Tax alert: Reimbursement for secondment of employees is taxable as FTS

24 June 2026

The Delhi High Court (HC) based on facts, has held that the reimbursement received by the taxpayer on account of secondment of employees is taxable as Fees for Technical Services (FTS) under Article 12 of the India-USA tax treaty. Further, the HC also allowed benefit under Article 12(5)(e) of the India-USA tax treaty, to the extent of professional services.

In a nutshell

Indian entities had no power to sever the relationship between the seconded employees and taxpayer, which would resume at the end of the deputation agreement. Hence, the taxpayer had a lien on those employees or conversely, the employees had the lien on their employment with taxpayer.

The fact the overseas entity did not charge a mark-up over and above the costs of maintaining the secondee relevant in itself, as the absence of markup could not negate the nature of the transaction. Rather, various factors concerning the determination of the real employment link continued to operate.

The secondee personnel had come to India to imbibe the group's culture and implement the groups policies / standards on the Indian entities. Once the process and policies were imbibed / retained, there was no need for the secondee personnel to work again with the Indian entities, as the employees of the Indian entities could apply the same by themselves.

Though the taxpayer had argued that there was no transfer of any technical know-how or expertise, the same were negated by the terms of the scope of service, which demonstrated that certain training was also imparted by the seconded employees of taxpayer. Hence, there was an element of transfer of technical knowledge, experience, skill, or know-how.

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Background:

- The taxpayer[1] is a limited liability partnership firm, incorporated under the laws of the US and engaged in the business of providing professional services in the field of assurance, tax, transaction and business advisory services etc., to its clients across the globe, including India. It is a member of the global network and has three entities operating in India.
- The taxpayer entered into a deputation agreement with the three Indian entities under which certain personnel of taxpayer were seconded to the three Indian entities. The taxpayer received cost-to-cost reimbursement on account of secondment of its employees and also payment for services rendered to the Indian entities.
- During the course of audit proceedings, the Assessing Officer (AO) proposed, amongst others, that the payment received on account of secondment of employees would be taxable as Fees for Technical Services (FTS) under Article 12 of the India-USA tax treaty.
- Aggrieved, the taxpayer filed objections before the Dispute Resolution Panel (DRP), which rejected the contentions of the taxpayer and upheld the additions made by the AO. The AO and DRP, *inter-alia*, held as follows:
  - the employment offered by Indian entities was for a limited period of up to 2-3 years;
  - at the end of the secondment agreement either by completion of their tenure or when the same was ended by either of the contracting parties, the seconded employees would join back the taxpayer company;
  - the employees never ceased to be employees of the overseas entity;
  - the secondees had come to India to imbibe the culture of the group and ensure the application of network group policies /processes and other quality standards in Indian entities.

  In effect, the AO's conclusion was that the services rendered by the secondees satisfied the make available test in terms of Article 12(4)(b) of the India-USA tax treaty.
- Aggrieved, the taxpayer filed an appeal before the Income-tax Appellate Tribunal (ITAT). The ITAT allowed taxpayer's appeal and set aside the assessment order.
- Aggrieved, the Revenue authorities filed an appeal before the Delhi High Court (HC).

Relevant provisions of Article 12 and 15 of the India-USA tax treaty

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...

...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 :

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or
(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.

5. Notwithstanding paragraph 4, "fees for included services" does not include amounts paid:...
...(e) to an employee of the person making the payments or to any individual or firm of individuals (other

[1] The Commissioner of Income-tax (International taxation)-1, New Delhi v Ernst and Young U.S. LLP (2025) ITA No. 423/2025 and others [Delhi HC]

than a company) for professional services as defined in Article 15(Independent Personal Services).

Article 15 Independent personal services

...2. The term "professional services" includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants."

Decision of the HC:

The HC acknowledged that the issue for consideration was whether the payment received by the taxpayer on account of secondment of employees would be taxable as FTS under Article 12 of the India-USA tax treaty and whether the receipts for services rendered in and from the USA fall under the exemption of Article 12(5)(e) of the India-USA tax treaty. In this regard, the HC held as follows:

- The AO after examining the scope of services provided by the taxpayer, had held that the secondee personnel had come to India to imbibe the group's culture and implement the groups policies / standards on the Indian entities.

