THE POWER OF BEING UNDERSTOOD

RSM India Newsflash - Delhi High Court holds Secondment Reimbursements to EY US taxable as FTS under the India-US Tax Treaty, where employee lien and overarching control remained with EY US

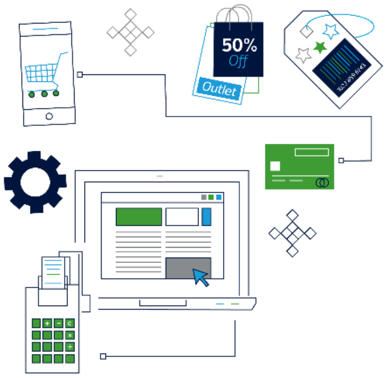
Newsflash

Delhi High Court holds Secondment Reimbursements to EY US taxable as FTS under the India-US Tax Treaty, where employee lien and overarching control remained with EY US

For Circulation
21 July 2026

1.0 Background

1.1. Cross-border secondment of employees is a common arrangement within multinational groups, particularly where specialised personnel are deputed to Indian group entities for knowledge transfer, implementation of global standards, quality control, project execution or client delivery. From an Indian tax perspective, such arrangements often give rise to disputes on whether reimbursements made by the Indian entity to the overseas entity are merely salary cost reimbursements, or whether they represent consideration for rendering technical / consultancy services taxable as Fees for Technical Services / Fees for Included Services under section 9(1)(vii) of the Income-tax Act, 1961 and the applicable tax treaty.



The Delhi High Court, in the case of **Commissioner of Income Tax (International Taxation)-1, New Delhi v. Ernst & Young U.S. LLP vide its judgement dated 18 June 2026**, examined this issue in the context of the secondment of employees by EY US to EY India entities. The case also involved the taxability of receipts from services rendered by EY US to Indian clients from the USA under Article 12 of the India-USA DTAA, and whether such receipts could be excluded as professional services under Article 12(5)(e) read with Article 15 of the DTAA. The appeals covered AY 2018-19 to AY 2022-23 and arose from ITAT orders granting relief to the assessee.

It is pertinent to note that the above judgement delivered by the Division Bench of the Delhi High Court ("**Hon'ble Court**") arises from a batch of five appeals[1] that were filed by the Income Tax Department against EY US.

In this Newsflash, we provide a brief overview of the Delhi High Court ruling on taxability of secondment reimbursements and overseas service receipts as Fees for Technical Services under the Income-tax Act and the India-USA DTAA.

[1] ITA 753/ 2025 (for AY 2018-19); ITA423/ 2025 (for AY 2019-20); ITA 715/ 2025 (for AY 2020-21); ITA 424/ 2025 (for AY 21-22); ITA 760/ 2025(for AY 2022-23).

2.0 Facts of the Case

2.1. EY US, a limited liability partnership firm incorporated under the laws of the United States of America, is a member firm of the Global EY network and is engaged in the business of providing professional services in the field of assurance, tax, transaction, and business advisory services, etc., to its clients across the globe, including India.

2.2. EY US has three EY entities operating in India, as below:

(i) EY GBS (India) Pvt Ltd
(ii) EY Global Delivery Services India LLP (EYGDS) and
(iii) Ernst &Young LLP

collectively referred to as "**EY India.**"

2.3. EY US entered into a deputation agreement with EY India under which certain personnel of EY US were seconded for a limited period of up to 2-3 years to EY India. As per the deputation agreement, the key terms are as under:

- EY India entity has the **right to select such personnel** belonging to EY US, who possess the requisite qualifications and expertise. Further, such selected personnel shall be released from their work at EY US and shall be integrated into EY India for the period of employment as its own employees.

- Seconded personnel shall function solely under the **direction, supervision, and control** of EY India and in accordance with its **rules, regulations, policies, guidelines, and other practices.**

- **Nature of work** to be assigned to seconded personnel shall be the responsibility of EY India. Further, accountability and review of work carried out shall vest with EY India.

- EY US shall not have any **obligation with regard to the performance** of the seconded personnel. The privity and lien of EY US would cease to exist during the period of employment with the EY India entity upon the entering of employment contract by seconded personnel with EY India.

