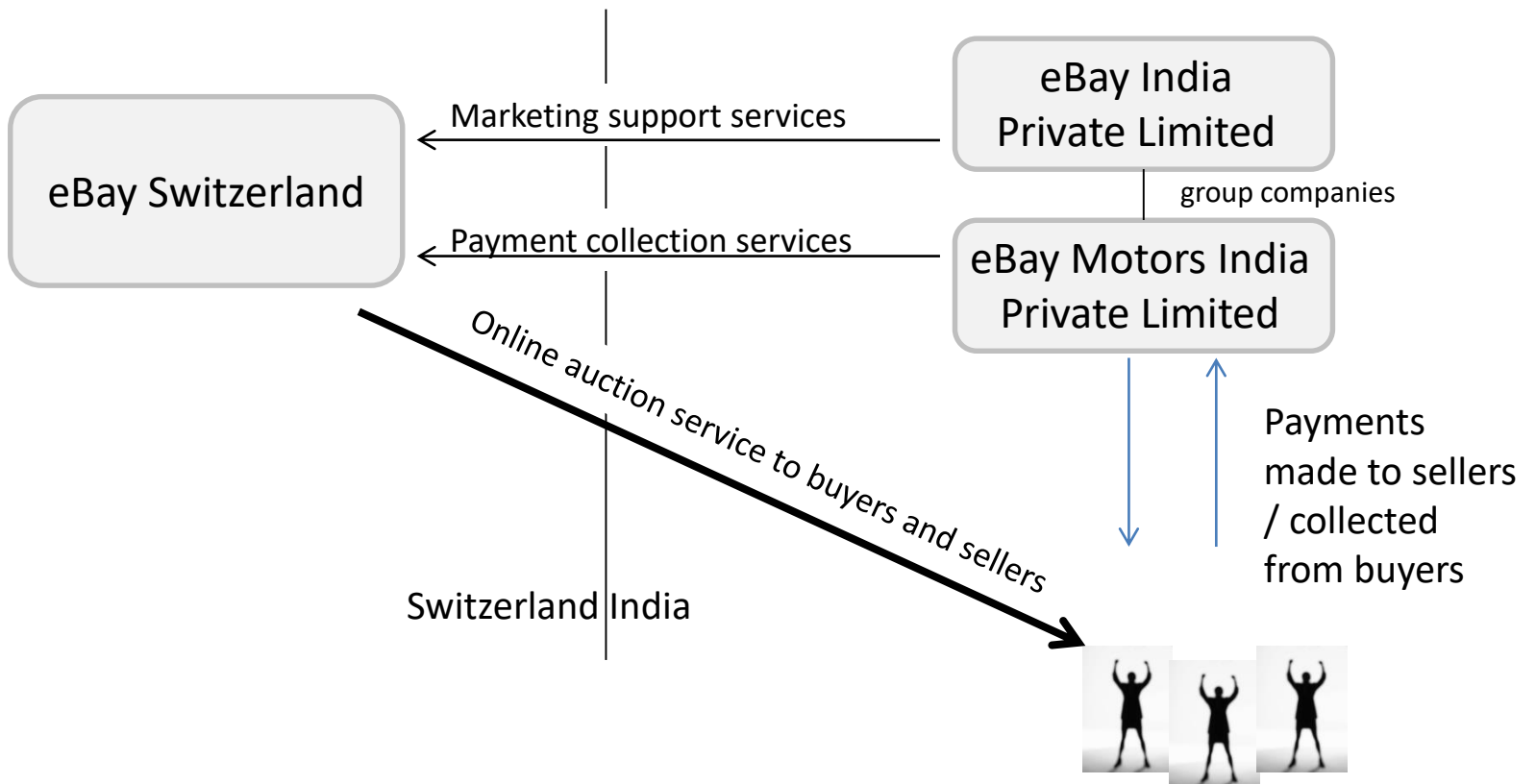
# Case laws u/s 37(3A)

