

# Secondment Uncovered: Insights from a Service PE Lens

Secondment can be understood as an arrangement where the employee of one entity is temporarily assigned to work for another entity. This concept is extensively utilized across the globe by Multinational Entities (MNEs), mainly to expand businesses while achieving various managerial objectives such as curtailing expenditure w.r.t hiring more workforce, sharing of talent pool across group entities and maintaining global standards.

From an India Income-tax perspective, a Foreign Enterprise (FE) may inevitably face critical issues on account of operating in India vide the secondment model, for instance, the risk of constituting a Permanent Establishment (PE) in India.

Though secondment arrangement can pose risk of different types of PE in India. However, we have limited the scope of this Article to discuss aspects related to Service PE only.

## Service PE

An enterprise of one country may constitute a Service PE in another country if it furnishes services in the other country through its employees or personnel under its direct control, for a specified period. Service PE finds place in many but not all tax treaties.

At the outset, let's visit the recent judgment pronounced by the Delhi High Court (HC) in the case of **Samsung Electronics Co. Ltd.**<sup>1</sup>, wherein the HC discussed OECD

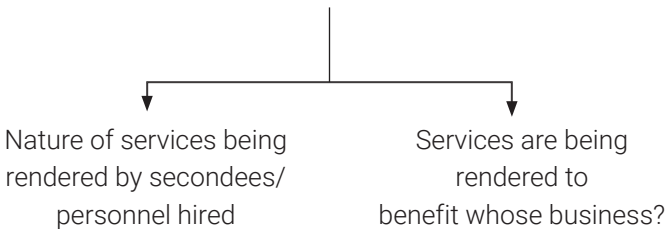
Model Commentary w.r.t the constitution of a Service PE.

**Question:** Whether Samsung Electronics Co. Ltd. (SEC), a Korean entity constituted a PE in India on account of secondment of employees to its Indian subsidiary, namely Samsung India Electronics Private Limited (SIEL)?

**Services performed by secondees:** services related to product specialization, stock verification, design adjustments for Indian consumer preferences, and marketing strategies - all of which were within the scope of SIEL's business as opposed to SEC's business.

**Conclusion:** HC reinforced the principle that seconded employees do not automatically create a Service PE unless they are engaged in activities directly linked to the foreign entity's global business operations.

Apropos, and upon a deep dive into the illustrations discussed in the commentary on Article 15<sup>2</sup> and discussion in the OECD Discussion Draft (2006) on "The Tax Treaty Treatment of Services: proposed Commentary Changes", the following have a bearing on the risk of constitution of a Service PE:



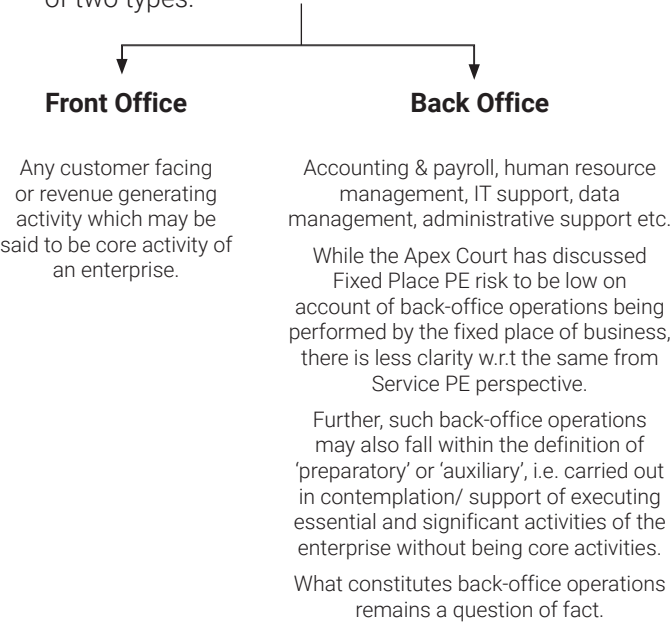
<sup>1</sup> [2025] 170 taxmann.com 417 (Delhi)

<sup>2</sup> Paragraphs 8.13 to 8.15 - OECD Model Commentary on Article 15 - Concerning the Taxation of Income from Employment

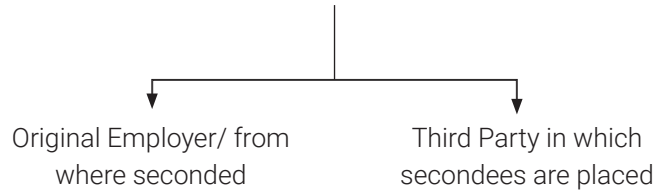
In the ensuing paragraphs, we have discussed these aspects in depth:

(a) Nature of Services

- It is noteworthy that the nature of services being performed by a secondee/ personnel hired may be of two types:



(b) Services are being rendered to benefit business of



In light of the above discussion, we note that where

front office operations are being provided by seconded employees, in furtherance of business of the original employer, the risk of constitution of Service PE is imminent while where back office services are rendered by the seconded employees to the original employer, such risk may be subdued.

In light of the same, let us discuss another important in the context a Service PE, – “who is an employee or ‘other personnel’?”.

