



## **Global Employer Services Alert**

Harmonizing global & local perspectives

**No taxes to be withheld for non-residents rendering services outside India; credit for overseas taxes permissible for residents at withholding stage, rules AAR**

**Issue no:** GES/02/2018

**In this issue:**

[Facts](#)  
[Issues before the AAR](#)  
[Observation and Ruling of AAR](#)  
[Conclusion](#)  
[Union Budget 2018 publications and Webcast archives](#)  
[Contacts](#)

## Facts

- M/s. ABC India Private Limited (ABC India/applicant) deputed two of its employees (assignees) to ABC United States (ABC US) and ABC Germany for a period of two years and three months and two years respectively.
- The assignees continued to be on the payroll of ABC India and received salary (except certain allowances paid overseas) in India while rendering services in the host countries (USA / Germany).
- As per the Income Tax Act, 1961 (ITA), the assignees qualified as non-residents (NR) for the Financial Year (FY) 2011-12 and resident and ordinarily residents (ROR) for the FY 2012-13 in India.
- They qualified as residents of the host country by virtue of the provisions of the respective Double Taxation Avoidance Agreements (DTAA) for the deputation period.
- ABC India continued to operate withholding taxes on the salary payments as a matter of abundant caution. The applicant was of the view that taxes withheld will be refunded to them by virtue of beneficial provisions of the respective tax treaties. Further, other employees who had taken recourse to the said treaty provisions had been granted refunds by the tax authorities.
- ABC India posed two questions seeking a ruling from the Authority of Advance Ruling (AAR).

## Issues before the AAR

- Whether ABC India is obliged to withhold taxes for salary payments made in India to the non-resident assignees rendering services abroad when such salary was not liable to be taxed in India?
- Whether ABC India, while discharging its tax withholding obligation as per the ITA, can take credit for taxes paid in the host locations, for the assignees who qualified to be ROR?

## Observation and Ruling of the AAR

### 1. Whether withholding of taxes is required for salary payments made in India to non-residents?

#### Arguments by ABC India

- The scope of total income of a non-resident<sup>1</sup> includes income received in India, comprising the salary paid by ABC India. However, this is subject to the other provisions of the ITA and hence effect has to be given to the applicable provisions, recourse to tax treaty being one of them. Accordingly, assignees are entitled to adopt either the provisions of the ITA or DTAA, whichever is beneficial<sup>2</sup>;

- As per ITA, salary is chargeable to tax on accrual basis and taxability on payment basis is triggered only when it is paid in advance;
- Income in the nature of salaries is deemed to accrue or arise in India only when it is earned in India, i.e. when the services are rendered in India (explanation to Section 9(1)(ii));
- An employer is obliged to withhold taxes only when the salary is chargeable to tax;
- The relevant article under the DTAA<sup>3</sup> provides that salaries, wages and other similar remuneration derived by resident of USA/ Germany shall be taxable in the host country as employment is exercised there. Further, model commentaries also provide that the place of employment is where employee is physically present rather than place of receipt of salary;
- In the instant scenarios, since salary paid in India is not taxable in India both as per ITA and DTAA, it would not constitute income chargeable under the head salaries. Hence, ABC India does not have an obligation to withhold tax on such salary payment;
- Further taxes are to be withheld at the average rate of income-tax i.e. rate arrived at by dividing the amount of income-tax by the total income. Thus, where total income (salaries) is nil, the average rate of tax would be nil and withholding provisions would not be triggered;
- In the case of British Gas India (AAR/725/2006) it was held that salary is not taxable in India provided same is taxed in UK;
- Reliance was also placed on the Supreme Court decision in the case of Eli Lilly and Co. (312 ITR 225) where it was held that withholding tax obligation is triggered if salary is taxable in India and on the Andhra Pradesh High Court ruling in the case of Coromandel Fertilisers Ltd (187 ITR 673) wherein the Court held that no requirement to withhold taxes arises, unless the salary income was taxable in the hands of the recipient.

### **Arguments by Revenue**

- Salary income received in India is taxable under the ITA;
- Services are considered as rendered in India as contract between the employer and employee has been entered in India.

### **Ruling of AAR**

- Income-tax shall be charged in accordance with and subject to provisions of the ITA;
- Section 5(2) has to be read in conjunction with other applicable sections to determine chargeability to tax. Salary income accrues where the services are rendered and therefore salary income received by assignees of ABC India for services rendered overseas is not chargeable to tax in India;
- The recent decision of the Calcutta High Court in the case of Utanka Roy (390 ITR 109) following the decisions in the case of Avtar Singh Wadhwan (247 ITR 260) and Prahlad Vijendra Rao (ITA No. 838/2009), held that where services are rendered outside India, income is earned outside India. This decision would apply to the present scenario;
- The material point was not whether the employer was an Indian company or not, but where the services were rendered and income accrued to the employee;

- The decisions endorse the view taken by Klaus Vogel in his commentary on Dependent Personal Services, Article 15, i.e. employment is exercised in the place where employee is personally present;
- ABC India is not required to withhold taxes on salaries paid by it as the non-resident assignees are not liable to be taxed in India.

