



Global Tax Update

India

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Indian High Court ruled that secondment gives rise to Service PE¹

In a recent ruling the Delhi High Court has held that the reimbursement of the seconded expatriate employees amounts to fees for technical services (FTS) under the Indian tax treaties with UK and Canada. The Court further rejected the arguments of the Indian applicant that the secondment does not give rise to Service permanent establishment (PE) under these treaties, which could be seen as indirectly concluding that secondment creates a Service PE for the overseas entities.

The concept of Service PE is not present in the India-Japan tax treaty. Indian treaties with the UK, Canada and some other countries contain a special category of PE (i.e. Service PE) which gets triggered if the foreign entity renders services in India through its employees for a period above the threshold prescribed. Since, India-Japan tax treaty does not have this kind of PE; services through employees falls under the Fixed Place PE, which is a general category of PE.

The High Court in this case held that the seconded employees did not become employees of the Indian entity but continued to remain employees of the overseas entities during the

secondment period. While determining such employer-employee relationship, the High Court paid emphasis to the following facts:

- a) Seconded employees retained their employment to participate in the overseas entities' retirement, social security plans and other benefits applicable to them.
- b) Documents submitted did not reflect that the salary costs of the secondees were borne by the Indian entity.
- c) The assignees had no legal recourse against the Indian entity in the event of default in payment of salary.
- d) The Indian entity had the right to only terminate the secondment agreement and not the services of the assignees.
- e) The employment relationship between the overseas entities and the assignees was at no point terminated nor was the Indian entity given the authority to modify the continuing relationship.
- f) The Indian entity might have operational control over these persons and may be responsible for their failures, but these facts cannot displace the larger and established context of employment abroad.
- g) The services are not in the nature of stewardship and the overseas entities continue to be the real employer.

¹ Source: Centrica India Offshore (P) Ltd. - [2014] 44 taxmann.com 300 (Delhi)

- h) The Court also determined that the OECD Commentary which distinguishes a situation where an employee works exclusively for an enterprise in the State of employment and is released for a period in the State of residence, did not apply given the facts of the case.

Accordingly, the High Court held that the arrangement involved rendition of services by the overseas entities to the Indian entity through its employees. By implications, the transfer of employment through secondment arrangement has been struck down by the High Court.

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