- EY India shall be solely responsible for bearing and paying salary and other costs of the seconded personnel. **However, for administrative convenience, EY US will make payment (on behalf of EY India) towards salary and other costs to the seconded personnel which would be reimbursed by EY India on actual cost basis, subject to tax being withheld as per Indian tax laws.** For this purpose, EY US would need to produce the necessary documentary evidence supporting payment towards salary and other costs, to enable EY India to reimburse the cost so incurred without any markup.

- **Responsibility to withhold and deposit taxes on salary and other costs** paid to the seconded personnel vests with EY India.

- EY India shall be **responsible for the performance appraisal** of such seconded personnel.

- EY India had the **right to undertake performance appraisal and disciplinary action** and **to terminate** the assignment/ secondment contract in specified circumstances; however, **<u>as later noted by the Hon'ble Court, EY India did not have the power to sever the underlying employment relationship between the secondees and EY US.</u>**

2.4. Keeping the above in consideration, EY US contended that it was making payment of salaries of the seconded personnel merely for administrative convenience and thereafter, recovered the exact amount from EY India, treating the same as a pure cost-to-cost reimbursement without any markup.

2.5. Apart from the above, EY US also received professional fees from various Indian clients for services rendered in and from the US through engagements such as the implementation of customer billing software for an Indian client, where EY US provided project management, organizational change management, training, business work-streaming, technical infrastructure, and data conversion. The Assessee contended that these receipts qualified as "professional services" under Article 15(2) - Independent Personal Services **("IPS**") of the India - US tax treaty and were therefore excluded from being classified as FTS through Article 12(5)(e) of the India - US tax treaty.

2.6. However, during the course of assessment, the **Assessing Officer ("AO") alleged that**:

- **Seconded personnel never ceased to be employees of EY US because** salary payments of such seconded personnel employed with EY India were being made by EY US.

- **EY India can only terminate the secondment agreement** entered into with the seconded personnel. It has no power to sever the relationship between such personnel and EY US, which would resume at the end of the deputation agreement. Hence, **EY US continued to retain the lien on such personnel.**

- **EY US made payments towards the social security contributions** while such personnel were working in India.

- Seconded personnel lend their experience as employees of EY US in providing both technical and consultancy services. Further, such personnel have come to India to imbibe the culture of the Group and ensure the application of the EY group policies/processes and other quality standards in EY India. Hence, **once the process/ policies are retained/imbibed, there is no need for the personnel again, and EY India can apply the same itself.**

- **Professionals who rendered services to various Indian establishments in and from the US also imparted training to end customers**, thereby satisfying the 'make available' test.

2.7. In line with the earlier precedent set by this Hon'ble Court in the case of ***Centrica India Offshore (P) Limited vs CIT***[3]*, ("Centrica India"),* **the AO held that**:

- **Employer - Employee relationship continued to exist between EY US and such seconded personnel**, even though such personnel were working with EY India.

- The **absence of a mark-up**, **by itself**, does not determine the character of the payment; if the arrangement, in substance, involves the rendering of technical or consultancy services, the payment may still be taxable as FTS / FIS.

- **Services rendered by EY US through the seconded personnel to EY India were technical / consultancy in nature** and led to the transfer of technical knowledge, experience, skill, know-how, thereby, satisfying the 'make available' test under Article 12(4)(b) of the India - US tax treaty and hence, taxable as FTS.

- **Professional fees received by EY US are not excluded as professional receipts under Article 15(2) read with Article 12(5)(e) of the India - US tax treaty**. Only a portion of such services qualifies as "professional services", while the majority is in the nature of technical and consultancy, hence, these services ought to be taxed as FTS/FIS under Article 12 of the India - US tax treaty and not as "professional services" under Article 15 of the India - US tax treaty.

2.8. The above view was upheld by the Dispute Resolution Panel ("**DRP**") with a specific mention made to the "*Doctrine of Substance over Form"* observing that:

- **The intent of the terms of the Deputation Agreement** are crystal clear which is basically to second the employees of EY US to its AE in India (EY India) with a careful usage in the terms of the contract that it should not be treated as a manpower supply contract and not cast any obligation on the AE to pay any technical fees on the same.

