



**Tax rulings and social security agreements:
Shifting sands for India inbound moves**

The Dbriefs India Spotlight series

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Agenda

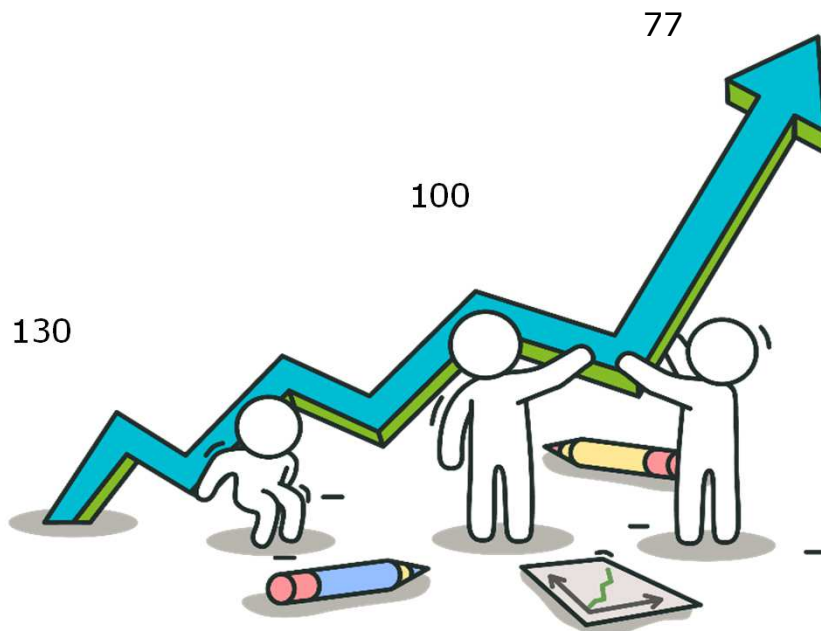
- India compliance framework
 - Immigration
 - Income tax
 - Social security
- Types of deputation
 - Assignment
 - Permanent transfer
- Deputation to India – challenges
- Tax rulings
- Social security agreements
- Questions and answers

