

India; United States

# Indian Court Holds Reimbursement Costs of Seconded Employees Not Fees for Technical Services, Not Taxable in India

28 June 2023

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On 20 June 2023, the Delhi Income Tax Appellate Tribunal (ITAT), in the case of *Ernst & Young U.S. LLP v. Assistant Commissioner of Income Tax (ITA. No. 2332/DEL/2022)*, held that the reimbursement of salary costs of seconded employees paid by Indian member firms to the taxpayer was in the nature of reimbursement and not fees for technical services (FTS). Accordingly, the costs were not taxable in India.

(a) Facts. The taxpayer was a US-based limited liability partnership firm, engaged in providing professional services in the field of assurance, tax, transaction and business advisory services etc. to global clients. During the relevant tax year, the taxpayer seconded its personnel to EY India member firms and the latter were responsible for the payment of salary and other costs of such personnel. The taxpayer received a reimbursement from the Indian firms for salary/related costs paid by it on behalf of the Indian firms for administrative convenience.

(b) Issue. The ITAT considered the issue whether cost to cost reimbursement on account of secondment of employees was FTS under article 12 of the [India-United States Income Tax Treaty \(1989\)](#) (Treaty) and whether the arrangement between the taxpayer and the Indian firms constitutes the "provision of services" by the taxpayer through seconded personnel.

(c) Decision. The ITAT ruled that cost to cost reimbursement was not FTS and held as follows:

- the Indian firms were solely responsible for complying with the requirement of withholding tax in India;
- the deputation agreement provided for (i) the release of personnel by the taxpayer to the Indian firms, (ii) the personnel were to function solely under the control, direction and supervision of the Indian firms, (iii) the taxpayer not being responsible for the work of such personnel nor assuming any risk for their work, and (iv) the taxpayer not having any obligation towards the Indian firms for performance of duties by the personnel;
- in light of the deputation agreement, cost to cost reimbursement on account of secondment of employees cannot be treated as FTS under article 12 of the Treaty;
- income of the seconded personnel, being employees of the EY India firms, was already taxed as salary in their respective hands. Therefore, the very same amount could not be taxed twice – firstly in the hands of the seconded employees working in India and secondly again in the hands of the taxpayer; and
- ITAT relied on the earlier decisions in the case of Flipkart Internet and Boeing India while pronouncing this decision.

The full text of the decision pronounced by the ITAT is available [here](#) in pdf and in English.

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India; United States - Indian Court Holds Reimbursement Costs of Seconded Employees Not Fees for Technical Services, Not Taxable in India (28 June 2023), News IBFD.

Exported / Printed on 6 Mar. 2024 by hkermadi@deloitte.lu.