- **Tax authorities ought to examine the true nature of a transaction**, even if the language of the agreement is worded to imply a non-taxable service or FTS payment. It is imperative that tax laws should not be allowed to be circumvented by superficially crafted agreements.

- **Taxpayers have a right to structure their affairs to minimize taxes**, but they cannot do so in a way that distorts the transaction's reality. Putting the pieces of the jigsaw puzzle together and reading the clauses of contract in totality in important.

- **Tax liability is based on the actual true economic purpose of transactions** rather legal or contractual form.

---

[3] 364 ITR 336 (Delhi High Court) (2014)

2.9. Aggrieved, the Assessee filed an appeal before the Tribunal and placing reliance on the decision of the Tribunal in the Assessee's own case for AY 2019-20 and AY 2021-22, it was held that:

- **Seconded personnel are employees of EY India** whose income has been taxed as salary under section 192 of the ITA.

- **Amounts paid by EY India to EY US on account of secondment of employees are a cost- to-cost reimbursement** of the amount paid by EY US, for and on behalf of EY India. The amounts have already been taxed at the hands of the seconded personnel employed in India, and the same cannot be subject to double taxation again through EY US.

- Through the seconded personnel, **there has been no transfer of knowledge, skill, know-how to employees of EY India to make further use of it, hence, 'make available test' has not been satisfied** under Article 12(4)(b) of the India - US tax treaty.

- **Professional fees received by EY US are not FIS because the "make available" requirement of Article 12(4)(b) of the India - US tax treaty is not satisfied** in the absence of transfer of technical knowledge, experience, skill, know-how or processes. Further, it was held that persons rendering such services, though highly qualified, experienced and trained and irrespective of the fact whether or not governed by an organisational / professional body, would be treated as "professionals" thereby, benefit under Article 12(5)(e) read with Article 15 (2) of the India - US tax treaty can be rightly availed.

2.10. Aggrieved by the decision of the Tribunal, the Revenue preferred an appeal before the Hon'ble Court wherein the issues for consideration were as under:

- Whether the ITAT has erred in holding that cost-to-cost reimbursement on account of secondment of employees should not be treated as FTS under section 9(1)(vii) of the ITA as well as Article 12 of the India-US tax treaty?

- Whether the ITAT has erred in appreciating the application of the "Make available" clause, as FTS, as per Article 12 of the India-US tax treaty?

- Was the ITAT justified in holding that the Assessee falls within the meaning of Article 12(5)(e) read with Article 15 of the India-US tax treaty?

3.0 Legal provisions

3.1. Section 9(1)(vii) of the ITA defines <u>FTS to include consideration for the rendering of any managerial, technical, or consultancy services (including the provision of services of technical or other personnel</u>).

3.2. **Article 12 (4) of the India - US tax treaty** states that "Fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services-

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or

(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

3.3. **Article 12(5) of the India - US tax treaty** mentions notwithstanding Article 12(4), "fees for included services" does not include amounts paid-

(a) ….
(b) ….
(c) ….
(d) ….
(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15 (Independent Personal Services).

3.4. **Article 15 of the India - US tax treaty with respect to 'Independent Personal Services'** states that-

1. Income derived by a person who is an individual or firm of individuals (other than a company) who is a resident of a Contracting State from the performance in the other Contracting State of professional services or other independent activities of a similar character shall be taxable only in the first mentioned State except in the following circumstances when such income may also be taxed in the other Contracting State:

   (a) if such person has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or

   (b) if the person's stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 90 days in the relevant taxable year.

2. The term "professional services" includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants.

4.0 Contentions of the Assessee / EY US

4.1. Cost to Cost Reimbursement on account of secondment

- Placing reliance on the deputation agreement and the Tribunal's order in its own case for AY 2019-20, the Assessee contended that the seconded personnel ceased to be its employees during the period of deputation and were employees of EY India. Further, with respect to reimbursement, the Assessee insisted that the payment made was a mere cost-to-cost reimbursement with no profit element involved. Such reimbursements retain their non-taxable nature even when the payment is partly or wholly towards social security dues, and do not in any way detract from the fact that it was a cost-to-cost reimbursement, which by itself is conclusive that the matter does not give rise to any taxable income[4].