India compliance framework

Ease of doing business

Jumping up the ladder

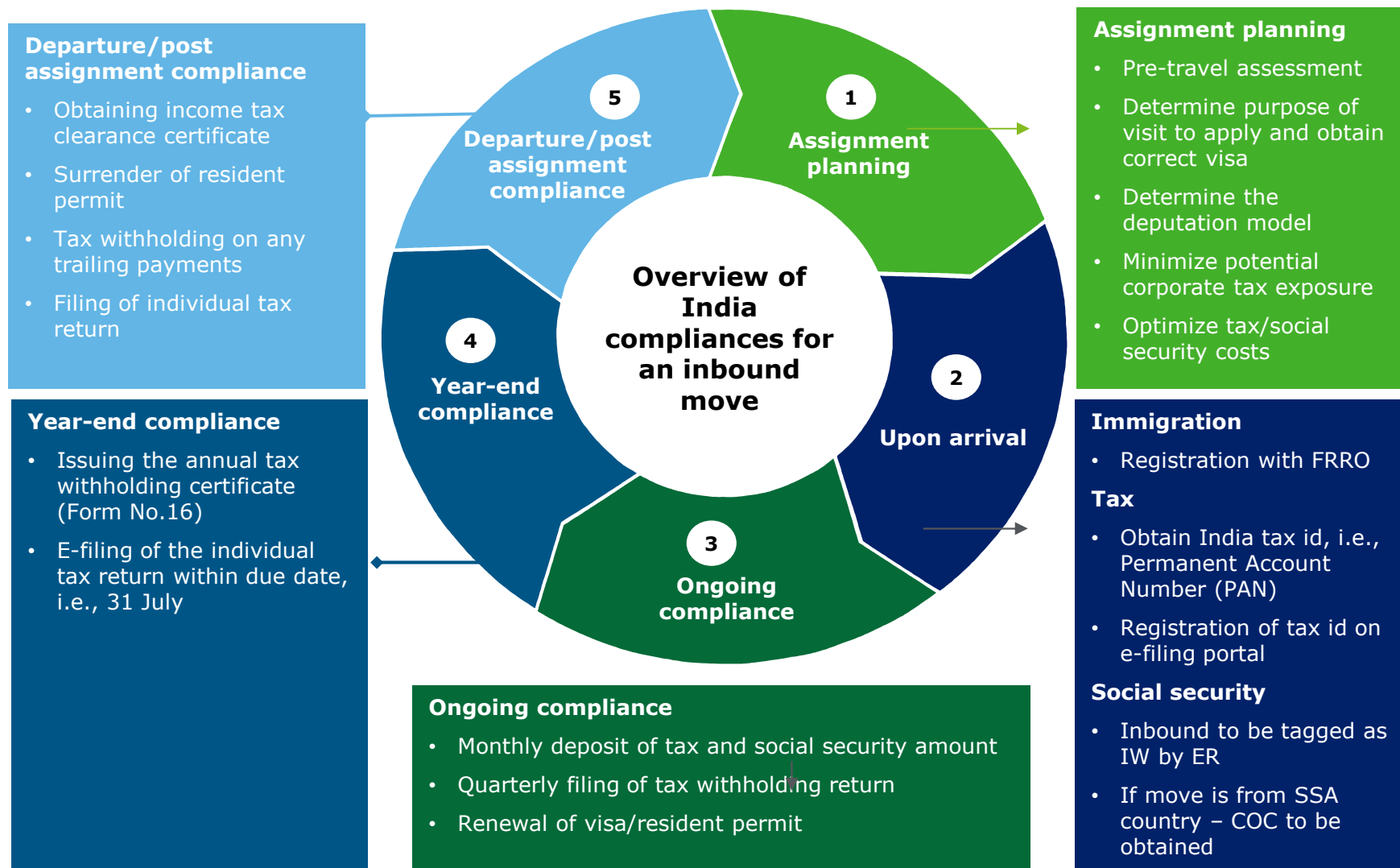
- India is now 77 compared with 100 last year - World Bank's Ease of Doing Business Index
- India has improved its ranking in 6 out of the 10 parameters considered for evaluation like construction permits, trading across borders, starting a business, getting credit and electricity, enforcing contracts
- The maximum improvement was in securing construction permits where the procedures and time for obtaining approvals was considerably reduced
- India is the first BRICS and South Asian country to be recognized as top improvers in consecutive years.
- As a result of continued performance, India is now placed at first position among South Asian countries as against 6th in 2014



- Communication services , manufacturing, retail and wholesale trade, financial services and computer services have been the largest beneficiaries who received the highest FDI
- Investor confidence in India is renewed
- High investments in Bharti Airtel, Idea, Walmart acquisition of Flipkart, Ikea announced to set up multi-format stores and experience centres etc., are some of these examples

India compliance framework

Bird's eye view



India compliances

Some insights

Immigration

- Apply for the right visa and ensure FRRO registration within 14 days
- Look out for stipulations/specific endorsements on the visa for compliance
- OCI cardholders, Nepalese, and Bhutanese do not need visas, nor are required to register with FRRO
- PIO card holders are required to convert the same into machine readable OCI cards within 31 March 2019

Taxation

- Tax implications are aligned to purpose of visit and the deputation structure
- Availability of short stay benefits under the domestic tax law or treaty to be examined
- Tax Residency Certificate for availing exemption under the treaty, filing of Form 67 for availing foreign tax credits

Social security

- Where employment is exercised in Indian with a covered establishment, PF is applicable – no deminimus period or salary
- Filing of Form IW1 and remittance of PF mandatory
- Determination of Pay for the purposes of PF is litigative
- Inbounds from Social Security Agreement countries can be exempt from India PF if certificate of coverage is obtained – deployment structure to be aligned
- Withdrawal is permissible for moves from SSA country

**Sharing of information amongst immigration, tax, and social security authorities is high
Higher communication within the company to ensure well aligned documents**

India compliance framework

Enhanced monitoring

Data mining and digitization

- Linking of PAN and Aadhaar
- Monitoring high value transactions and remittances
- Project insight – profiling tax payers by collating information from social media
- Corroborating documentation provided by companies with press release made by companies, LinkedIn profiles etc.

