

**INTERNATIONAL ASSIGNMENTS TO AND FROM INDIA: SOME FOCUS AREAS****1. INTRODUCTION**

The media today is often rife with reports that various countries are adopting protectionist measures to promote local employment and curb immigration. However, the jury is still out on whether these measures can substantively affect the benefits of globalisation, which has seen unprecedented growth in international trade, investment and cross border transfer of labour. Global businesses invariably demand a continuous search for better opportunities and skillsets, and with multi-national companies being well-placed to facilitate these, employee transfers and secondments are an integral part of a modern and successful workforce. India too seems to be an essential part of all debates surrounding the deputation or secondment of employees – thus, if you're looking to send across an expatriate to India or if you're an Indian company looking to depute employees overseas, the following may be useful to bear in mind.

**2. DEPUTATION AND TRANSFER OF EMPLOYMENT: WHAT'S THE DIFFERENCE?**

The difference between a deputation and transfer of employment is key to understanding the extent to which Indian laws will apply during the course of such deputation or transfer.

As per judicial decisions, a deputation typically involves a tripartite agreement, based on the consent of the principal employer to lend the employee's services which is accepted by the borrowing department and also by the employee in question.<sup>1</sup> In a deputation, the employee continues to be subject to the deputing company's internal policies, including those pertaining to performance appraisals, promotions and disciplinary action. A 'transfer' on the other hand has the exact opposite connotation – here, the transferring entity would not have a lien on the employee or have any control over the terms of his/her employment post the transfer.

In other words, the crux of a deputation arrangement involves the deputing company retaining some kind of lien on an employee's employment whereas a 'transfer' involves a clean break in employment, with the employee joining the foreign company as a fresh employee. Accordingly, in case of a deputation from an Indian to a foreign company, while local laws would apply, it's also possible that the employee would continue to be subject to certain Indian laws (given that he/she will still be an employee of an Indian company). However, if an employee is transferred from India to a foreign entity, then Indian laws would clearly not apply in the course of the transfer. It is thus important to ensure that the nature of the arrangement (be it deputation or transfer) is documented accurately so that the terms of employment and applicable law are made abundantly clear during the course of the deputation or transfer.

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<sup>1</sup> *Bhupinder Singh Negi v. Union of India and Ors.* MANU/HP/0532/2016. Courts have also held that if a tripartite agreement is entered into, it would have the effect of terminating the employee's original contract of employment. If, however, such a tripartite agreement is not entered into, then the employee continues to remain in the employment of the principal employer, even if the employer asks him to execute work for another person, who could be responsible for paying his wages and exercising control over his services (*Manager, M/s Pyare Chand Kesari Mal Bidi Factory v. Onkar Laxman* AIR 1970 SC 823).

### 3. SOCIAL SECURITY ISSUES

While India does not have a very extensive social security regime, there are two key pieces of social security legislation which are relevant for employee depositions or transfers: (I) the Employees Provident Fund and Miscellaneous Provisions Act, 1952 along with schemes formulated thereunder (“**EPF Act**”); and (II) Payment of Gratuity Act, 1972 (“**Gratuity Act**”).

#### 3.1. EPF Act

Under the EPF Act, both the employer and employee are required to contribute 12% of an employee’s ‘basic wages’ to a Government-run fund, called the Employees Provident Fund or “**EPF**”. In addition to domestic employers and employees, the EPF Act also defines another category of workforce that is required to contribute to the EPF – the ‘International Worker’ or “**IW**”<sup>2</sup>. An IW is defined both in an inbound and outbound context as follows:

- (i) An IW (inbound) is a person who holds a passport other than an Indian passport and comes to work for an Indian establishment that is covered under the EPF Act. It’s important to note that the EPF Act makes no distinction between a foreign worker on deputation to India and a foreign worker who is transferred to India. All IWs (inbound) are required to contribute to the EPF, unless they are ‘excluded employees’. Exclusion from EPF contributions is only granted if the IW contributes to a social security program in his/her host country which has executed a social security agreement (“**SSA**”) with India.

There are certain significant differences between EPF contributions in respect of IWs (inbound) and domestic employees. For instance, such IWs are required to contribute to the EPF on their ‘full salary’ and not merely ‘basic wages’. There are also differences in case of timing of withdrawal of EPF contributions. Also, significantly, no specific exemption regarding EPF contributions is granted on the ground that the IW’s (inbound’s) remuneration is not paid in India. Thus, even if an IW (inbound) is paid entirely in his/her country of origin, he/she may be still be required to contribute to the Indian EPF.