- Salary and other costs paid by EY US to seconded personnel were for administrative convenience, incurred for and on behalf of EY India. Such costs continued to remain the liability of EY India. EY US raises an invoice to EY India for reimbursement of the exact amount which is paid by EY US to the seconded personnel, without any addition or subtraction. The amounts paid by EY India have already been taxed as salary under section 192 of the ITA, in the hands of the seconded personnel, hence, amounts further paid by EY India to EY US is a cost-to-cost reimbursement. Since, the amounts have already been taxed in the hands of the seconded personnel employed in India, the same cannot be subject to double taxation again through EY US.

- To strengthen the above argument, the Assessee distinguished the judgement of *Centrica India (supra)*, emphasizing that in that case the foreign company was rendering services to the Indian entity through its own employees who never became employees of the Indian entity but remained employees of the foreign entity at all times, and the payment made by the Indian entity is nothing but compensation or service charges paid to foreign entity, whereas in the case of the Assessee, the position is entirely different since, the seconded personnel were employees of EY India and not EY US and payment made to EY US by EY India is a mere cost to cost reimbursement.

- Referring to the Tribunal's order in its own case for AY 20-21 and AY 21-22, the Assessee contended that services rendered by the seconded personnel were neither technical nor consultancy in nature, there was no transfer of any technical knowledge, skills, or know-how that could be independently applied by EY India, in the future. Consequently, the 'make available' requirement under Article 12(4)(b) of the India-US tax treaty was not triggered, and hence, such reimbursements in no manner can be treated as FTS / FIS.

4.2. Receipts from Professional Services

- Professional fees received by EY US directly from various Indian establishments for professional services rendered in and from US do not meet the requirements of 'Make Available' clause under Article 12(4)(b) of the India - US tax treaty. Such "professional services" fall within the ambit of Article 15(2) read with Article (12)(5)(e) of the India - US tax treaty and hence are not taxable in India.

- The Assessee clarified that Article 15(2) of the India - US tax treaty gives an inclusive and not an exhaustive definition of "professional services" and includes independent

[4] DIT (International Taxation) vs AP Moller Maersk AS ((2017) 392 ITR 186 (SC));

scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants. Further, many of the above-mentioned services that have been expressly mentioned are rendered by people who do not necessarily belong to and are governed by any professional body.

- In the case of the Assessee, people who rendered professional services to various Indian establishments were engineers, economists, technical experts, and computer/software experts, not members of any statutory professional body such as the Bar Council of India or the Medical Council of India. However, since these persons were recognised experts in their respective fields, the Assessee contended that they could still be considered "*professionals*" within the meaning of Article 15 of the tax treaty.

- Reference was also made to section 194J and section 44AA of the ITA on the definition of "Professional services" which includes services rendered by a person in the course of carrying on legal, medical, engineering, or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as notified by the CBDT.

- Keeping the above in consideration, the Assessee strongly contended that merely because certain professionals are not governed by a specific professional organizational body, the benefit of Article 15(2) read with Article 12(5)(e) of the India - US tax treaty cannot be denied.

5.0 Contentions of the Revenue

5.1. Cost-to-Cost Reimbursement on account of secondment

- The Revenue argued that the Seconded Personnel –

    - On completion of the deputation tenure, they were repatriated to EY US.
    - Employment with EY India came with a lien marked on the employment with EY US.
    - While working in India, EY US still contributed to the social security benefits in the US.
    - Never ceased to be employees of EY US. The employer-employee relationship between EY US and such seconded personnel continued to exist even while they were working in India.

    Reliance was placed on extracts from the Internal Revenue Service (IRS) website on the social security contribution of such personnel. Hence, the Revenue strongly contended that the seconded personnel are still working for EY US, who continues to be their real employer.

- The seconded personnel came to imbibe the culture of EY Group and implement its policies/standards on EY India, and once such process/ policies were imbibed/

retained, there was no need for the seconded personnel to work again with the EY India, as employees of EY India could apply the same by themselves. Since enduring benefit was provided to the recipient i.e., EY India, such services fell within the ambit of the 'Make Available clause' i.e., Article 12(4)(b) of the India- US tax treaty and hence, taxable as FTS.