Integrated approach

- Proactive request for tax and PF account details by immigration authorities
- Sharing details of FRRO registrations with social security authorities on a quarterly basis
- Immigration authorities call for explanations on why taxes are not remitted at the time of visa extensions where short stay benefits are availed
- Focus on foreign nationals on India payroll at the time of PF inspections
- Tax clearances called for at the time of departure in certain jurisdictions



Disclosures in tax return

- Comparing incomes disclosed in tax return with Form 26AS
- Mandatory reporting of assets and liabilities where taxable income exceeds INR 5 Million
- Foreign asset reporting mandatory for all residents and ordinarily residents
- Introduced Form 67 for claiming foreign tax credits
- Certain exemptions available for foreign citizens, e.g., Disclosure of Aadhaar in tax return not mandatory, etc.

Information exchange

- Government has entered into tax information exchange agreements with multiple governments
- Issue of summons by investigative wing of tax office – personal attendance by tax payer has been sought

Polling question 1

How strong is your documentation which is being submitted for inbound immigration purposes? Are these well aligned from a tax, immigration, and social security perspective?

- Yes, the documents are customized for each situation and are well aligned
- Yes, while the documents are standardized, we have different formats for each type of travel, may need some refinement
- Standard documentation as requested by the immigration vendor is used and may not be aligned
- Don't know/not applicable

Deputation models

Deputation models

Permanent moves

Features

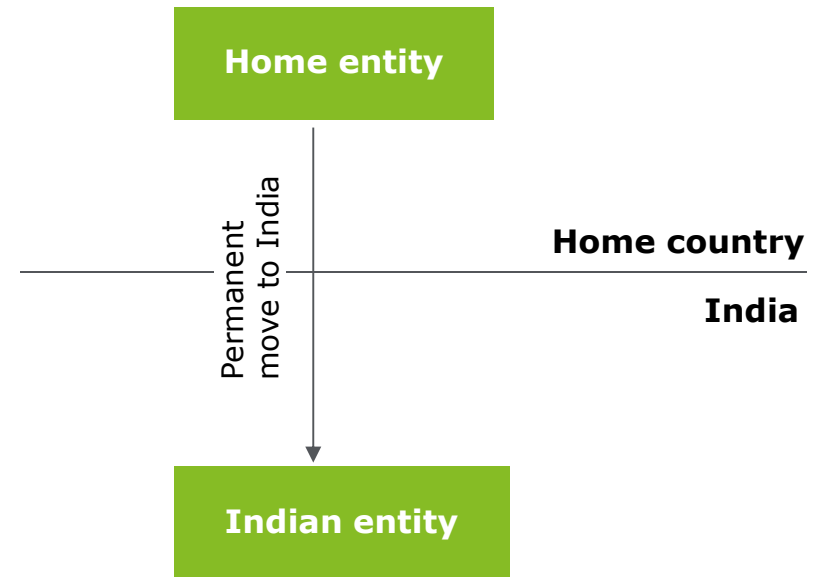
- Termination of the employment with home entity
- Inbounds become permanent employees of the host entity – at par with domestic employees
- Legal and economic employment shifts to India. The Indian entity is responsible for
 - Payment of salary
 - Retirement benefits
 - Direction, supervision, appraisal, and termination of employment
- **Best suited for mid-management level employees, new hires, and freshers**

Pros

- Cost optimal as compared to traditional long-term assignments
- On par with local employees, hence no additional benefits
- No-tax equalization, lower cost, and minimal administrative challenges
- Corporate tax challenges mitigated

