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Cross border secondment of employees – Tax and FEMA (Inbound)

1. Background

Mobility of labour across national borders is the need of the hour for various organisations to meet the desideratum of customised skills and expertise in the wake of globalisation and exchange of talent and manpower across the globe.

This results in frequent secondment or deputation of employees from or to countries other than the one in which employee had originally continued service. Moving to a foreign country often proves challenging, not only for the employee but also for the sender and receiver organisations. Coming to terms with a new regulatory system is one of the most significant factors contributing to this challenge.

At present there are approximately 244 million migrants around the world, representing 3.3 per cent of the global population as per World Migration Report 2018 issued by the International Organisation for Migration (IOM). Working in India means participating in one of the fastest-growing and most diverse economies worldwide. The official data from International Labour Organisation shows 3,90,000 emigrants for work in India from abroad in 2017.

Coverage of this article

1. Introduction to secondment
2. Indian taxation: An overview
3. Dependent Personal Services
4. Factors to be considered for Secondment
5. Corporate Tax issues
6. Practical considerations for secondee
7. Relevant matters under FEMA, 1999

Few of the magnitude of concerns while planning secondment of employees include:

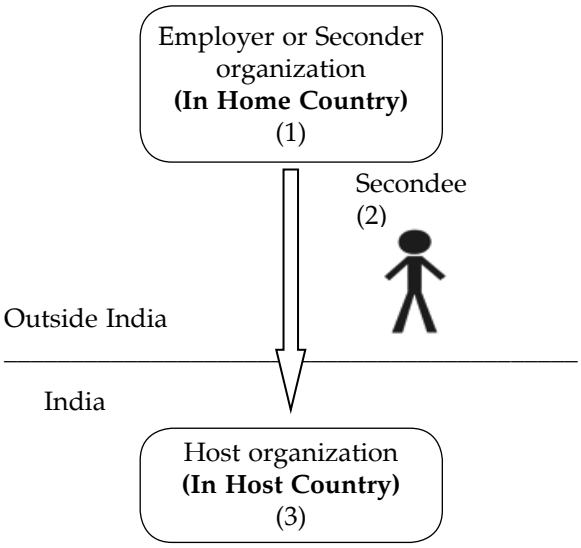
1. Dynamism in the status of employer-employee relationship
2. Nature and duration of the assignment
3. Deciding the organisation on whose payroll employee is to be held post deputation
4. Control & supervision over the employee and several related issues.

Let us first understand the concept of Secondment and a few terms associated with the same.

1.1 Secondment refers to

At common parlance, secondment of employees refers to a situation when a staff contractually employed by one company is sent/transferred to another company to perform certain work specifically assigned to them.

There are generally three parties (1,2,3 depicted below) to a classic inbound secondment agreement into India depicted hereunder:



A secondment agreement executed by the parties contains the detailed terms and conditions of the arrangement between the employer and the host.

The company and the seconded employees have to specifically take into consideration various issues like:

- Tax issues in the home and host countries,
- Host country regulations & compliances such as:
  - a) immigration laws
  - b) foreign exchange regulations
  - c) social security norms
  - d) other labour laws risks
  - e) Risk of permanent establishment ('PE')

1.2 Economic Employer vs. Legal Employer

In this arrangement, there are virtually two (or more) employer organisations created for the particular employee. An understanding of the role of each employer is vital in structuring the whole arrangement such as to minimise regulatory and other hurdles.

Economic employer	Legal employer
• Is in the host country • Pays costs related to the day-to-day maintenance of the employee • Reimburses cost of salary paid to secondee by the seconder entity	• Is in the home country • Substantial recruiter of the employee • Provides pension and other social security benefits • Pays salary to the secondee and claims reimbursement from host country organisation

IDS Software Solutions vs. ITO [2009] 122 TTJ 410 (Bang. ITAT) – In favour of the assessee

In this case, though the US Co was the employer in a legal sense but:

i. the services of the employee had been seconded to the assessee

ii. the assessee was to reimburse the emoluments

iii. it controlled the services of the employee

It was the assessee which for all practical purposes was the employer. Accordingly, the salary reimbursed to the US Co was not chargeable to tax in India.

Centrica India Offshore Private Limited vs. CIT SLP dismissed by SC on 10th Oct, 2014 – Against the assessee [Ref: (2014) 364 ITR 336 (Delhi HC)]

The Apex Court held that the reimbursement by the Indian entity of seconded employees' salaries and costs amounts to Fees for Technical Services and is liable to be taxed in India.

It was held that even though the control and supervision of the seconded employees rested with Centrica India (economic employer), their presence in India will be treated as a Service PE of the Overseas Entity. Accordingly, reimbursement of the employee costs is liable to be treated as taxable service income arising from such Service PE (and not merely a reimbursement of salary) on which tax is to be deducted by Centrica India while making the payments.

Abbey Business Services (India) Pvt. Ltd. [2012]53 SOT 401 (Bang ITAT) – In favour of the assessee

In another case, Abbey Business Services, with similar facts as those of Centrica India Offshore Pvt. Ltd., the Tribunal took a different view and held that the Indian company is the **real employer.** The difference in facts of this and the Centrica case above was that Abbey's secondment agreement contained two clauses, described below, which led to the Tribunal to declare the Indian entity as the employer.

i. Reimbursement was calculated on the basis of the time utilised and was bereft of profits, and

ii. Number and qualifications of the employees was determined by the secondee company.