- The Revenue weighed on the fact that not charging a markup over and above the cost for maintaining the secondee was irrelevant in itself, since the absence of markup, subject to an independent transfer pricing exercise, cannot negate the nature of the transaction.

- Placing reliance on *Centrica India (supra),* which, according to Revenue is similar to the Assessee's case, the salaries of the seconded personnel were paid by the overseas companies (EY US) and the same was paid back by the Indian entity (EY India) to the overseas companies (EY US). Hence, making it amply clear that the EY US was rendering technical services to EY India, which would fall within the ambit of Article 12 of the India-US tax treaty and cannot be treated as a pure reimbursement.

5.2. Receipts from Professional Services

- Professional fees received by EY US on account of services rendered independently to various Indian establishments was in nature of FIS as per Article 12(4)(b) of the India -US tax treaty because such services rendered did not qualify as "Professional Services" as defined in Article 15 of the India - US Tax treaty. Only those services, which are specifically related to activities mentioned in Article 15 qualify as "Professional Services" and are thereby exempted. Hence, services rendered by EY US do not fall within the meaning of Article 15(2) and the benefit under Article 12(5)(e) of the tax treaty cannot be availed.

- The definition of "*Professional Services*" cannot be confined to persons who are governed by professional organizations and a parallel on the scope of "*Professional Services*" cannot be drawn with Section 194J and Section 44AA of the Act. The scope of tax relief based on certain terminology provided by the provisions of the ITA cannot be used to interpret the provisions of the tax treaty which in itself is a separate, specific document arrived at after deliberations between two sovereign nations.

- Article 15 of the India-US tax treaty is applicable only if the services were rendered in India. In the case of the Assessee, services have been rendered from outside India, making such transactions fall outside the scope of Article 15 of the India - US tax treaty.

6.0 Decision of the Hon'ble Delhi High Court

6.1. Cost to Cost Reimbursement on account of Secondment -

- **<u>Lien vests solely with EY US-</u>**
  On a detailed review of the Deputation agreement entered into between EY US and EY India, the Hon'ble Court noted that:

- Assignment of the seconded personnel was akin to a deputation from EY US to EY India
- All benefits, including social security benefits entitled to such seconded personnel, were being provided by EY US.
- Despite being operationally controlled by EY India, the **real and economic control** was with EY US.
- On completion of the deputation tenure, the seconded personnel were repatriated to join EY US
- Agreement between EY US and EY India is described as a 'Deputation Agreement' as different from a Letter of Appointment or Transfer.
- Seconded **personnel never ceased to be employees of EY US** with EY US retaining an overarching control over them.
- EY India could not have terminated the services of the secondees and only had the right to undertake legal or disciplinary action against misconduct, fraud, wilful negligence or any illegal action and terminate the secondment, prior to the agreed period, and relieve such personnel from EY India to enable them to join EY US. This thus shows that the secondees never ceased to be the employees of EY US.

Keeping the above in mind, with facts being squarely similar to the landmark precedent given by this Hon'ble Court in Centrica India *(supra)*, **the Hon'ble Court held that EY US was the real and economic employer of the seconded personnel since, the employer-employee relationship with EY US had continued to exist even while working in India.**

The Hon'ble Court also noted that the decision in Centrica India Offshore Pvt. Ltd. had been upheld by the Supreme Court, and the ITAT's failure to consider this binding precedent rendered its findings unsustainable.

Further, since EY India had no power whatsoever to sever the relationship between the seconded personnel and EY US, which would resume at the end of the deputation agreement, **the Hon'ble Court held that EY US has a lien on those employees or, conversely, the employees have a lien on their employment with EY US**.