Cons

- Discontinuation of home social security. Mandatory coverage under Indian social security
- Withdrawal of Indian social security is only after the age of 58
- Challenging when tax obligations continue in home country
- Potential risk to employer since compliances are not monitored



Deputation models

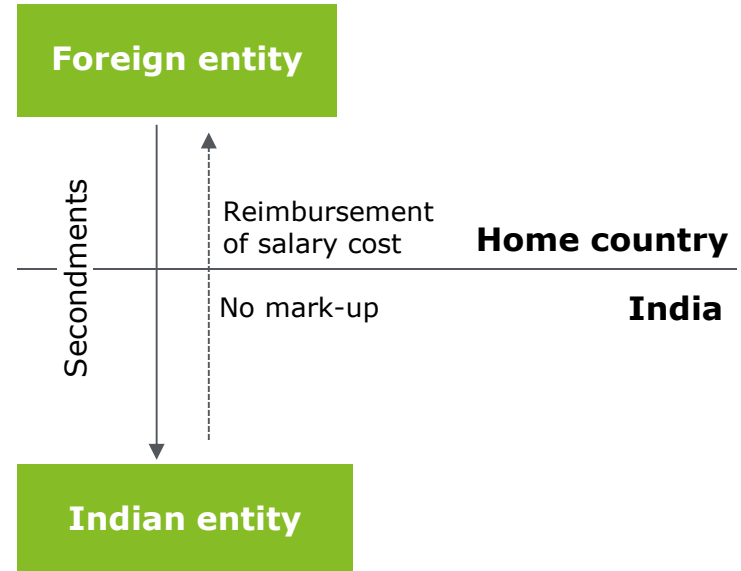
Secondments

Features

- Legal employment and salary payment continues with home entity. Economic employment shifts to India
- Home entity acts as a disbursing agent of Indian company for remittance of salary
- The employee works under the direction and supervision of Indian entity during assignment period
- Indian entity reimburses the salary cost to the home entity
- **Helps companies leverage on experienced employee base seamlessly**

Pros

- Perceived positively by employees as a career enhancing move
- Tax equalized and employee assured net pay
- Lien on home employment
- Employee is left to focus on work as all compliance aspects taken care of by the employer through out the period of assignment



Cons

- Not an open ended assignment
- High cost of assignment when compared with permanent moves – strong cost benefit assessment required
- Additional cost of dual social security and tax in home and host location
- Potential for corporate tax litigation

Secondments

Triggers for litigation

Domestic tax law does not specifically recognize economic employer concept

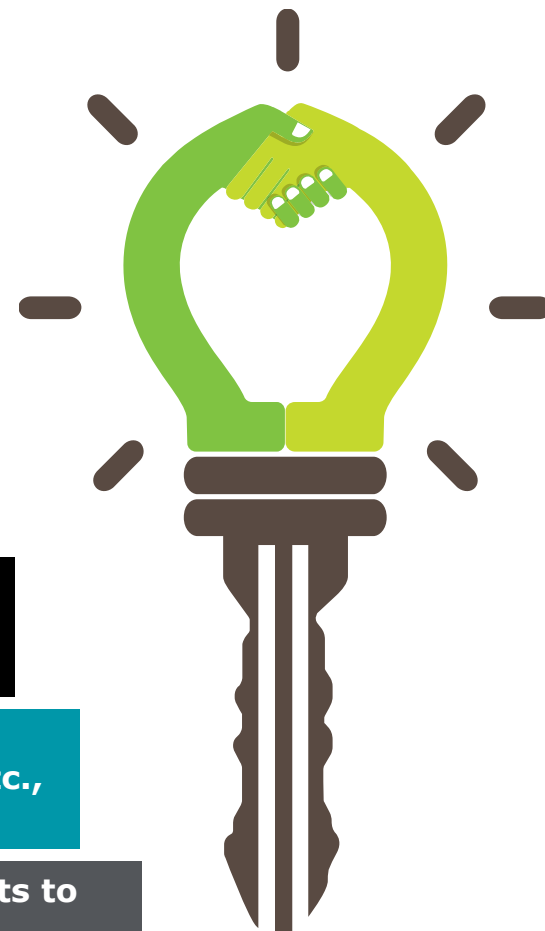
Shift of employment to India required both in form and substance

India employment needs to be reflected through the facts on the ground, actions of the deputed employee, in the documentation, designation and reporting structure – alignment across

All rights of employer to be exercised by Indian entity – choice of employee, control, supervision, appraisals, risk and reward of employment etc.

