CIT v. Ernst & Young U.S. LLP

[2026] 187 taxmann.com 711 (Delhi HC)

Secondment Taxability

10th July 2026

BCAS ITF Study Circle

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Key concepts

Secondment

Contract for service

vs

Contract of service

Legal *vs* **Economic** *vs* **Real Employer**

Secondment – Potential Implications
[India-USA DTAA]

Service PE

FTS

Salary Taxability

Secondment – Potential Implications

Service PE

ARTICLE 5
PERMANENT ESTABLISHMENT

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

2. The term "permanent establishment" includes especially :
…
(l) the **furnishing of services**, **other than** **included services** as defined in Article 12 (Royalties and **Fees for Included Services**), within a Contracting State by an enterprise **through employees** or other personnel, but **only if**:

(i) activities of that nature continue within that State for a period or periods aggregating more than 90 days within any twelve-month period ; or

(ii) the services are performed within that State for a related enterprise [within the meaning of paragraph 1 of Article 9 (Associated Enterprises)].

Secondment – Potential Implications

FTS

ARTICLE 12
ROYALTIES AND FEES FOR INCLUDED SERVICES

1. Royalties and fees for included services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for included services may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if the beneficial owner of the royalties or fees for included services is a resident of the other Contracting State, the tax so charged shall not exceed (15%).

…

4. For purposes of this Article, "**fees for included services**" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

…

(b) **make available** technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

Secondment – Potential Implications

FTS

(under the Act)

Section 9(1)(vii)…

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"**;

Secondment – Potential Implications

Salary Taxability

ARTICLE 16
DEPENDENT PERSONAL SERVICES

1. … salaries, wages and other similar remuneration derived by a resident of **US** in respect of **an employment** shall be taxable only in **US unless the employment is exercised in India**. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in **India**.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of **US in respect of an employment exercised in India** shall be taxable **only in US, if**:

a) the recipient is present in **India** for a period or periods **not exceeding** in the aggregate 183 days in the relevant taxable year ;
b) the remuneration is paid by, or on behalf of, an employer who is not a resident of **India**; and
c) the remuneration is not borne by a permanent establishment or a fixed base or a trade or business which the employer has in **India**.

Also: Section 10(6), OECD Model Commentary on Article 15

Key decisions

Morgan Stanely (SC) 2007

Service PE,
Lien, Stewardship

Centrica (Delhi HC) 2014

(WDR)
Serious flaws

N.O.S. (SC) 2022

Service Tax
Manpower Supply

Boeing (Delhi HC) 2023

Relies on ITAT's
findings of facts

Flipkart (Kar HC) 2025

Relies on Abbey
Triple test:

1. Control
2. Supervision
3. Direction

EY US (Delhi HC) 2026

Relies on Centrica
(WDR)
Serious flaws

Centrica India Offshore (P.) Ltd. v. CIT

[2014] 44 taxmann.com 300 (Delhi)

AAR Ruling:

1) The services **did not fall within the purview of "FTS"** (in favour of the assessee)
2) However, seconded employees resulted in a "Service PE"

Assessee's Writ Petition

Only challenge to AAR's findings on **Service PE**

Hon'ble HC's decision:

1) Service PE & FTS **mixed up**

2) **Issue framed**: Whether secondment falls within A.12/A.13 of India-Canada/UK *which embody the concept of "Service PE"*!

3) **Emphasis**:

- ❑ Initial years of operation of Indian entity +MSA+ Social Security + terms of contract not supportive + **lien** on employment with foreign employer: 'Real employer' is the foreign entity
- ❑ 'Soft Intellectual Property' + "Reimbursement" nomenclature not determinative = FTS

4) **Conclusion: Writ dismissed + AAR's order upheld** **[So? Not FTS?]**

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Two totally distinct issues:

01

Secondment

Whether secondment reimbursements constitute Fees for Technical Services under Article 12(4)(b) of the India-USA DTAA?

02

Professional Services

Whether professional services rendered from USA to clients in India covered by the exception under Article 12(5)(e)?

Involved certain **trainings** to be provided to customers in India (such as, Infosys)

EY – Secondment Agreement (1/2)

Relevant Clauses:

AND WHEREAS EYUS has **agreed to relieve** such personnel (hereinafter EYGDS India Employee) **so that he can work in employment with EYGDS INDIA** on the terms and conditions as agreed between EYGDS INDIA and Employee;

AND WHEREAS the personnel shall be **released from their work at EYUS** and shall be integrated in EYGDS INDIA for the period of employment with EYGDS INDIA.

"Assignment" shall mean release of personnel of EY US to and **who is to be in employment by EYGDS India for period of employment** under the terms and conditions agreed by EYGDS India and employee.