1.3 Expatriate vs. Secondee

Although used interchangeably in the parlance of cross-border employment arrangements, there exist subtle differences between the terms "Expatriation" and "Secondment" as enunciated hereunder:

Particulars	Expatriation	Secondment
Meaning	The expatriate employee is recruited specifically for the assignment or is sent by the employer to work abroad	The seconded employee is already working for the company and is sent abroad for a limited period
Duration	Expatriation may last a year or a lifetime; no time limit exists	The authorized length of secondment varies depending on variety of factors specific to each case
Employment contract	The employment contract (with Home Unit) is suspended during expatriation and a new employment contract is signed with Host Unit for the period of expatriation	No new employment contract is signed with Host Unit. Secondment functions as an addendum to original employment contract.
Disbursement of Salary	The remuneration is normally paid (and charged to) by Host Unit	Remuneration continues to be paid by Home Unit (or charged to Home Unit)
Reporting entity	The employee reports to Host Unit	The employee reports to Home Unit. However, this may be subjective for each contract

1.4 Stewardship vs. Deputation

Oxford dictionary defines "Stewardship is the job of supervising or taking care of something, such as an organisation or property". A steward is a person whose responsibility it is to take care of something.

Deputation, as per the aforesaid dictionary means "a group of people appointed to undertake a mission or take part in a formal process on behalf of a larger group".

2. Indian taxation : An overview

2.1 Recent Updates in taxation

Filing the Income Tax return

- For the FY 2017-18 (AY 2018-19), non-residents have to mandatorily file their returns in either ITR-2 or ITR-3 instead of the simpler ITR-1 form used until FY 2016-17.
- The new ITR-2 form requires reporting of at least one foreign bank account with IBAN (International Bank Account Number) and SWIFT details of the Bank if they do not hold a bank account in India in which refund, if any, may be credited by the tax department.
- This ITR also requires declaration of foreign assets acquired outside India by Non-Resident or Resident but not ordinarily Resident (RNOR) if and only if income from such assets is derived during the FY.

Recent Permanent Establishment and TDS issues

***Addl. DIT (International taxation) vs. Marks & Spencer Reliance India Pvt. Ltd. TS-178-HC-2017 (Bombay HC)* – In favour of assessee**

In a significant ruling, the Bombay High Court issued an order concluding that payments made under a secondment agreement were reimbursements of expense, not technical service fees and, therefore, was not subject to Indian withholding tax under the India-UK tax treaty. It was determined that the assistance provided by the seconded employees to JV Co did not include "making available" skills or technical knowledge and, therefore, the payments made by JV Co could not be considered FTS under the treaty.

***Burt Hill Design Private Limited vs. Deputy Director of Income Tax [2017] 164 ITD 697 (Ahmedabad-ITAT)* – In favour of assessee**

In this case, the Ahmadabad Tribunal ruled that reimbursement made by an Indian company to a foreign company towards the cost of employees seconded by it to the Indian company does not attract tax withholding in India.

***Samsung Electronics Co. Ltd. vs. DCIT (International Taxation) [2018]-TII-91-INTL (Del. ITAT)* – In favour of the assessee**

It was held that where there was neither any business conducted by assessee - (Korean company) nor any income was derived through activities of employees seconded in India, there could have been no fixed place PE of assessee in India.

Assessee had two wholly owned subsidiaries in India i.e., SIEL and Samsung R&D. Expatriate employees, seconded to SIEL were only discharging duties of Indian subsidiary company towards Korean holding company and whatever benefits that were derived by Indian subsidiary were offered to tax in India. It was held that such activity did not constitute a PE under Article 5(4)(d), (e) and (f) of India-South Korea DTAA.

Further, as there is no provision for service PE in India-South Korea DTAA, no question of Service PE would arise in this matter. Also, there was no proof as to any management activity of the Korean company being conducted in India. Thus, there could have been no fixed place PE of assessee constituted through these expatriate employees.

***Ms. Flughafen Zurich AG vs. Deputy Director of Income Tax [TS-96-ITAT-2017](Bang- ITAT)* - Against the assessee**

The Bangalore Tribunal has ruled that payments made to a non-resident entity towards the cost of employees seconded by it to an Indian entity qualifies as Fees for Technical Services (FTS) and attracts tax in India. Even if the secondment period is long, the Tribunal held that the seconded employees continued to have an employer-employee relationship with the company in the home country and not in the Indian company.

Comments
It is advisable that taxpayers should maintain appropriate agreements and relevant documentation to support the position that payments for seconded employees are reimbursements of costs and are not Fees for Technical Services. Care must be taken to structure these arrangements in such a way as to minimise the risks posed in light of the above judgments. Vigilant planning of secondments can help taxpayers in substantially obviating such exposure.

2.2 Residential status

This is one area, which can have a large number of issues cutting across a complex set of facts in real life secondment scenarios. Taxation in India is based on the residential status of a person and not on citizenship. Determining the residential status for each year of deployment is of vital importance not only under the Act but also under the DTAA.