- Commission paid to sales agents not covered – Selling expenses in ordinary course of business not covered (195 ITR 582)
- Special discounts / incentives not covered ( 210 ITR 78; 201 ITR 884)
- Prizes to attract more members are sales promotion (245 ITR 217)
- Publication of chairman's speech is advertisement, as there is no statutory requirement for doing so (210 ITR 274)

# Issues

- Will the old provisions and case laws be of any help?
- Few case studies

# Facts – eBay case – ITAT Mum



# Facts

- eBay Switzerland filed income-tax return in India declaring 'nil' income
- eBay Switzerland operated India specific websites providing an online platform for facilitating purchase and sale of goods and services to users based in India
- eBay Switzerland entered into a Marketing Support Agreement with eBay India Private Limited (eBay India) and eBay Motors India Private Limited (eBay Motors)
- eBay India was remunerated on a cost plus basis by CH

# Issues

1. Whether amount paid by sellers to eBay Switzerland through eBay India from operations of its auction websites in India Fees for Technical Services?
2. Whether eBay India / eBay Motors treated as Dependent Agent PE of eBay in India?

# Tribunal's ruling

## • Fees for Technical Services?

- Definition of Fees for Technical Services under domestic law and treaty law
- By providing a **platform for doing business**, eBay Switzerland cannot be considered having rendered any managerial services
- eBay Switzerland has not rendered any technical services



# Tribunal's ruling

- eBay Switzerland does not provide technical services or other personnel in entire process
- There is no consultancy provided by eBay Switzerland
- Hence, fee received by eBay Switzerland cannot be described as Fees for Technical Services
- Fees 'Business profits'

# Tribunal's ruling

## • eBay India / eBay Motors Dependent Agent Permanent Establishment?

- eBay India involved making awareness in India about websites in collection of payments from Indian sellers
- Business operations are not directly or indirectly controlled by eBay India
- eBay India has no role in directly introducing any specific customer
- Agreements between sellers of products and eBay Switzerland entered online without any involvement of eBay India
- eBay India / eBay Motors are providing exclusive services to eBay Switzerland

# Tribunal's ruling

- eBay India has at no stage negotiated or entered into contract for or on behalf of eBay Switzerland
- Not maintaining a stock of goods for or on behalf of enterprise
- eBay Motors / eBay India are not required to process goods on behalf of eBay Switzerland
- eBay India / eBay Motors did not perform any of functions enumerated in clauses (i) to (iii) of Article 5 (5) of the Indian Swiss Treaty hence they cannot be described as a Dependent Agent PE of eBay Switzerland

# Conclusion of ITAT

- Online platform similar to a market place
- Revenues earned by the eBay Switzerland from sellers do not constitute fees for technical service
- **No permanent establishment despite acting as dependent agent**
- As such, income of eBay CH held to be not taxable in India

# Will it attract EL

- Payments by buyers on the platform are for purchase of goods, hence not liable
- Payments by sellers by way of charges recovered from them are for platform, not advertisement, or is it?
- Online advertisement incurred by e Bay India – and recharged to CH – liable to EL

# Example: Ad aggregator in CH

- CH CO identifies various sites on which the advertisements / links of I CO can be arranged by them
- I CO approves such sites, and provides the material for advertisement (ad banners) / URLs (links) to CH CO
- CH CO releases such advertisements on the sites as agreed
- CH CO is paid on a “per click” basis, and the number of clicks during a period are aggregated and the payment made by I CO to CH CO.
- The payment made by I CO to CH CO is the complete payment for the transaction, and the payment to the ultimate media / site on which the advertisement /link is arranged is made by CH CO itself, with no further liability on I Co.
- CH CO operates from Switzerland, and is a tax resident of that Country.