“Legal employment” with home country for limited purpose of payroll processing/continuation of social security contributions etc., at the request of the employee

Costs to be borne by Indian entity, re-charge of remuneration costs to Indian entity, remittances to overseas entity



Focus area

- **Align documentation, facts on the ground, wider communication, employee behavior**

Polling question 2

How strong is your documentation with respect to secondment of inbound assignees?

- Yes – documents are aligned and clearly indicates shift of employment to Indian entity
- Reasonably yes, though we could have a higher level of alignment
- No, the documents are not well aligned
- No, we do not have clear documentation to support secondments

Tax rulings on secondments - learnings

Tax rulings

Deputation of personnel – whether PE triggered

✗ PE in India

- 2007 Morgan Stanley# (SC)
- JC Bamford (Delhi ITAT)
- AAR in Verizon Data Services India Pvt Ltd.
- Centrica India Offshore P. Ltd. (Del HC)
- Morgan Stanley incorporated (2015 Mum ITAT)

✓ No PE

- Tekmark Global Solutions LLC (AAR)
- 2014 E-funds IT Solutions # (SC)
- Ariba Technologies India (Pvt) Ltd ((Ban ITAT))
- Karl Storz Endoscopy India P Limited (Delhi HC)
- Abbey Business Services India Pvt Ltd. (Ban ITAT)
- Samsung Electronics (Del ITAT)

Stewardship activity donot result in a PE exposure

PE – not free from litigation
Facts to be supported by documentation

Tax rulings

Remittance of cost recharge – whether FTS

✗ Taxable as FTS/reimbursement of salary income taxable

- AAR in AT&S India
- AAR in Target Corporation



Mere reimbursement not taxable

- Cholamandalam MS General Insurance (AAR)
- HCL Infosystems Limited (Del HC)
- 2009 (IDS Software Solutions (India) (P.) Ltd
- Cerner Healthcare Solutions Pvt Ltd (Ban ITAT)
- Caterpillar India P. Ltd. (Ban ITAT)
- Centrica India Offshore P. Ltd. (Del HC)
- Morgan Stanley Asia (Singapore) Pte. (ITAT – Mum)
- Panasonic Corporation (ITAT – Chennai)
- AT & T Communication Services India Pvt Ltd. (ITAT – Delhi)

Withholding tax issue – not free from litigation
Facts to be supported by documentation

Principles emanating from the rulings

Whether PE for home entity is triggered in India				
Whether the remittance of cost re-charge amounts to Fee for Technical Services				
Economic employment	Lien	Right of termination of employment	Benefit of services derived	Technical services provided by employees

PE not triggered

- Services in the nature of stewardship activities
- Seconded expats working under the control and supervision of Indian company
- Documentation as well as process indicate "Indian Company is the employer"

Outcomes highly fact based



Rationale behind the rulings

PE triggered

- Hire and fire rights and continuity of lien with Home company
- Documentation favoring relationship between employee and Home company
- Salary paid by Home entity, which is not a mere conduit but a legal employer at all times

Pure cost reimbursement

- Indian company exercising control and supervision over the seconded employee and bearing the salary cost, considered as an 'economic employer'
- Amounts taxed as salary income in the hands of deputed employees cannot be treated as FTS

Fee for Technical Services

- Services rendered by the employees could be deemed as services provided by overseas entity
- Services rendered by the employees may partake the character of technical services as they are highly qualified people who provide their expertise