2.2.1 Taxability of income under the Income-tax Act, 1961 ('The Act')

Taxation undergoes variation based on the residency status of the individual in each financial year.

Particulars	**Resident & Ordinary Resident (ROR)**	**Resident but Not Ordinarily Resident (RNOR)/Non-resident (NR)**
Income accrued/deemed to accrue in India (Section 5 & 9)	Taxable in India	Taxable in India
Income received/deemed to be received in India (Section 5)	Taxable in India	Taxable in India
Income accrued and received outside India	Taxable in India	Not taxable in India unless it is derived from a business controlled in India or profession set up in India.

Residential status is determined solely based on his or her physical presence in India regardless of the purpose of stay. Below is a simplified criteria for determining residency of an individual under Section 6 of the Act:

Resident [Section 6]

Resident & Ordinary Resident (ROR) [Sec. 6 (1), 6(6)(a)]	*Resident but Not Ordinarily Resident (RNOR) [Section 6(6)]*
(a) He was in India for a period or periods totalling in all to 182 days or more during relevant previous year.	(a) He was in India for a period or periods totalling in all to 182 days or more during relevant previous year
OR	OR
(b) He was in India for a period or periods totalling in all to 60 days or more during relevant previous year and 365 days or more during four previous years preceding the relevant previous year.	(b) He was in India for a period or periods totalling in all to 60 days or more during relevant previous. year and 365 days or more during four previous years preceding the relevant previous year.
And	And

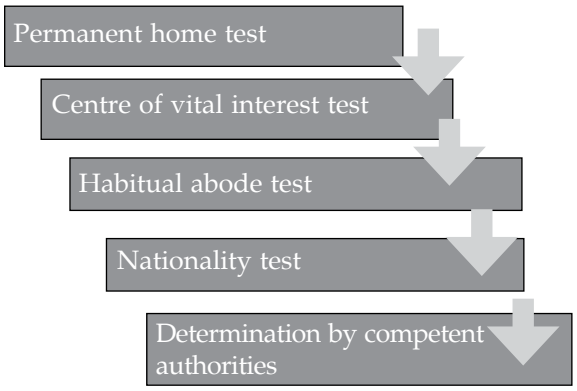
Resident & Ordinary Resident (ROR) [Sec. 6 (1), 6(6)(a)]	*Resident but Not Ordinarily Resident (RNOR) [Section 6(6)]*
Subsequent conditions (i) Must be resident of India (by fulfilling at least one of two above mentioned tests) in at least 2 out of 10 previous years preceding the relevant previous year. And (ii) Must have stayed in India for 730 days or more during 7 previous years preceding the relevant previous year.	Subsequent conditions (i) Was non-resident in India in 9 or 10 previous years out of 10 previous years preceding the relevant previous year. OR (ii) Was in India for less than 730 days during 7 previous years preceding the relevant previous year.

Non- Resident [Section 2 (30)]
Under Section 2(30) of the Income Tax Act, 1961 an assessee who does not fulfill any of the two subsequent conditions given above for ROR would be regarded as "Non-Resident" assessee during the relevant previous year.

2.2.2 Under the DTAA
Article 4(1)-RESIDENT, United Nations Model Tax Convention (UN Model), on basis of which treaties with various countries have been entered into by India , lays down as under:

"For the purposes of this Convention, the term 'resident of a Contracting State' means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of incorporation, place of management or any other criterion of a similar nature, and also includes that State and any political sub-division or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein."

However, if an expatriate employee is deemed resident of both the treaty countries under the respective country's domestic tax law, the Tie-breaker rules as per Article 4(2) of the UN model shall apply:



3. Dependent Personal Services (DPS):

The general rule under Article 15 of the UN Model with respect to income from DPS is that the remuneration may primarily be taxed in the country where the employment is exercised.

Notwithstanding this general rule, an exemption from source taxation applies if all of the following three conditions are met:

a) the employee is present in the source country for 183 days or less in any 12-month period commencing or ending in the fiscal year concerned; and

b) the remuneration is paid by, or on behalf of, a non-resident employer; and

c) the remuneration is not borne by a permanent establishment or a fixed base

of the non-resident employer, which is situated in the source country.

A special rule applies under Article 15 for remuneration from employment exercised aboard ship or aircraft in international traffic, or a boat engaged in inland waterways transport. Such remuneration may be taxed in the country in which the place of effective management of the transport enterprise is situated (or in the country of residence of the enterprise, where that formulation is used in the treaty).

A few issues which might arise in dealing with DPS include:

- the nature of services rendered;
- determination of residential status of the employer;
- quantification of income derived from each of the countries;

***Director of Income-tax (International Taxation) vs. Maersk Co. Ltd. [2013] 351 ITR 366 (Uttarakhand HC)* – In favour of assessee**

In this case, Danish employees were seconded to India [Dependent personal services] for a period not exceeding 183 days. Salary was paid by the non-resident company and not borne by the PE or fixed base in India. In view of provisions of Article 16 (corresponding to Article 15 of the UN model) of the Treaty read with Section 9 of the Act, remuneration paid to Danish nationals was taxable in Denmark and not in India as it was not borne in India.