# Example: Ad aggregator in CH

- The work of identifying the sites and coordinating with them is done by CH CO from Switzerland.
- The sites where the advertisements / links are arranged are having their servers outside India, and the work is expected to be done by CH CO outside India. They have also confirmed that they do not have any Permanent Establishment in India though which the related work is done.

# Example: Ad aggregator in CH

- Under ITA- Business Profits

The entire services / operations in the instant case are rendered from outside India (i.e. configuring /uploading of the ad banners) and the consideration for the same is also paid outside India.

Thus, no portion of the income can be said to be covered by the section 9(1)(i) of ITA, as it cannot be said that CH Co has a business connection in India, esp. with reference to advertisements displayed on sites which have servers outside India.

Online advertising revenues generated in India are not supported by, serviced by or connected with any entity based in India, and as such , s 9(1)(i) does not have any application (*ITO vs Right Florists Private Limited [TS-137-ITAT-2013][Kol]*).



# Example: Ad aggregator in CH

- Under ITA- Royalties / FTS

Royalties – Decisions like *Asia Satellite Telecommunication Co. Ltd v DIT* 197 Taxman 263 (Del), *et al* held to be not covered. However, post the amendment of 2012, it remains to be seen if such judicial view is available or not.

FTS - *DCIT v Parasrampuriah Synthetics Ltd* [2008] 20 SOT 248 (Del)], *Tata Consultancy Services v State of Andhra Pradesh* 271 TIR 401 (SC), *Skycell Communications Ltd v DCIT* (2001) 251 ITR 53, *CIT v Estel Communications (P) Ltd* 217 CTR 102 (Del), *Pacific Internet (India) Pvt Ltd v ITO* 318 ITR (AT) 179 (Mum), *Kotak Securities Ltd v DCIT* [2012] 50 SOT 158 (Mum)

# Example : Ad aggregator

Under DTAA –

- Royalties – *The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent trademark, design or model, plan, secret formula or process, or for the use of, or the right to use, any industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience.*
  - Extended meaning given to the said words contained in Explanation 4 and 5 of section 9(1) (vi) are conspicuous by their absence
  - WNS North America Inc vs. ADIT, and also ITAT benches in the cases of Nokia Networks OY 78 DTR 41 (Del), B4U International 74 DTR 162 (Mum) – Extended definitions not to apply to treaties
- FTS – NA.
- Business Profits – NA as no PE

# BUT EL payable?

- Payment is for online advertisement
- Assume that the aggregator pays 70% of its revenue to the media sties, and retains 30% for itself.
- Whether EL payable of 70% or 100%

# Example : Hire a Cloud



- I Co obtains following services from US Co
  - Space on server of US CO as may be required by I Co from time to time.
  - Random Access Memory (RAM) on server of US Co as may be required by I Co from time to time.
  - Incidental Operating systems for enabling I Co to use the above as per its requirements.
  - Connectivity for enabling I Co and/or its customers/vendors to use the above.
- I Co uses the services either (i) to provide a platform from which its customers (through intermediaries such as mobile phone companies) download games; or (ii) for usage as a social networking site where its games are available for free usage to users. – advertisements of customers published on the site

# Example : Hire a Cloud



For same reasons as in earlier example, not taxable  
as business profits or royalties of FIS

## Is EL payable?

Payment is not for advertisement

But does provide digital advertising space

Does it become specified service?

If yes, EL payable.

# Payment by I Co for foreign subs

- I Co is having gaming platform in India and 9 African countries.
- I Co pays for online advertisements to overseas vendor. For getting better rates and volume discounts, ads of all 10 entities contracted with I co, rather than each individual entity.
- I Co remits full amount, but recovers prorata from the 9 entities.
- Whether EL payable on I Co share alone, or full remittance.

# Listing on E Commerce sites

- I Co lists its products on an overseas site
- It pays listing fees – fixed per annum
- It also pays transaction fees @ agreed % of sale value of each successful transaction.
- Which of the two payments will attract EL

**THANK YOU**

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