

TAX SPHERE

Cost-to-cost salary reimbursements of seconded employees taxable as FTS where ‘make available’ condition is satisfied

The Delhi High Court in the case of *CIT vs Ernst and Young U.S. LLP*[1] (“EY US”) has ruled that cost-to-cost reimbursements received by the US-based LLP from its Indian affiliates towards salary of seconded employees constitute Fees for Technical Services (“**FTS**”) under Article 12 of the India-USA DTAA (“**the DTAA**”), as the secondment satisfied the ‘make available’ condition under Article 12(4)(b) of the DTAA.

The assessee, a US-based member of the EY network, seconded its personnel to three EY India entities under deputation agreements and received cost-to-cost reimbursement of salary costs from such Indian entities. The assessee claimed that such reimbursements were not taxable in India as they were merely cost-to-cost in nature, without any element of income embedded therein, and the secondees were to be regarded as employees of EY India entities during the period of deputation. The Assessing Officer (“AO”) held that the secondees continued to be employees of EY US, who made available their technical

[1] [2026] 187 taxmann.com 711 (Delhi HC)



knowledge and expertise to the Indian entities and, accordingly, treated the reimbursements as FTS. The Dispute Resolution Panel (“DRP”) upheld the order of the AO. In appeal, the Tribunal, however, held that the ‘make available’ condition under Article 12(4)(b) of the DTAA was not satisfied and hence, the cross-charges were cost-to-cost reimbursements of salary, already taxed in the hands of the secondees.

In further appeal by the Revenue, the High Court reversed the order of the Tribunal on the secondment issue. The Court noted that the secondees continued to maintain their lien with EY US during the period of deputation, remained entitled to all employment benefits, including social security from EY US, and could not have their employment with EY US severed by the Indian entities, who only had the right to terminate the secondment and relieve the secondees to enable them to rejoin EY US. The Court further observed that the scope of services, as elaborately examined by the Assessing Officer and unchallenged before the Court, demonstrated that the secondees had come to India to implement policies, standards and culture of EY Group within the Indian EY entities, resulting in transfer of technical knowledge, skill and experience to the Indian entities for their future use.

The High Court placed reliance on its earlier decision in the case of



Centrica India Offshore (P) Ltd vs CIT[2] [SLP filed by the assessee dismissed[3]], wherein it was held that the mere characterization of payment as ‘reimbursement’ in a secondment agreement is not determinative of the nature of the services; the absence of mark-up cannot govern the nature of the transaction. Applying the said principles, the High Court upheld the findings of the AO and further held that the orders of the Tribunal were per incuriam and perverse insofar as they failed to make any reference to the binding precedent of this Court in *Centrica India Offshore (supra)*.

This ruling reaffirms that in a secondment arrangement, the real nature of the services and employment relationship - and not the mere label of ‘reimbursement’ or ‘cost-to-cost’ - is determinative of taxability. Where secondees retain their lien and employment benefits with the overseas entity and the scope of work demonstrates transfer of technical knowledge to the Indian entity for its future use, the ‘make available’ condition under the DTAA shall be treated as satisfied for bringing to tax such receipts as FTS in the source country.

[2] [2014] 364 ITR 336 (Del)

[3] [2014] 227 Taxman 368 (SC)



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