4. Other factors to be taken into consideration for each secondment assignment

Below are few important aspects to be taken care while planning movement of secondee to India:

4.1 Short stay exemption

A secondee may be on a business visit, a short-term assignment or on a long-term assignment. Section 10(6)(vi) of the Act provides tax exemption for services rendered in India if:

a) The foreign enterprise is not engaged in any trade or business in India;

b) The employee's stay in India does not exceed in the aggregate a period of ninety days in the previous year;

c) Such remuneration is not liable to be deducted from the income of the employer chargeable under the Act.

***Commissioner of Income-tax vs. Bharat Heavy Electricals [2001] 252 ITR 218 (Delhi HC)* – In favour of the assessee**

Assessee, a Government undertaking, obtained services of two experts of NEL of UK, with Government's approval. They rendered services in India on remuneration. ITO held that amount remitted to NEL was not actually paid to employees as remuneration but was paid to NEL itself directly for technical services rendered by foreign experts and said amount was taxable. However, the two experts were found (by the Tribunal) to be employees of a foreign concern which was not doing any business in India and amount was not paid to foreign concern for technical services but for payment to two experts whose services were requisitioned. It was held by Tribunal and upheld by HC that said amount was exempt from tax under section 10(6)(vi).

4.2 Tax Residency Certificate (TRC)

Non-residents seeking tax treaty benefits are mandatorily required to produce a verified TRC with prescribed particulars from the Government of the Treaty partner country according to section 90(4) of the Act. Here, care needs to be taken for the difference between the Indian tax year (March to April) and calendar year (Jan-Dec.) followed in many other countries. It is to be noted that submission of the TRC containing prescribed particulars is a necessity, but not sufficient condition for availing benefits of the DTAAs.

It is to be noted that Form 10F is allowed to be filed by the non-resident as a self-declaration in absence of the TRC.

4.3 Foreign Tax Credit (FTC)

FTC works towards ensuring that the taxpayer is not being taxed on the same income by the home and host country. FTC can be availed in accordance with the provisions of either the relevant DTAA or Section 91 of the Act (if no DTAA exists). Rules for claiming FTC have been notified under Rule 128 w.e.f. 1-4-2017 which have been briefly captured as under:

1. FTC is to be allowed in the year in which the income corresponding to such tax has been offered to tax in India;
2. FTC shall be available against the amount of tax (including Minimum Alternate Tax under section 115JB of the Act), surcharge and cess payable under the Indian tax laws but not against interest, fee or penalty;
3. FTC shall not be available if the foreign tax is in dispute;
4. FTC shall be computed separately for each source of income derived from a particular country;
6. FTC shall be the lower of, tax payable on such doubly taxed income under the Indian tax laws and the taxes paid out of India.

Form 67 is a crucial document that is mandatorily required to be furnished in order to claim FTC on or before the due date of filing the original return of income. Online submission of Form 67 encrypting it with a Digital Signature certificate or Electronic Verification Code along with the below mentioned documents is mandatory.

1. A statement of:
   - foreign income offered to tax
   - foreign tax deducted or paid on such income in Form No. 67
2. Certificate or statement specifying the nature of income and the amount of tax deducted therefrom or paid by the taxpayer:
   - From the tax authority of the foreign country
   - from the person responsible for the deduction of such tax
   - signed by the taxpayer
3. Proof of taxes paid outside India

4.4 Hypothetical tax deduction (Hypo tax)

The need for tax neutrality from the perspective of the secondee gives rise to the concept of an estimated notional tax, which is equivalent to the tax, the expat would pay had he remained in the home country with that level of salary. Relevant up/down calculations are then made based on actual salary and tax rates for the concerned period and the differential amount between estimate and actual amount is paid/collected from the employee.

***CIT vs. Dr. Percy Batlivala [2010-TIOL- 175] (Delhi HC)* – In favour of assessee**

The employment contract bore that the US Company (employer) would bear the tax liability of the assessee on deputation to India. In this case, the total tax liability in India was lower than that in USA and the department claimed to tax the difference amount as Hypo tax. The HC however ruled that this differential amount had never accrued to the secondee in India and thus no question of law arises.

***Jaydev H. Raja [2013] 357 ITR 293 (Bom. HC)* – In favour of assessee**

Assessee was a resident but not ordinarily resident individual and an employee of a foreign company. He earned salary income of ₹ 77 lakhs in India on which tax was payable at maximum

rate amounting to ₹ 35 lakhs. He was entitled to receive the same as reimbursement from the employer. Assessee had included ₹ 35 lakhs to his salary income of ₹ 77 lakhs and offered ₹ 113 lakhs (round figure) to tax. Total tax liability of the assessee amounted to ₹ 50 lakhs which was borne by the assessee. It was held that the balance tax amounting to ₹ 15 lakhs paid by the assessee out of the salary income (not reimbursed by the company) could not be added to that income of the assessee.