- (ii) An IW (outbound) is defined as an Indian employee going to work in a foreign country with which India has an SSA and eligible to avail social security benefits in that country on the terms of such SSA. Accordingly, if a person is deputed overseas but continues to receive remuneration in India and is still covered under the EPF Act, then he/she will not be an IW (outbound). Such persons will continue to contribute as domestic employees.

#### 3.2. Gratuity Act

Under the Gratuity Act, employees who have completed 5 (five) years of ‘*continuous service*’ are entitled to gratuity, at the rate of 15 days’ wages for every completed year of service<sup>3</sup>. Gratuity payouts are currently

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<sup>2</sup> Paragraph 83 of the EPF Scheme.

<sup>3</sup> Section 4 of the Gratuity Act.

capped at INR 20,00,000<sup>4</sup> (\$ 30,000). The term 'continuous service' in this context is defined<sup>5</sup> generally as uninterrupted service, including interruptions arising due to sickness, accident, absence from duty without leave, etc. However, if an employer issues any order treating an absence from work as a break in service, then such break will not be counted towards the 'continuous service' requirement.

The Gratuity Act is silent on whether gratuity is payable during the course of an employee's deputation abroad. Thus, any deputation or transfer of employees would have to be examined within the above framework, to understand whether the duration of the deputation/transfer will also be counted towards 'continuous service'. While it's likely that a complete transfer of employment may not fall within the definition, it's highly likely that a deputation might. However, this would largely depend on the facts and circumstances and would have to be examined on a case by case basis.

#### 4. INCOME TAX CONSIDERATIONS

India follows both a residence as well as source-based system of taxation. As per the Income Tax Act, 1961 ("ITA"), income earned in a previous financial year is typically subject to tax in the next year. Indian tax residents are subject to tax in India on their global income. An individual will qualify as a resident in a particular tax year, if he/she resides in India for a period of 182 days or more in that year. A company is said to be resident if it is incorporated in India or its place of effective management is situated in India. Non-residents are subject to tax in India only in respect of income that is received or deemed to be received in India, or income that accrues or arises or is deemed to accrue or arise to them in India. Income accruing to a non-resident from a "business connection" in India (i.e. a term along the lines of the 'permanent establishment' ("PE") concept under tax treaties, but is generally considered to be wider in scope) or from an asset or source of income in India (for instance, salary, interest, royalties and fees for technical services) will all be income taxed in the hands of a foreign resident, in India.

India has a vast network of double taxation avoidance agreements ("DTAAs") to minimise the effects of double taxation and allow assesseees to claim credit in one country for the taxes paid in the other. As per the ITA, assesseees can avail benefits under DTAAs to the extent they are more beneficial than domestic law.

While deputing or transferring employees to India, the foreign company would have to be mindful of mainly the following:

- (i) whether such deputation or transfer could lead to any PE risks for the company in India;
- (ii) the employee's tax position in India and whether this would have to be factored into the expatriate's salary;
- (iii) whether the employee would be taxed in both jurisdictions, and if so, whether he/she can claim credit or exemption under provisions of any DTAA.

Similar considerations (as above) would also arise for the Indian company that is deputing or transferring employees abroad.

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<sup>4</sup> Payment of Gratuity (Amendment) Act, 2018 effective from March 29, 2018.

<sup>5</sup> Section 2A of the Gratuity Act.

The detailed roles and responsibilities of the employee being transferred or deputed would also have to be considered separately to examine if there are any specific PE risks.

## 5. OTHER CONSIDERATIONS

The foreign company would also have to ensure that the employee being transferred or deputed to India has obtained the right category of visa to work and live in India. Also, depending on the expatriate's country and level of familiarity with India, it would also serve him/her well to get somewhat familiar with local nuances. While English is widely spoken in urban India and is the primary language of business, the importance of gauging the cultural pulse of the specific local region of the country (where he/she is located) and of the organisation (especially if the expatriate is a senior level employee) cannot be overemphasised. As with any country, imbibing this will go a long way in ensuring that the expatriate's Indian stint is memorable for years to come!

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