1. During the Period of Assignment, the International Assignees shall **function solely under the control, direction and supervision of EYGDS INDIA** and in accordance with all rules, regulations, policies, guidelines and other practices, generally applicable to the employees of EYGDS INDIA. International Assignees shall **work exclusively for EYGDS INDIA** and shall be solely responsible to EYGDS INDIA for their work during the period of Assignment. **EYGDS INDIA shall decide the nature of work** of the International Assignee and **EYGDS INDIA shall be solely responsible for the work of International Assignees** during the period of Assignment.

3.2 **EYUS shall not be responsible for the work of the International Assigner**, or assure any risk for results produced from the work performed by the International Assignees during the period the International **Assignees shall not be regarded as an employee or EYUS and shall not in any way be subject to any kind of instructions or control of EYUS during the Period of Assignment.**

EY – Secondment Agreement (2/2)

Relevant Clauses:

3.3 **EYUS shall not have any obligation towards EYGDS INDIA** with regard to the performance of International Assignees. The **privity and lien of EYUS would cease during the period of employment with EYGDS INDIA** on entering of Employment Contract by International Assignee with EYGDS INDIA.

3.4 **EYGDS INDIA shall be solely responsible to pay salary and other costs** of International-Assignees during the Period of Assignment as provided in Section 4 of the Agreement.

3.6 During the Period of Assignment, **EYGDS INDIA shall have a right to undertake performance appraisal of the International Assignees** in accordance with policy of EYGDS INDIA.

3.7 **EY LLP shall have a right to terminate the Assignment** of an International Assignee.

3.8 During the Period of Assignment, **EYUS shall not save a right to recall any International Assignee without the approval of EYGDS INDIA**

4.1 During the Period of secondment, **EYGDS INDIA alone shall be solely responsible to bear and pay salary and other costs** of international Assignees. However, for **administrative convenience**, **EYUS may make payment (on behalf of EYGDS INDIA)** towards salary and other costs to the International Assignees as agreed between international Assignees and EYGDS INDIA and as recorded in Employment-Contract of International Assignees. **EYUS shall intimate EYGDS INDIA and EYGDS INDIA shall reimburse EYUS for such payments** made towards salary and other costs in relation to the period of secondment of the International Assignees on an actual basis subject to tax being withheld as per the applicable provisions of the India tax laws.

Hon’ble ITAT’s Findings on Secondment

[2023] 153 taxmann.com 95 (Delhi - Trib.)

01 **Reliance on the clauses of the agreement**

Seconded personnel would be considered to be the employees of Indian entities

02 **Reliance on Boeing & Flipkart**

In Boeing, Delhi HC had distinguished Centrica & relied on AP Moller Maersk (SC)

03 **NOS – Distinguished**

Relying on Flipkart (Kar HC) where NOS was distinguished

04 **Salary income already taxed, cannot be taxed twice**

No occasion to discuss “Make Available"

Decision of the Hon'ble High Court

Extensively relies on **Centrica**

+

Déjà vu
(mixes up the facts of two different issues)

01

EY USA continues to be the employer

Lien over employement, social security benefits, EY India had no power to terminate the original employment

<u>Conclusion</u>: Secondees continue to be the employees of foreign co.

02

Holds ITAT's order to be *per incuriam:*

1) Failure to expressly deal with Centrica's decision

2) ITAT should not have held that services do not "make available" without detailed examination **(incorrect – this issue was not discussed by the ITAT as regards the secondment issue)**

03

'Make available' satisfied

1) Relies on AO's averment

2) Observes that 'training' was also provided **(incorrect – this was in relation to the second issue)**

3) 'Soft intellectual property' was passed on

*secondees had come to India to **imbibe** the culture of EY Group and implement its policies/standards on the Indian EY entities. Once the process and policies are imbibed / retained, there is no need for the secondees personnel to work again with the EY India entities, as the employees of the EY India entities can apply the same by themselves*

04

Categorisation as 'Reimbursement'not determinative

Absence of mark-up doesn't matter as the services qualify to be FTS

Going Forward…

- What if the foreign entity sends an employee on secondment, for his own learning?
- For treaties with 'Make Available' clause – Routine work can still be performed
- Short stay exemption – In that case, only FTS will be taxable
- Service PE a better solution? [for treaties which do not exclude FTS from Service PE]
- Dual employment? Would that make a difference?
- What if secondee is 'engaged' as a 'consultant' instead of an employee?
- Name of the employer in the Employment Visa – Whether determinative?
- Best case – Completely discontinue the employement with foreign entity?
- Follow the jurisdictional High Court?
- Mutual Agreement Procedure to avoid dual taxability? Possible?

Thank you!

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