***Roy Marshal vs. ACIT (2008-TIOL-567-ITAT-MUM)* – In favour of assessee**

The assessee is a foreign national resident in India during the previous year. As per the contract, employer was to bear liability to the extent of excess taxes payable in India as against that in his home country. Assessing Officer took view that 'hypothetical taxes', should also form part of salary income. Taking reference of *Jaydev Raja vs. DCIT (supra)* it was held that no deduction was actually claimed by assessee on account of hypo-tax and accordingly the addition by the Department ought to be deleted.

***ITO vs. Lukas Fole [2009] 124 TTJ 965 (Pune-ITAT)* – In favour of assessee**

The ITAT laid down the principle that for the purpose of computation of income of secondee in India, hypothetical tax is to be reduced from the tax perquisite of the employees and not from their basic salary.

4.5 Overseas Social Security and Pension Contributions

Any foreign national holding foreign passport (international worker) coming to India to work for an Indian establishment to which the Employees Provident Funds and Miscellaneous Provisions Act, 1952 applies, is required to contribute to the Employee's Provident Fund in India. However, international workers (IW) coming from a country with which India has a social security agreement (SSA) and he is contributing to the social security of the home country and enjoys the status of a detached worker is excluded from this requirement provided he obtains a certificate of coverage (COC) from the home country.

Following are the updates in Withdrawal provisions for inbound employees as per Notifications and Circulars issued:

- IW from SSA country:
  - Provident fund: On completion of Indian assignment
  - Pension fund: Early lump sum withdrawal possible
  - Withdrawal in Indian bank account, overseas bank account and 'through the employer'
- IW from non-SSA country:
  - Provident fund: On retirement from service or attaining 58 years of age, whichever is later
  - Pension fund: Early lump sum withdrawal not possible
  - Withdrawal only in Indian bank account

Currently India's Social Security Agreements are operational in nineteen countries – France, Germany, Switzerland, Belgium, South Korea, Denmark, Netherlands, Luxembourg, Sweden, Finland, Czech Republic, Norway, Hungary, Austria, Australia, Japan, Portugal, Canada and the latest to be signed the SSA with Brazil in 2017 which will be in force from a date in 2018 (not yet notified).

***Yoshio Kubo vs. CIT [2013] 357 ITR 452 (Delhi HC)* – In favour of assessee**

M/s. Sony Corporation of Japan (SCJ) deputed its employee to work in India and also bore his taxes arising in India. On contentions raised by the Department in the employee's case, the Delhi HC ruled as under:

1. On social security, pension and medical insurance contributions by employer:

   These amounts assure not a present benefit but future benefit to the employee, only in the event of a contingency. This amount does not vest in the employee and is not taxable perquisites.

2. Regarding assessability of TDS refunds:

   Amounts are paid directly by the employer to the Government over and above the tax due on the salary. These do not, in any case, accrue to the assessee and are not taxable in his hands.

***ACIT vs. Harashima Naoki Tashio [2010] ITA No. 4634 (Delhi ITAT)* – In favour of assessee**

In case of a foreign national, working as employee of Indian Co., employer's contribution towards social security, health insurance, etc. in Japan was held not liable to tax in the hands of the employee in India as it was made under statutory provisions of Japan. It did not give any vested right to the employee in the year of contribution and it was a contingent benefit dependent on an event beyond the control of the employee. Therefore, the amount contributed by the employer was not treated as a taxable perquisite in the hands of the employee.

***Gallotti Raoul vs. ACIT [1997] 61 ITD 453 (Mum ITAT)* – In favour of assessee**

Assessees were French nationals working in India - In terms of French legislation, every French national was under an obligation to affiliate with social security organisation and contribute certain percentage of salary irrespective of the place of employment. Social security charges were tax deductible in France. Assessee was paid salary after deduction of social security charges. It was held that contribution made to these charges could be deducted while computing salary income of assessee as social security organisation has overriding charge and assessee has no domain over it.

4.6 *Per diem* allowance

The employees also receive a *per-diem* allowance over and above the normal home country salary. Section 10(14)(i) of the Act read with Rule 2BB(1)(b) of the Income-tax Rules, 1962 exempt any allowance whether granted on tour or for the period of journey in connection with transfer, to meet the ordinary daily charges incurred by an employee on account of absence from his normal place of duty. It is to be noted that the exemption is available only to the extent to which the expense is actually incurred.

Caution: The allowance must be granted as a reimbursement and not as personal advantage

***CIT vs. Goslino Mario (2000) 241 ITR 312 (SC)* – In favour of assessee**

In case of *Per Diem* allowance, it was held that where the employees were required to stay away from their homes, daily allowance given to them to incur expenditure, **wholly, necessarily and exclusively for the purpose of duties and such expenditure was in nature of reimbursement,** the same will be excluded from the net cast by the Act.

4.7 Tax on Non-monetary perquisites – Exempt in the hands of employee

A plain reading of section 10(10CC) of the Act is as - *"in the case of an employee, being an individual deriving income in the nature of a perquisite, not provided for by way of monetary payment, within the meaning of clause (2) of section 17, the tax on such income actually paid by his employer, at the option of the employer, on behalf of such employee, shall not be included in total income."*

***Yoshio Kubo vs CIT [2013] 357 ITR 452 (Delhi HC)* – In favour of assessee**

M/s. Sony Corporation of Japan (SCJ) deputed its employee to work in India and also bore his taxes arising in India. On contentions raised by the department on taxability of non-monetary perquisites, the Delhi HC rule as under:

1. Taxes paid by employer on employee's behalf:

   Amounts paid directly by the employer to discharge its employees' income tax liability are exempt in the hands of employee u/s. 10(10CC)and are to be excluded from his income calculation.