  Once the process and policies were imbibed / retained, there was no need for the secondees personnel to work again with the Indian entities, as the employees of the Indian entities could apply the same by themselves.

  Though the taxpayer had argued that there was no transfer of any technical know-how or expertise, the same were negated by the terms of the scope of service, which demonstrated that certain training was also imparted by the seconded employees of taxpayer. Hence, there was an element of transfer of technical knowledge, experience, skill, or know-how.

  The services rendered by the taxpayer included technical services which would satisfy the 'make available' test, for the reason that there was a transfer of skill/knowledge.

- Further, the authority to terminate such employees was not with the Indian entities in as much they could only terminate the secondment prior to the agreed period by relieving the secondees from the Indian entities to enable the secondees to join back the taxpayer. The Indian entities had no power whatsoever to sever the relationship between the seconded employees and taxpayer, which would resume at the end of the deputation agreement. This made it clear that taxpayer had a lien on those employees or conversely, the employees had the lien on their employment with taxpayer.

- The HC in an earlier ruling[2], had referred to the findings of the Authority for Advance Rulings (AAR) on the obligation under section 195 of the Income-tax Act 1961 (ITA) to hold that the mere fact that the company and the secondment agreement phrases the payment made by the taxpayer to the overseas entity as "*reimbursement*", could not be determinative of the nature of the services. **The fact the overseas entity did not charge a mark-up over and above the costs of maintaining the secondee relevant in itself, as the absence of markup could not negate the nature of the transaction. Rather, various factors concerning the determination of the real employment link continued to operate. The payments were not in the nature of reimbursement, but rather for services rendered.**

  The employment relationship between the overseas entities and the company from which the former's independent obligation to pay the secondees arose, continued to hold, as there was no obligation to use money arising from the payment to pay the secondees. It also held that overseas entities' obligation to pay the secondees came under a separate agreement, based on independent conditions, in relation to the company's obligation to pay the overseas entity.

- In the case under consideration:

[2] Centrica India Offshore (P.) Ltd. vs. Commissioner of Income-tax -I [2014] 44 taxmann.com 300 (Delhi HC)

- The secondees were working in the Indian entities, during the period of assignment. On such assignment, the secondees continued to maintain their lien with the taxpayer.
- The secondees were entitled to all available benefits including social security from their employer (i.e. taxpayer). This made the assignment of the secondees, akin to a deputation from the taxpayer to the Indian entities, to enable the secondees to use their expertise of technical knowledge/ know how and make available the same to Indian entities for use in future. In fact, the agreement between the taxpayer and Indian entities was described as deputation agreement as different from a letter of appointment or transfer.
- During deputation, the employee continued to maintain on their employment lien with the leading entity (taxpayer), unless a secondee was absorbed in Indian entities.
- Additionally, the Indian entities could not have terminated the services of the secondees, and they only had the right to undertake legal or disciplinary action against misconduct, fraud, wilful negligence or any illegal action of any international assignee and terminate the secondment, prior to the agreed period and relieve them from the Indian entities to enable them join the taxpayer. This showed that the secondees never ceased to be the employees of the taxpayer and that it retained an overarching control over them.

The facts in the case under consideration were similar to an earlier case[3] before the HC and the said case was squarely applicable. The HC noted that the said case was upheld by the Supreme Court[4].

- The rulings[5] relied upon by the taxpayer had no applicability in the case under consideration as the secondees continued to be employees of the overseas entity, i.e. the taxpayer, and satisfied the ‘make available’ test as they transferred techniques and skills required for the operation of business, i.e., soft intellectual property.

Whether the ITAT was justified in holding that the receipts of the taxpayer from Indian clients for services rendered by it in and from the USA, fall within the meaning of Article 12(5)(e) of the India-USA tax treaty?

- The AO and DRP had held that the services rendered by functionaries such as economist, MBA graduates, diploma holders and other trained technical professional did not fulfill the criteria of being a professional within the meaning of the term “professional services” under Article 15(2) of India-USA tax treaty. Hence, the quantum of receipts from Indian clients for services rendered in India which did not strictly qualify as professional services, could not be claimed as exempt under Article 15 of India-USA tax treaty.
- The ITAT held that the definition of “*professional services*” was inclusive and not exhaustive, and the same could not be circumscribed by including only those people belonging to any governing professional body.

  It also held that ‘professional services’ contemplates other than those specifically mentioned in Article 15(2) of India-USA tax treaty.