- **<u>Substance over Form overrides a transaction classified as a mere "reimbursement" -</u>**

Taking note of the DRP's observation on the principles of the "*Doctrine of Substance over Form*", the Hon'ble Court reiterated that describing a transaction in a superficially crafted deputation agreement as a "reimbursement" will not be a deciding factor in determining the nature of the payments. Though the term "reimbursement" is used, the nature of payments under the secondment agreement has to satisfy the characteristics of reimbursement. The absence of markup (subject to an independent transfer pricing exercise) cannot negate the nature of the transaction. Apart from the above, various factors examining the real economic relationship, actual control exercised and benefit derived, rather than contractual labels, continue to remain relevant to determine the nature of the transaction, in essence and substance.

Placing reliance on the judgement of *Centrica India (supra)*, the Hon'ble Court concluded that the mere fact that the deputation agreement phrases the payment made by EY India to EY US as a "reimbursement" cannot be the determinative factor of the nature of the services. The payments made are not in the nature of reimbursement, but rather for services rendered. The employment relationship between EY US and EY India, from which the former's independent obligation to pay the secondees arises – continues to hold, as there is no obligation to use money arising from the payment by EY India to pay the secondees.

Keeping the above in mind, **the Hon'ble Court held that cost-to-cost reimbursement on account of secondment of employees made by EY India to EY US is not a mere reimbursement, but rather is a consideration paid for services rendered through employees of EY US and ought to be taxed as FTS under Article 12 of the India -US tax treaty.**

- **Make Available Test-**

The Hon'ble Court observed that the seconded personnel imbibe the culture of the EY Group and implement its policies/standards at EY India, and once such process/ policies were imbibed/ retained, there was no need for the seconded personnel to work again with EY India, as employees of EY India could apply the same by themselves. This clearly reflects that there has been a transfer of technical knowledge, experience, know-how, skill, and processes.

Hence, the Hon'ble Court held that since enduring benefit was provided to EY India through the seconded personnel, the technical services rendered satisfied the crucial 'Make Available' test under Article 12(4)(b) of the India - US tax treaty and are taxable as FTS.

6.2. Receipts from Professional Services

- **Services rendered fulfill the "Make Available" criterion-**

The Hon'ble Court held that apart from rendering services, EY US employees were also involved in imparting training to the end customers, thereby providing enduring benefit to the recipient and satisfying the 'make available' criterion under Article 12 of the India- US Tax Treaty. Differing from the view of the Tribunal, the Hon'ble Court also observed that the Tribunal's findings were unwarranted and incorrect, without any sufficient reason.

Placing reference to the engagement letter with scope of work extract relied upon by the AO in the Assessee's own case for AY 2020-21, the Hon'ble Court concluded that such professional services rendered by EY US ought to be taxed as FIS/ FTS under Article 12 of the India-US Tax Treaty.

- **<u>Eligibility under Article 12 (5)(e) to be examined on service basis -</u>**

  On the issue pertaining to the taxability of receipts received by EY US directly from Indian clients for services performed in and from the US, as "FTS" under the Article 12(5)(e) / Article 15 "professional services" exclusion, the Hon'ble Court had a varying perspective as compared to the Tribunal.

  The Tribunal had held that professionals being physicians, engineers, lawyers, accountants, etc., under Article 15(2) of the India-US tax Treaty, is an illustrative list and not an exhaustive one, and that economists, engineers, MBA graduates, diploma holders, and other trained technical personnel who do not belong to a particular professional governing body could still render "professional services."

  However, the Hon'ble Court did not outright reverse the above interpretation of the Tribunal, but found that the Tribunal had failed to consider two important aspects –

  - Firstly, the AO's detailed, factual finding that the actual services involved (referring to the engagement letter with scope of work, including services like project management, data conversion and training) were technical and consultancy in nature, and were not solely in the nature of an independent professional activity; and

  - Secondly, that the AO had already split the total receipts as professional services that were exempt under Article 12(5)(e) read with Article 15, and the balance receipts in the nature of technical / consultancy were offered to tax as 'FTS' under Article 12 of the India US Tax Treaty.

  The Hon'ble Court made note of the fact that the Tribunal's blanket finding that all receipts were exempt, overlooking the total receipt breakup, was incorrect and unwarranted.