## **2. Whether credit for taxes paid outside India can be taken at the tax withholding stage in respect of resident assignees?**

### **Arguments by ABC India**

- Section 90 read with Article 25 (India-US DTAA) and Article 23 (India-Germany DTAA) provides credit for the taxes paid. Therefore the assignees qualifying as ROR and offering worldwide income would be eligible to claim credit for taxes paid outside India;
- An employee who is working simultaneously under more than one employer can furnish the details of salary, tax deducted at source and such other particulars in a prescribed form to one of the employers, who would need to consider "such other particulars"<sup>4</sup>;
- Section 90 of the Act being a beneficial provision has to be interpreted in such a manner that an assignee gets the relief, without making it necessary for him to claim the same only in his return of income.

### **Arguments by Revenue**

- Several conditions need to be satisfied for allowing foreign tax credit (FTC), such as actual payment of taxes, tax to be attributable to income etc., and hence verification of credit by assessing officer is a pre-requisite. The deductor is not equipped to verify these at the time of deducting tax;
- Section 192 does not allow FTC at the time of deducting tax and employees have to claim refund at the time of filing return of income.

### **Ruling of AAR**

- When payments are received by these employees from more than one source during a particular year, the provisions of section 192(2) will apply.
- This provision casts an obligation on the employee to furnish to the employer, such details of the salary etc. received by him from the other employer/s, the tax paid or deducted therefrom, and other particulars, and the employer would examine and take into account such details before computing the tax deductible. It cannot be presumed otherwise.
- Therefore, the present employer can give credit for the taxes deducted during their deputation outside India at the withholding stage.

---

<sup>1</sup> Section 5(2) of the ITA

<sup>2</sup> Section 90 of the ITA

<sup>3</sup> Article 16(1)/15(1) of DTAA

<sup>4</sup> Section 192(2) of the ITA

## Conclusion

The AAR ruling is a welcome one, resulting in minimising cash flow woes of companies. While the AAR ruling is binding only on the applicant, employers with outbound deputations having employees on India payroll would be well advised to:

- revisit the tax payment and settlement mechanisms for their employees to leverage on the principles arising from the above ruling, and
- determine how these could be made applicable in their own case.

**Source:** AAR No. 1217 of 2011 pronounced on 29<sup>th</sup> January, 2018

## Union Budget 2018

**Budget 2018 Publications – click to download**

[Know Your Budget – Detailed Analysis](#)

[Glimpses of Budget 2018](#)

[Understand the impact of the Budget 2018 on Foreign Portfolio Investors.](#)

[BEPS Perspective](#)

**Budget 2018 Webcast archives – click to view**

[Session on detailed budget analysis and insights](#)

[Session on key budget highlights](#)

# Contacts

## Ahmedabad

19<sup>th</sup> Floor, Shapath - V  
SG Highway,  
Ahmedabad – 380 015.  
Tel: + 91 (079) 6682 7300  
Fax: + 91 (079) 6682 7400

## Coimbatore

Shanmugha Manram  
41, Race Course,  
Coimbatore  
Tamil Nadu - 641018  
Tel: + 91 (0422) 439 2801  
Fax: +91 (0422) 222 3615

## Kolkata

13th and 14th Floor,  
Building – Omega  
Bengal Intelligent Park  
Block – EP & GP  
Sector V, Salt Lake City,  
Kolkata – 700091  
Tel : + 91 (033) 6612 1000  
Fax : + 91 (033) 6612 1001

## Bangalore

Deloitte Centre, Anchorage II,  
100/2, Richmond Road,  
Bangalore 560 025.  
Tel: +91 (080) 6627 6000  
Fax: +91 (080) 6627 6010

## Delhi/Gurgaon

Building 10,  
Tower B, 7th Floor,  
DLF Cyber City,  
Gurgaon 122 002  
Tel : +91 (0124) 679 2000  
Fax : + 91 (0124) 679 2012

## Mumbai

Indiabulls Finance Centre,  
Tower 3, 28th Floor,  
Elphinstone Mill Compound,  
Senapati Bapat Marg, Elphinstone  
(W),  
Mumbai – 400013  
Tel: + 91 (022) 6185 4000  
Fax: + 91 (022) 6185 4101

## Chennai

No.52, Venkatanarayana Road,  
7th Floor, ASV N Ramana Tower,  
T-Nagar,  
Chennai 600 017.  
Tel: +91 (044) 6688 5000  
Fax: +91 (044) 6688 5050

## Hyderabad

1-8-384 and 385, 3rd Floor,  
Gowra Grand S.P.Road,  
Begumpet,  
Secunderabad – 500 003.  
Tel: +91 (040) 6603 2600  
Fax: +91 (040) 6603 2714

## Pune

706, B-Wing, 7<sup>th</sup> Floor,  
ICC Trade Tower,  
Senapati Bapat Road,  
Pune – 411 016.  
Tel: + 91 (020) 6624 4600  
Fax: +91 (020) 6624 4605



Deloitte makes an impact that matters

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see [www.deloitte.com/about](http://www.deloitte.com/about) for a more detailed description of DTTL and its member firms.

This material and the information contained herein prepared by Deloitte Touche Tohmatsu India LLP (DTTI LLP) is intended to provide general information on a particular subject or subjects and is not an exhaustive treatment of such subject(s). This material contains information sourced from third party sites (external sites). DTTI LLP is not responsible for any loss whatsoever caused due to reliance placed on information sourced from such external sites. None of DTTI LLP, Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this material, rendering professional advice or services. This information is not intended to be relied upon as the sole basis for any decision which may affect you or your business. Before making any decision or taking any action that might affect your personal finances or business, you should consult a qualified professional adviser.

No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this material.

©2018 Deloitte Touche Tohmatsu India LLP. Member of Deloitte Touche Tohmatsu Limited