  However, the ITAT did not delineate the actual services provided by the taxpayer to its Indian clients or discussed whether such services could be included in the definition. It merely noted the qualifications of the employees of the taxpayer and held that they would come within the ambit of the definition of professional services provided under Article 15(2). The merit and effect of the finding of fact by the AO that the services were in the nature of technical services and consultancy had not been discussed nor distinguished by the ITAT.

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[3] Centrica India Offshore (P.) Ltd. vs. Commissioner of Income-tax -I [2014] 44 taxmann.com 300 (Delhi HC)

[4] Special Leave to Appeal (C) No.22295/2014 *vide* order dated 10 October 2024

[5] CIT (International Taxation)-1 v Bio-Rad Laboratories (Singapore) Pte. Ltd. [2023] 155 taxmann.com 646 (Delhi HC), Aecom Technical Services Inc. vs. Income-tax Officer, IT [2025] 174 taxmann.com 1173 (Delhi HC), C.I.T v. RELX Inc, 160 taxmann.com 1090, Pr. Commissioner of Income Tax-1 v. AT & T Communication Services India Pvt Limited, ITA No.354/Del/2017 and CIT v. Industrial Engineering Projects (P) Ltd, [1993] 202 ITR 1014 (Delhi).

- The AO, while calculating the receipts from the Indian clients taxable as FTS, had already given the benefit of Article 12(5)(e) to certain services provided by the taxpayer.

  Out of a total amount received from services rendered by different categories of personnel mentioned by the taxpayer itself, some amounts were deducted on account of the fact that they were carried out by 'professionals' as defined under Article 15(2) of the India-USA tax treaty. The remaining amount was technical and consultancy services falling within Article 12(4) of the India-USA tax treaty.

- Hence, for the professional services carried out by the taxpayer, the benefit under Article 12(5)(e) was allowed by the AO. What remained were the services which squarely fell outside the definition of "*professional services*" as provided under Article 15(2). This aspect should have been considered by the ITAT, before returning a blanket finding that all services of the taxpayer fall within Article 12(5)(e) of the India-USA tax treaty. The ITAT ought to have examined the key differences regarding the services which have been charged as FTS in contrast to the nature of services which were found to be exempted. Having not done so, the ITAT's order was to be set aside.

Comments:

In the context of multinational enterprises, personnel may be deputed across globe/jurisdictions in group companies. The determination of the nature of the arrangement assumes particular significance for determining its taxability under the relevant tax treaty provisions, amongst others, as managerial, technical, consultancy or professional services.

The HC in this ruling has, *inter-alia*, held the following:

- Indian entities had no power to sever the relationship between the seconded employees and taxpayer, which would resume at the end of the deputation agreement. Hence, the taxpayer had a lien on those employees or conversely, the employees had the lien on their employment with taxpayer.
- The fact the overseas entity did not charge a mark-up over and above the costs of maintaining the secondee relevant in itself, as the absence of markup could not negate the nature of the transaction. Rather, various factors concerning the determination of the real employment link continued to operate.
- The secondee personnel had come to India to imbibe the group's culture and implement the groups policies / standards on the Indian entities. Once the process and policies were imbibed / retained, there was no need for the secondees personnel to work again with the Indian entities, as the employees of the Indian entities could apply the same by themselves.
- Though the taxpayer had argued that there was no transfer of any technical know-how or expertise, the same were negated by the terms of the scope of service, which demonstrated that certain training was also imparted by the seconded employees of taxpayer. Hence, there was an element of transfer of technical knowledge, experience, skill, or know-how.

The cases[6] relied on by the taxpayer had distinguished the HC ruling in case of Centrica India Offshore Pvt. Ltd. basis facts. As per the HC, the facts of the case under consideration were similar to Centrica and had distinguished the other rulings relied upon by the taxpayer on the basis that the facts of the said cases were different.

It also becomes imperative to examine GST[7] implications on the secondment arrangement as the same could be regarded as 'import of services' under GST Law.

Taxpayers may want to evaluate the impact of this ruling to the specific facts of their cases.

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[6] PCIT v. AT & T Communication Services India Pvt Limited, ITA No.354/Del/2017
P.C.I.T. v. Boeing Limited, 2022: DHC:4188-DB

[7] Goods and Service Tax