  Thus, the Hon'ble Court held that the ITAT could not have set aside the AO's findings without cogent reasons, particularly where the AO had examined the engagement letter and scope of services and had identified training, technical and consultancy elements. However, since the AO had also allowed Article 12(5)(e) benefit for certain services, the Court remanded the matter to the ITAT to examine the nature of taxable and exempt services separately

6.3. Conclusion

The Hon'ble Delhi High Court set aside the findings of the ITAT and held that, on the facts of the case that:

- Cost to Cost reimbursement to Ernst & Young U.S. LLP ("**EY US**" / "**the Assessee"**) on account of secondment of personnel by EY US to EY India entities ("**EY India**") is taxable as Fees for Technical Services ("**FTS**")/ Fees for Included Services ("**FIS"**) under section 9(1)(vii) of the Income Tax Act, 1961 ("**ITA"**) as well as under Article 12 of the India USA Double Tax Avoidance Agreement ("**India - US tax treaty**").

The Court observed that the secondees never ceased to be employees of EY US, as EY US retained lien and overarching control over them, and EY India did not have the power to sever the underlying employment relationship between the secondees and EY US.

- Services rendered by such seconded personnel (who never ceased to be employees of EY US) to EY India led to the transfer of technical knowledge, skill, experience, and know-how, (including through implementation of EY group policies/standards and training) satisfying the 'Make Available' test and hence falling under the ambit of Article 12(4)(b) of the India-US tax treaty. The Court relied on the principle laid down in **Centrica India Offshore Pvt. Ltd.**, and noted that the ITAT had failed to consider this binding precedent.

- With respect to receipts from services rendered by EY US to Indian clients from the USA, the Court found that the ITAT had given a blanket finding without adequately examining the nature of services. Since the AO had already bifurcated the receipts between services qualifying as professional services under Article 12(5)(e) read with Article 15 and services taxable as FTS / FIS, the Court held that the ITAT ought to have examined the distinction on a service-wise basis. Accordingly, this issue was remanded to the ITAT for fresh consideration.

7.0 Our Comments

7.1. This landmark ruling highlights that, where the overseas entity continues to retain employee lien, benefit obligations, repatriation rights or overarching control, the reimbursement may be characterised as consideration for services and taxed as FTS / FIS.

*Note: It is pertinent to note that on a similar issue of reimbursement of salary expenditure, the Delhi Tribunal in **Horiba India Private Limited**[5] (pronounced just shortly after the current ruling in the case of EY) has taken a contrary view and held that salary expenses reimbursed by Horiba India towards employees seconded by Horiba Japan were in the nature of mere reimbursement without any profit element embedded and thus, not liable to tax in India.*

In this case, the seconded employees were engaged in rendering routine business day-to -day functions of sales and accounting to Horiba India, without having any specialization in any technical skill. Further, placing reliance on Form 16, it was noted that Horiba India was duly deducting tax under section 192 on the entire salary payment. Since, no 'technical' services were rendered by such employees, the Tribunal held that Horiba India is the real and economic employer of the seconded employees and such reimbursement does not constitute FTS either under the Act or the relevant tax treaty.

---

[5] *Horiba India Private Limited (2026)(TS- 939-ITAT-2026)(Delhi)*

7.2. The ruling also emphasises the importance of the “make available” test under the India-USA DTAA. If seconded personnel transfer technical knowledge, skill, experience, know-how or processes to the Indian entity, including through training or implementation of group policies/standards, such services may be regarded as making available technical knowledge.

THE POWER OF BEING UNDERSTOOD

RSM

For further information please contact:

RSM Astute Consulting Pvt. Ltd.

9th Floor, Maker Chambers VI, Nariman Point, Mumbai - 400021

3rd Floor, Technopolis Knowledge Park, Mahakali Caves, Chakala, Andheri East, Mumbai - 400093

T: (91-22) 6108 5555/ 6121 4444
F: (91-22) 6108 5556/ 2287 5771

E: emails@rsmindia.in **W:** www.rsmindia.in

Offices: Mumbai, New Delhi - NCR, Chennai, Kolkata, Bengaluru, Navi Mumbai, Surat, Hyderabad, Ahmedabad, Pune, Gandhidham, Jaipur and Vijayanagar.

facebook.com/RSMinIndia

X.com/RSM_India

linkedin.com/company/rsm-india

Youtube.com/c/RSMIndia

21 July 2026