April 23, 2022

Agency PE

Shreya Rao
AZB & Partners

Agency under contract law

Section 182 of the Indian Contract Act, 1872:

“an “agent” is a person employed to do any act for another or to represent another in dealings with third person. The person for whom such act is done or who is so represented is called the “principal”

Example: 5(4) of the India - US Treaty (pre-MLI)

- *4.* Notwithstanding the provisions of paragraphs 1 and 2, where a person—other than an agent of an independent status to whom paragraph 5 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if :

(*a*)		he has and habitually exercises in the first-mentioned State an authority to conclude on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph ;
(*b*)		he has no such authority but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise, and some additional activities conducted in the State on behalf of the enterprise have contributed to the sale of the goods or merchandise ; or
(*c*)		he habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise.

Example: 5(4) of the India - UK Treaty (pre-MLI)

- *4.* 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) of this Article applies, shall be deemed to be a permanent establishment of that enterprise in the first mentioned State if:

(*a*)		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
(*b*)		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
(*c*)		he habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise itself or for the enterprise and the enterprises controlling, controlled by, or subject to the same common control, as that enterprise.

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5(5) - US Treaty (pre-MLI)

- *5.* 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, provided that 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 and the transactions between the agent and the enterprise are not made under arm's length conditions, he shall not be considered an agent of independent status within the meaning of this paragraph.

5(5) - UK Treaty (pre-MLI)

- *5.* 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, if the activities of such an agent are carried out wholly or almost wholly for the enterprise (or for the enterprise and other enterprises which are controlled by it or have a controlling interest in it or are subject to same common control) he shall not be considered to be an agent of an independent status for the purposes of this paragraph.

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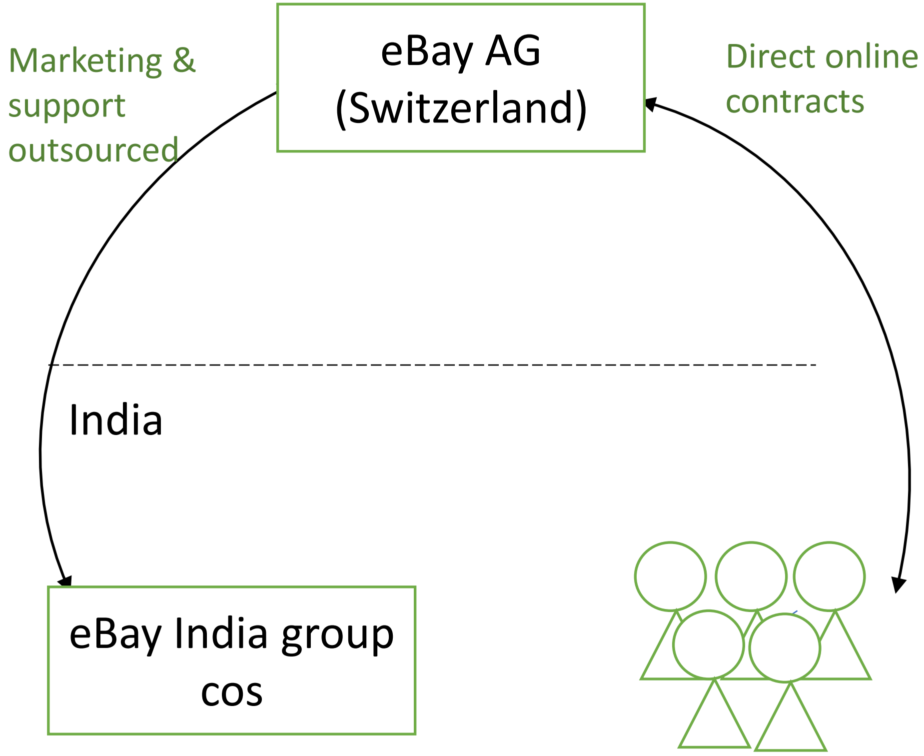
eBay International AG (Mumbai ITAT, 2012)

- TS-734-ITAT-2012(Mum)

- eBay AG, Switzerland operated India specific websites for facilitating the purchase and sale of goods to users based in India
- Appoints two group companies in India to provide: a) marketing support and b) payment collection support. No other source of Income except that from eBay AG
- Customers entered contracts online directly with eBay AG. India Co played no role in introducing specific customers to eBay AG or in entering of online contracts
- However, Indian Cos had a) no authority to conclude contracts and b) did not undertake any activities provided in Article 5(5) of India – Swiss Treaty such as habitual securing of orders or maintenance of stock on behalf of eBay AG in India.
- HELD: No DAPE



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The Indian position

- **Paragraph 32.1 of the OECD Commentary**, introduced in 2008 as India's position to the language of the Commentary on 'authority to conclude contracts', which reads as:

  "…a person has attended or participated in negotiations in a State between an enterprise and a client, can in certain circumstances, be sufficient, by itself to conclude that the person has exercised an authority to conclude contracts in the name of the enterprise; and that a person who is authorized to negotiate the essential elements of a contract and not all the elements, can be said to exercise the authority to conclude contracts.'