2. Regarding grossing up

   Where tax is deposited in respect of non-monetary perquisite, it is exempt under section 10(10CC) and multiple stage grossing up is not applicable.

***RBF Rig Corpn. LIC (RBFRC) vs. ACIT [2007] 109 ITD 141 (Delhi ITAT) (SB)* – In favour of Assessee**

Payment of tax on behalf of employee at option of employer is a non-monetary perquisite fully covered by section 17(2)(iv) . Thus, it is exempt under section 10(10CC) and is not liable to be included in total income of employee. Taxes paid by employer can be added only once in salary of employee and thereafter, tax on such perquisite is not to be added again.

5. Corporate tax issues

5.1 Permanent Establishment (PE) exposure for overseas employer

The overseas employer runs a risk of triggering PE exposure in the host country depending on the period of presence, nature of work performed and the text of contract with the host country which could lead to unwarranted tax and compliance issues. Various judicial precedents in this matter need to be verified so as to examine its relevance with reference to nature of services performed, applicability and interpretation of the Act and DTAA for resemblance and accordingly structure the secondment contract to minimise the tax and regulatory implications.

***Assistant Director of Income-tax vs. E-Funds IT Solution Inc. - [2017] 399 ITR 34 (SC)* – In favour of assessee**

E-Funds India, the Indian arm of the assessee's group rendered back office support services for the USA based assessee for which it received remuneration at arm's length price. The High Court decided the issue in favour of the assessee after which the tax department filed an appeal to the SC. The SC after considerable arguments of both parties observed:

Fixed place PE

A fixed place at the disposal of the foreign entity is required to attract this type of PE which was not found in the present case.

Service PE

Article 5(2)(l) of the India -US DTAA requires an enterprise to furnish services within India through personnel. The Indian company rendered only auxiliary operations to facilitate services outside India which did not give rise to PE.

Agency PE

The Indian entity was not authorised to conclude contracts on behalf of the assessee. Hence there is no question of forming an agency PE in India.

***ADIT (IT) vs. Bay Lines (Mauritius) [2018] ITA No. 1181 (ITAT-Mum.)* – In favour of assessee**

The Tribunal laid down that where activities of assessee's sole agent in India were not devoted exclusively on behalf of assessee as it also did work on behalf of other principals and earned a substantial part of its income from them, it was not an exclusive agent of assessee and, accordingly, it did not come under purview of definition of dependent agent as defined in article 5(5) of DTAA between India and Mauritius. Thus, assessee was not having any PE in India and therefore it was not taxable as per Article 7 of the DTAA.

***ACIT (IT) vs. Valentine Maritime (Gulf) LLC [2017] 166 ITD 1 (Mumbai - ITAT)* – In favour of assessee**

The assessee based in Abu Dhabi had entered into a contract with Indian company to provide

services of personnel and survey services. It submitted that it did not have PE in India as each of its contracts were for a period less than 9 months. However, Assessing Officer considered the combined period of all projects undertaken by the non-resident company to determine. The learned ITAT held that the actual period of two unconnected projects undertaken by a foreign company could not be combined so as to determine its PE in India.

***GE Energy Parts Inc. vs. ADIT (International tax) [2017] 56 ITR (T) 51 (Delhi ITAT)* – Against the assessee**

It was observed that expatriates deputed in India undertook core marketing and sales activities of the overall GE group from GE's liaison office. Thus, Indian liaison Office constituted assessee's fixed place PE.

Further, since GE India, comprising of secondees from overseas GE entities had the authority to conclude contracts on behalf of GE overseas, GE India constituted dependent agency PE.

***Morgan Stanley & Co. [2007] 292 ITR 416 (SC)* Against the assessee**

In Morgan Stanley's case, the Supreme Court concluded that the US company did not have a PE in India on most accounts, except that if personnel are deputed to India, then the deputees are likely to constitute a 'service PE' in India. In this case, the court examined the consequences of Morgan Stanley sending personnel to India on stewardship (Supervision of operations) and deputation and concluded that as regards stewardship, no 'service PE' will exist, whereas deputation will result in a 'service PE'.

Further, under Indian transfer pricing laws, international transactions with associated enterprises are required to be at an arm's length price which will debar further tax consequences and attribution of profits.

5.2 Risk of Double Taxation for the entities involved

Many a times, the home country employer continues to pay the salary to the seconded employees on behalf of the host country employer and claims reimbursement for the same from the host country organisation. It is worth observing that the same amount of money is brought into the tax net - once in the secondee's hands as salary accrued/received in India and as payment to foreign entity for services rendered by their employee. This results in duplication of taxes and is a grave loss to the taxpayer. Further, even if the withholding tax (WHT) is deducted and the net tax liability of the Foreign entity is nil or refundable, the actual receipt of this WHT amount back to the foreign entity is not easy to obtain. Ultimately, it leads to unnecessary sacrifice of money. Thus, it is very important to take care of the tax structure for all the parties concerned, as a single loophole may lead to enormous cost and litigations.