Minimising your exposure

Key aspects

Review documentation

- Minimize risk of permanent establishment exposure
 - Consistency in documentation from individual tax, social security, and immigration
 - Documentation to be aligned to facts on the ground
 - Reconciliation of remittance of cross charge with the amounts on which taxes are withheld
- Minimize potential of reimbursement of salary cost being considered as FTS
- Manpower supply under the Indirect Tax regulations
- A three-way documentation, as shown below, reflecting the facts on the ground may assist

Deputation

- Deputation letter must be issued by the home company to the employees clearly documenting that
 - Existing employment will cease during assignment period
 - Salary is being paid in through home company payroll upon employee's specific request for continuity of social security

Indian employment

- Employment letter must be issued by Indian entity
- Employment terms should be similar to those applicable for local employee
- It must clearly mention that the employee will work under the complete supervision and control of Indian entity

Salary reimbursement

- Indian and Foreign company must execute an agreement clearly documenting
 - Deputation will be made upon specific request of Indian company
 - India company will have the right to choose the employee, supervise, control, and terminate
 - All employee related costs will be determined and borne by Indian company
 - Reimbursement of salary cost will be without any mark-up

Leverage on Social Security Agreements

Social Security Agreements (SSA)

SSA status

Country	Effective date
Belgium	1 September 2009
Germany	1 October 2009
Switzerland	29 January 2011
Denmark	1 May 2011
Luxembourg	1 June 2011
France	1 July 2011
Korea	1 November 2011
Netherlands	1 December 2011
Hungary	1 April 2013
Sweden	1 August 2014
Finland	1 August 2014
Czech Republic	1 September 2014
Norway	1 January 2015
Austria	1 July 2015
Canada	1 August 2015
Australia	1 January 2016
Japan	1 October 2016
Portugal	8 May 2017

SSAs yet to be effective

Country	Concluded	Signed	Effective
Quebec	Y	Y	N
Germany (Comprehensive)**	Y	Y	N
Brazil	Y	Y	N

** To be effective from 1 May 2017 onwards – Notification pending from Indian EPFO

Ongoing negotiations

South Africa	Spain	Thailand
Cyprus	Mexico	Russia
Sri Lanka	US	Peru
	Morocco	

India has a bilateral comprehensive economic agreement with Singapore – facilitates relief from dual contribution

Aligning deployment structure

Social security costs (Provident Fund – PF) in India amounts to 24% of pay, with tax gross up could be as high as 30%

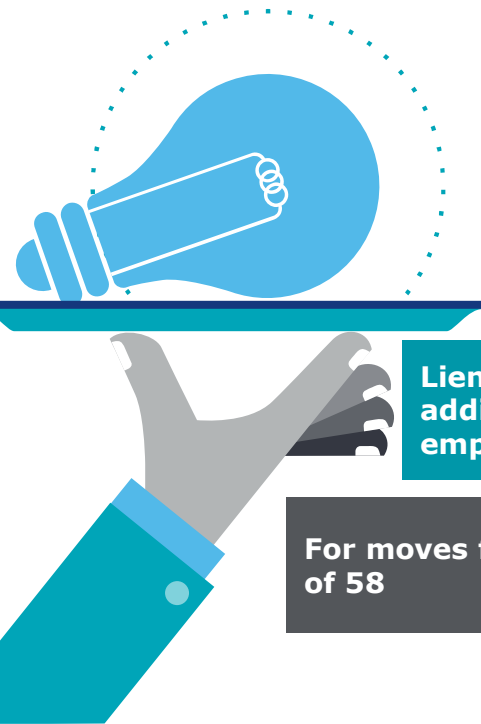
Significant litigation around determining Pay for the purpose of PF

Foreign nationals from SSA countries can obtain Certificates of Coverage provided home country contributions are continued. Secondment preferred over payroll transfer model for this purpose

For payroll transfer cases from SSA countries, important to track repatriations since PF withdrawal is permissible. Remittance can be made directly to the overseas bank account of the employee

Lien on PF balances by employer not permitted – question arises on whether additional contributions made by employer should be an additional benefit to the employee?