- **Ministry of Finance (Tax Office) v. Phillip Morris (GmBH), Corte Suprema di Cassazione** which held that even in the absence of a formal authority to conclude contracts, mere participation of representatives or employees in the phase of conclusion of contracts may in some instances constitute the authority to conclude contracts.
- **Rolls Royce Plc v. Director of Income Tax** where although the dependent agent in India did not have the authority to conclude contracts, it was held to be a DAPE on the basis of the overall facts.
- Also see: Delhi HC ruling in General Electric

Other examples of abuse

- Commissionaire arrangements
  - Agent sells goods in its own name (in a purchase and resale format, but with minimal remuneration to agent)
  - Contract would be in the agent’s name but goods would be transported from principal
  - Agent is often owned by the foreign enterprise

- Arrangements where local party has substantial negotiating powers
  - Substantial preparation, negotiation, finalization of terms in the source state
  - Rubber stamping/ finalizing in the residence state

BEPS and Agency PE

- Action Plan 7 – Preventing the artificial avoidance of PE status
- This maybe through

a. commissionaire arrangements and similar strategies

b. splitting up of services OR

c. specific activity exemptions (such as those available to preparatory/ auxiliary services)

OECD Model 2017 (post BEPS) – 5(5)

- *5.* Notwithstanding the provisions of paragraph 1 and 2, but subject to the provisions of paragraph 6, where a person is acting in a Contracting State on behalf of an enterprise, and in doing so, habitually concludes contracts or habitually plays a principal role in leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are

a) In the name of the enterprise, or

b) For the ownership of or for granting of the right to use, property owned by that enterprise, or that enterprise has the right to use, or

c) For the provision of services by that enterprise

Then the enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4, which if exercised through a fixed place of business (other than a fixed place of business to which paragraph 4.1 would apply, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

[See also Article 12 of MLI]

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OECD Model 2017 (post BEPS) – 5(6)

- 6. Paragraph 5 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first mentioned state as an independent agent and acts for the enterprise in the ordinary course of business.
- Where however a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.

OECD Model 2017 (post BEPS) – 5(6)

What is exclusivity:

- Illustration in OECD Commentary states that if the agent's sales for non-closely related enterprises is less than 10% of all sales, the agent would be considered to be acting exclusively. [Para 38.8]
- Similar threshold in AAR ruling pre-BEPS in Specialty Magazines (P.) Ltd. [2005] 144 Taxman 153.
- However, see Mumbai Tribunal in Varian India (P) Ltd. v. ADIT (an entity can be considered as 'devoted wholly or almost wholly' only if it is devoted to any one foreign enterprise)

Closely related if: 50% of the beneficial interest or aggregate voting is owned by the other enterprise OR one person directly or indirectly possesses more than 50% of the beneficial interest / aggregate vote and value of both enterprises.

BEPS and Agency PE

- Action Plan 7 – Preventing the artificial avoidance of PE status
- This maybe through

a. commissionaire arrangements and similar strategies

b. splitting up of services OR

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Issue	Resolution
Commissionnaire Arrangements	Agency PE created even when the contracts are not in the name of the enterprise
Substantial negotiation in the source country but actual conclusion of contract outside the source country	Introduction of concept of principal role leading to conclusion of contract that are routinely concluded without material modification by the enterprise
Exclusion of “independent agents” even though it is closely related to the foreign enterprise	Denial of independent agent status to closely related persons.

Multilateral Instrument

Need for MLI and chronology in relation to India

- July 1, 2018 MLI Enters into Force
- June 13, 2019 MLI ratified in India
- August 9, 2019 Notification 2887 under section 90
- April 1, 2020 23 Indian tax treaties modified by the MLI

Today, most Indian treaties covered by MLI. Some key exceptions include US, China, Germany, Mauritius. Whether country has a) signed MLI b) notified the MLI as a CTA c) completed ratification/ approval process? [Also see – reservations]

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Indian domestic changes (2018)

- “Explanation 2. —For the removal of doubts, it is hereby declared that "business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident,—
- (a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident or habitually concludes contracts or habitually plays the principal role leading to conclusion of contracts by that non-resident and the contracts are—
    - (i) in the name of the non-resident; or
    - (ii) for the transfer of the ownership of, or for the granting of the right to use, property owned by that non-resident or that non-resident has the right to use; or
    - (iii) for the provision of services by the non-resident;…”

Ensures that Indian domestic definition is not narrower than the MLI definition.

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Indian domestic changes (2018, 2020)

- **Significant Economic Presence**

Explanation 2A.— "…the significant economic presence of a non-resident in India shall constitute "business connection" in India and "significant economic presence" for this purpose, shall mean—

(a) transaction in respect of any goods, services or property carried out by a non-resident with any person in India including provision of download of data or software […]; or

(b) systematic and continuous soliciting of business activities or engaging in interaction with such number of users in India, as may be prescribed:

Provided that the transactions or activities shall constitute significant economic presence in India, whether or not—

(i) the agreement for such transactions or activities is entered in India; or

(ii) the non-resident has a residence or place of business in India; or

(iii) the non-resident renders services in India…"

Thank you