***DCIT vs. Mahanagar Gas Ltd. [2016] 158 ITD 1016 (Mumbai – ITAT)* – In favour of assessee**

Since technical services of US company employees had been seconded to assessee who was to reimburse (on cost basis) their emoluments, it was the assessee which for all practical purposes was the employer and, therefore, salary reimbursed could not be considered as 'fees for technical services' for purpose of section 194J (TDS on professional services).Accordingly, no TDS was required to be withheld under that section.

***Intel Corporation vs. Deputy Director of Income-tax,(International Taxation) [2016] IT(TP)A No.1486/Bang/2013 (Bang ITAT)* – Against the assessee**

Where assessee, US company received certain sum from its Indian subsidiary on account of salary costs of its seconded employees, since all secondees were rendering expert managerial services to Indian subsidiary and further, the assessee US company was the legal employer of secondees, sum received by assessee was clearly F.T.S. taxable in India.

***Commissioner of Income tax vs. Eli Lilly & Co. (India) (P.) Ltd [2009] 312 ITR 225 (SC)* – Against the assessee**

1. If any payment of income chargeable under head 'Salaries' falls within section 9(1)(ii) i.e. Salary earned in India for services rendered in India, then TDS provisions would stand attracted.

2. Whether home salary payment made abroad to expatriate employees by foreign company can be held to be 'deemed to accrue or arise in India' would depend upon in-depth examination of facts in each case.

3. Where such salary payment made by foreign company abroad is for rendition of services in India and no work is found to have been performed for foreign company, such payment would certainly come under the purview of TDS.

6. Practical considerations for the Seconded Employee:

6.1 Considerations before arrival in India

- Immigration: A foreign national visiting India for employment should apply for a valid visa before he arrives. Expats can either apply for an employment visa or business visa depending on their requirement to legally work in India – no separate work permit will be needed.

Particulars	Employment visas	Business visas
Eligibility	To work for an organisation registered in India	For expats who want to conduct business in India or those not on Indian company payroll
Scope of work	Relocating to India on either an intra-company transfer or with a guaranteed offer of employment	Applicants usually work on behalf of a foreign company for a limited time
Documents required	• Proof of contract • Professional Qualification proof	• Letters from the sponsoring organisation • Details of the local Indian organisation doing business with
Validity of Visa	2-5 years	6 months or more
Application Form	Local Indian Embassy or a VFS Global private processing agency appointed by the Indian authorities to process visa applications	
Extensions and renewals	From Indian Ministry of Home Affairs or an secondee's local Foreign Regional Registration Office (FRRO)	

- Contract: One should be employed as a full-time employee under an employment contract setting out in clear terms the remuneration or salary and the non-cash benefits (perquisites) to which the secondee will be entitled.

- The taxability of each allowance, perquisite and other considerations from both the employers need strict perusal as to their taxability or otherwise in India.

6.2. Considerations after arrival in India

6.2.1 A glimpse of requirements

Requirements	Form to be filled	Periodicity
Foreigners' Regional Registration Office (FRRO)	Apply online https://indianfrro.gov.in /frro/menufrro.jsp	Within 14 days of arrival. To be renewed periodically
PAN application	Form 49AA	One time
Tax payments (personal income)	Challan 280	15th June, 15th September, 15th December, 15th March
Income Tax return (ITR)	Commonly used returns for secondees are ITR-2 and ITR-3. However, it is advisable to select ITR depending on source of income each year	31 July
Social security	Done by the employer	Monthly
Income tax clearance certificate	Form 30A	Before departure

6.2.2 Bank Account:

- **<u>In India</u>**

  Under clause 5(1)(iii) of the FEM(Deposit) Regulations, 2016 notified *via* Notification No.5(R)/2016-RB dated 1st April, 2016, an expatriate is permitted to open a NRO Bank account with an Indian Bank or Indian branch of a foreign bank in India to credit his/her Indian earnings or receive funds from abroad, even though their residential status may be Person not resident in India.

  Upon becoming a person resident in India (PRI), a regular savings account bank can be opened.

- **<u>Outside India</u>**

  As per clause 5(F)(8)(i) of the FEM (Foreign currency accounts by a person resident in India) Regulations, 2015 notified via notification No. FEMA 10(R)/2015-RB dated 21st January 2016, *a citizen of a foreign State, resident in India, being an employee of a foreign company or a citizen of India, employed by a foreign company outside India and in either case on deputation to the office/ branch/ subsidiary/ joint venture/ group company in India of such foreign company may open, hold and maintain a foreign currency account with a bank outside India and receive the whole salary payable to him for the services rendered to the office/ branch/ subsidiary/joint venture/ group company in India of such foreign company, by credit to such account, subject to payment of taxes, as applicable in India.*

6.3 Annual Tax return of the employee

- A tax return has to be filed by the secondee within the due date of 31st July, following the end of the relevant tax year *(The Indian tax year runs from 1st April to 31st March)*

- <u>Penalty for non-filing:</u> A penalty of ₹ 5.000 is attracted if the filing is done between 31st July and 31st December. Thereafter the penalty will be a maximum of ₹ 10,000.