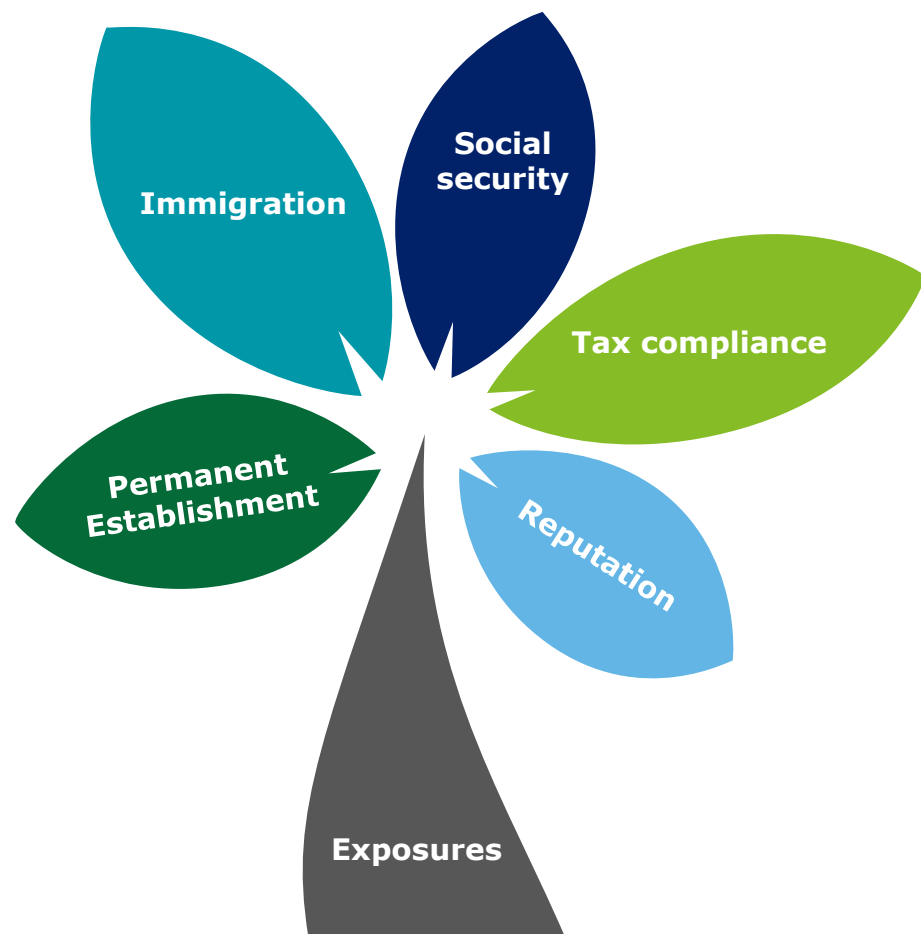
For moves from non-SSA countries, withdrawal is permissible only on retirement at the age of 58



Extended business travelers

Changing landscape

Tax – business travelers



Features

- Duration of stay is short
- Ideally should not be “working”
- All costs are borne by the home location
- Are not generally included in mobility

Business travelers to India if not tracked objectively may expose the overseas company to the various risks as

- Tax trigger in host location for employer-employee compliances
- Country and citizenship combinations and regulatory intersections proliferation (e.g., Indian citizen coming from a non-treaty country – Chile)
- Corporate exposure/PE exposure

Approach of the revenue

- Detection and enforcement is becoming more effective now than before as
 - Better technology integration allows authorities more visibility on your data
- Business travelers compliance has become focus area in many countries in the world like UK, Singapore, Canada, and Japan

- Real-time tracking of business travelers will ensure timely compliance
- Business analytical and/or business travelers tools can help in tracking and monitoring the cut off stay well in advance and flag off the compliances trigger in India

Questions and answers

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