



Inbound secondments: Tax and regulatory aspects

Automotive sector



Brief overview



Cross-border movement of personnel within a Multinational Group's affiliated entities is a business reality. Such movement, especially medium to long-term, is referred to as a 'Secondment'.

The automotive sector has had more such inbound secondments into India due to its distinctive business dynamics.

The tax department and the taxpayers have had varying views which have led to corporate tax disputes on secondment arrangements. While the Supreme Court, in the Morgan Stanley¹ case in 2007, did provide guidance on some of the relevant issues, the decision of the Delhi High Court in the case of Centrica India Offshore Pvt. Ltd.² has reignited the debate by

giving a detailed ruling in favour of the tax authorities.

There have been, in recent past, an array of Tribunal decisions ruled in favour of the taxpayers, which need to be evaluated from factual perspective on case to case basis.

There are other tax and regulatory aspects and implications in hands of Foreign Company (FCo)/Indian Company (ICo)/seconded which needs to be carefully evaluated and structured.

The impact of COVID-19/work-from-home on secondments would need evaluation, also considering the recent guidance issued by Organisation for Economic Co-operation and Development (OECD)³.



1. Director of Income-tax (International Taxation) v. Morgan Stanley & Co [2007] 162 Taxman 165 (SC)
2. Centrica India Offshore (P.) Ltd. v. Commissioner of Income-tax -I [2014] 44 taxmann.com 300 (Delhi)

3. Updated guidance on tax treaties and the impact of the COVID-19 pandemic, Organisation for Economic Cooperation and Development (OECD), January 2021

Key factors impacting Secondment Arrangements



1. **Tenure** - long term vs short term ?
 2. **Residential Status** (under Pre and Post-COVID-19 scenario) – Physical presence alone to be considered ?
 3. **Nature of service rendered** – Any service element ?
 4. **Subsisting employment relationship** with FCo – work done by secondee in India in furtherance of business of FCo ?
 5. **Economic versus Legal employer** :
 - Supervision, guidance and control of secondees with ICo or FCo?
 - Modus operandi of salary payment – full payment in India or partly in host country and partly in home country (with or without recharge) ?
- Damages on account of action of secondees – who is responsible?
 - Social Security Payments and Certificate of Coverage – Application of PF norms in host country vs continuity of social security benefits in Home country ?
 - Appropriate visa/minimum salary threshold from immigration perspective ?
 - Implications of proposed Labour Codes on proposed secondment arrangement ?
 - Underlying documentation of secondment arrangement (local employment contract and/or secondment contracts) ?



Major attributes for the inbound secondment arrangement



A

Corporate Tax: Permanent Establishment ('PE') risk ; 'reimbursement of salary' vs 'Services'; taxability; triangular structures; impact qua OECD guidance in COVID-19 etc.

B

Expatriate tax (including immigration): Residential status; taxability of income in the hands of secondees; treaty benefits; impact due to COVID-19; impact under possible dual employment scenarios; social security contributions and immigration requirements; impact of new Labour Codes etc.

C

Indirect tax: GST implications on reimbursement of salary cost by ICo to FCo; possibility of FCo having a fixed establishment in India and corresponding implications; etc.

D

Transfer Pricing: Determination of arm's length price for reimbursement of salary expenses; risk exposure of profits to be attributed towards the services rendered by the PE, if any, etc.

E

FEMA: Reimbursement of cost by ICo to FCo – whether capital or current account transaction; permissibility of receipt of salary outside India; remittance of funds during secondment/post secondment period; maintenance of bank accounts in/outside India.

Thus, it is utmost important to structure a secondment arrangement appropriately basis facts; and maintain appropriate documentation to substantiate.

How KPMG in India can assist



KPMG in India's holistic offerings

We work with a multi-disciplinary team involving experts from direct tax, global mobility services, indirect tax, transfer pricing and foreign exchange regulations to proactively engage in finding an efficient approach, as below:

Phase I - Diagnostic review to assess tax risk/exposure 	Phase II - Exploring alternative strategies 	Phase III - Implementation of the preferred option 
<ul style="list-style-type: none">a. Undertake review of the secondment arrangement and existing documentationb. Assess risk/exposure on account of the existing secondment arrangementc. Identifying risk areas and possible approaches aligning to the principles laid down in recent judicial precedentsd. Sensitize foreign affiliates and assignees about tax risks	<ul style="list-style-type: none">a. Explore and debate on various feasible alternativesb. Assist in evaluation of the alternatives from tax and foreign exchange regulations perspectivec. Advise an appropriate alternative after considering pros and cons of each of the options	<ul style="list-style-type: none">a. Assistance in relation to the documentation, substantiating the key aspects of the secondment arrangementb. Implement the alternative model selected by the companyc. Assistance in regulatory approvals, if required.d. Assistance in seeking legal counsel opinion, if required, on any complex tax risks or implications based on facts of the casee. Full suite of service on individual tax filings and educate foreign secondees during entry and exit of secondees

Holistic service offering based on client facts, covering full range of relevant tax and regulatory perspectives



KPMG in India contacts:

Rajeev Dimri
National Head

Tax
T: +91 124 307 4077
E: rajeevdimri@kpmg.com

Ajay Mehra
Partner and Head

Tax Markets and Strategy
T: +91 22 3090 2701
E: ajaymehra@kpmg.com

Waman Parkhi
Partner

Indirect Tax
T: +91 20 6747 7315
E: wparkhi@kpmg.com

home.kpmg/in

home.kpmg/in/socialmedia



#KPMGjosh

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

KPMG Assurance and Consulting Services LLP, Lodha Excelus, Apollo Mills Compound, NM Joshi Marg, Mahalaxmi, Mumbai - 400 011 Phone: +91 22 3989 6000, Fax: +91 22 3983 6000.

© 2021 KPMG Assurance and Consulting Services LLP, an Indian Limited Liability Partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

KPMG (Registered) (a partnership firm with Registration No. BA- 62445) converted into KPMG Assurance and Consulting Services LLP (a Limited Liability partnership firm) with LLP Registration No. AAT-0367 with effect from July 23, 2020.

The KPMG name and logo are trademarks used under license by the independent member firms of the KPMG global organization.

This document is for e-communication only. (001_FLY0421_SP)