  This is applicable only if the Total income for that year exceeds INR 500,000.

- Wherever necessary, exemption or claims should be backed by valid documentation. Returns need to be filed online from the website https://www.incometaxindiaefiling.gov.in

- Revision of return: In case of errors of for any other valid reason, this return is allowed to be revised within 2 years from the end of the relevant tax year on and from the year 2017-18.

6.4 Considerations while departing from India

6.4.1 Tax clearance certificate

- As a non-domiciled individual in India, the secondee is required to obtain a no objection certificate (NOC) from the Indian tax authorities at the time of leaving the country post completion of work contract.
- An undertaking by the employer needs to be furnished to the authorities assuming liability for tax if any, due from the secondee.
- Such NOC may be required at the port of departure by the immigration authorities.
- Procedure for making application:
  a) One has to apply for NOC in Form 30A. This form requires the employer or the person through whom the secondee has earned income in India, to act as a guarantor to pay the taxes payable by the person leaving India, under the Income-tax Act.
  b) The liability of the guarantor will extend to the amount of tax determined as payable on the income earned during the period of employment under the employer.
  c) The NOC in Form 30B is issued on receipt of Form 30A and has a period of validity specified therein.

6.4.2 Tax Refunds for departing secondee

- Few banks process refunds (through their tax pool account) for secondees who leave India and not having any bank account in India. A SWIFT message with KYC details of the beneficiary (from the Beneficiary's overseas bank) and specified documents are required to be submitted to an eligible Indian Bank who then collects and converts the refund into desired currency and remits it into the secondee's home country bank after deducting a service charge.
- As per Circular: No. 707, dated 11-7-1995, in certain cases, an employee to whom refunds are due has already left and has no bank account in India by the time the assessment orders are passed, the refund can be issued to the Indian employer as the tax has been borne by it. The non-resident assessee is required to duly give an authorisation in this regard.

  Also refer recent updates in point 2.1 in case of refund.

7. Foreign Exchange Management Act, 1999 ('FEMA')

FEMA regulations also need to be looked into to determine the ability to receive, retain and/or remit the salary outside India as well as at the time of opening a bank account in India. The key to this is to determine the residential status of the expatriate employee under FEMA, which contains a definition different from that under the Income-tax Act, 1961 ('the Act').

7.1 Residential status

FEMA makes clear distinction between resident and non-resident. Person resident in India means the following [Section 2(v) of FEMA]:

A person residing in India ("PRI") for more than 182 days during the course of preceding financial year. However, it does not include a person who:

- has gone out of India or who stays outside India for employment outside India or carrying on business or vocation outside India or for any other purpose, in such

circumstances as would indicate his intention to stay outside India for an uncertain period.

- has come to or stays in India, in either case, otherwise than
  - (a) He has come for or taking employment in India
  - (b) For carrying on business or vocation in India
  - (c) For any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period

Summarizing: 'Person resident in India' includes persons of India (except those staying abroad for work or business or other purpose) and foreign persons who come to India or stay in India for employment, carrying out business or other purpose. Even office, branch or agency can be 'person'.

One major distinction between. Income tax and FEMA provisions is that "purpose of stay" is not relevant in income tax unlike for FEMA.

7.2 Possession of foreign exchange by a person resident in India but not permanently resident therein

As per Regulation 4 of FEM(Possession and retention of Foreign currency), Regulations, 2015 , persons resident in India but not permanently resident (means a person resident in India for employment of a specified duration not exceeding three years) therein may possess without limit foreign currency in the form of currency notes, bank notes and traveller's cheques, if such foreign currency was acquired, held and owned by them when they were resident outside India and has been brought into India in accordance with the regulations made under FEMA i.e., after making declaration when required.

7.3 Holding assets outside India

As per Section 6(4) of FEMA, 1999, a PRI may hold, own, transfer or invest in:

i) foreign currency

ii) foreign security

iii) any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India. Further, no RBI permission is required to be obtained by PRI for making payments or fresh investments abroad from the income or sale proceeds of assets exclusively held outside India.

Conclusion

Based on the rulings cited in this article, following critical issues are to be taken care of while executing the secondment agreement:

a. The extent of responsibility, indemnity and risk borne by each of the employers.

b. Right to terminate or modify the conditions of secondment employment.

c. Authority to instruct, supervise and level of control on the secondee's work.

d. Whether the Indian company has exclusive control on the place of employment?

e. The ratio of reimbursement by host to h``ome country organisation of salary, allowances and other costs belonging to the secondee-whether this reimbursement includes an element of profit?

f. Exact nature of services rendered-the skill and expertise required for the same and the quantum of benefits received to each organisation.

g. Period of secondment and probability of requiring an extension beyond the period stipulated.

h. Is the secondment agreement a "contract for service" or a "contract of service?"

Needless to say, utmost caution is necessary in drafting the secondment agreement as otherwise an unintended obligations for the Indian company may be created in light of various judicial precedents.

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