Employer-Employee relationship

Generally, an employee-employer relationship gets established where an person (employee) works under the direction, supervision and control of another person/ organization (employer) and the employee gets a predefined amount (whether in form of salary, bonus, allowances, perquisites, social security benefits etc.) as per the agreed terms of employment and has a lien on such employment.

In this context, the Indian judiciary<sup>3</sup> along with the OECD Model Commentary has laid down certain parameters to determine ‘employer-employee’ relationship. The following parameters<sup>4</sup> help in the analysis and are summarized below:

Parameters	Corresponding Rights
Appointment and Control During Employment	Right to appoint the personnel
	Right to direct & supervise the personnel
	Right to impose disciplinary action
	Right to determine holidays/work schedule
	Right to feedback/ appraisal
Working Conditions	Right to sue
	Right to determine working conditions
Payment of Salary	Right to determine place where work is to be performed
Termination	Right to remuneration
Tools and Materials	Right to dismiss/ terminate/ withdrawal
	Right to put tools and materials necessary for work at the individual’s disposal

Among the parameters discussed above, the element of ‘operational control/ direction and supervision exercised over the employee’ carries significant weight. The OECD commentary underscores that the power to exercise authority over the person, roles and responsibilities, and conduct of the workforce is essential to establish the existence of a master-servant relationship and to ascertain who shall be construed as the ‘employer’. Thus, mere disbursing of salaries or meeting legal obligations is not an adequate measure to determine who the employer is.

Based on the above, it may be said that three types of employers emerge basis the roles vested with an entity engaging the personnel, namely:

- Real Employer** – The entity that controls/ supervises and directs such personnel and oversees their day-to-day operations may be construed as the real employer. The entity on whom the employee exercises lien on employment.
- Economic Employer** – In certain peculiar cases, employee salaries/ benefits may be reimbursed by another entity to the paying entity. Thus, the receipt of consideration from another entity and the timing and nature of such receipt has a key role to play in determination of who shall be construed as the economic employer. At times, salary may be paid by one entity for administrative purposes which may make such entity the economic employer.

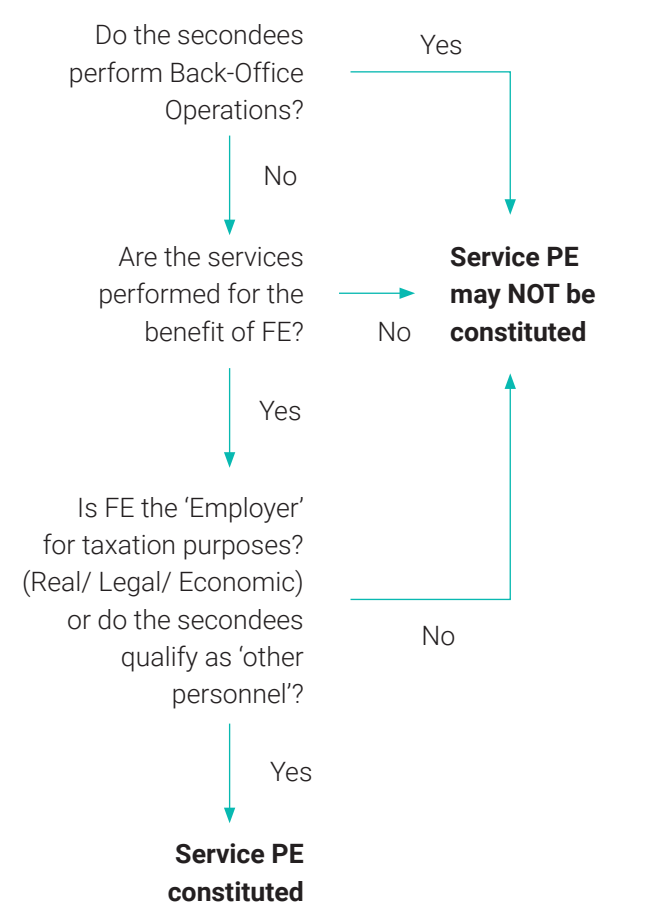
<sup>3</sup> DIT v. Morgan Stanley [2007] 292 ITR 416/162 Taxman 165 (SC), ADIT-1, New Delhi v. E-Funds IT Solution Inc. [2017] 86 taxmann.com 240 (SC), Samsung Electronics Co. Ltd. (supra), Centrica India Offshore (P) Ltd. v. CIT-I [2014] 44 taxmann.com 300 (Delhi High Court)

<sup>4</sup> Paragraph 8.14 - OECD Model Commentary on Article 15 - Concerning the Taxation of Income from Employment

- **Legal Employer** – The entity that is the employer simply on paper and not in substance.

**‘Other Personnel’**

The tax treaties not only includes employee, but also refers ‘other personnel’ for assessing Service PE. Accordingly, it is worth examining who falls within the purview of ‘other personnel’. The term has not been defined in OECD Model Commentary or under the respective tax treaties. However, an attempt has been made to interpret the term in various judgements where it has been construed to mean persons (other than employees) engaged or appointed by a FE who also exercises certain degree of control.



**In a nutshell, secondment arrangements wherein the secondees perform front office/ core business activities of FE, in furtherance of FE's business in India, are highly likely to constitute a Service PE of FE in India if they are construed to be employees of FE or fall within the ambit of ‘other personnel’. The same has been diagrammatically summarized below:**

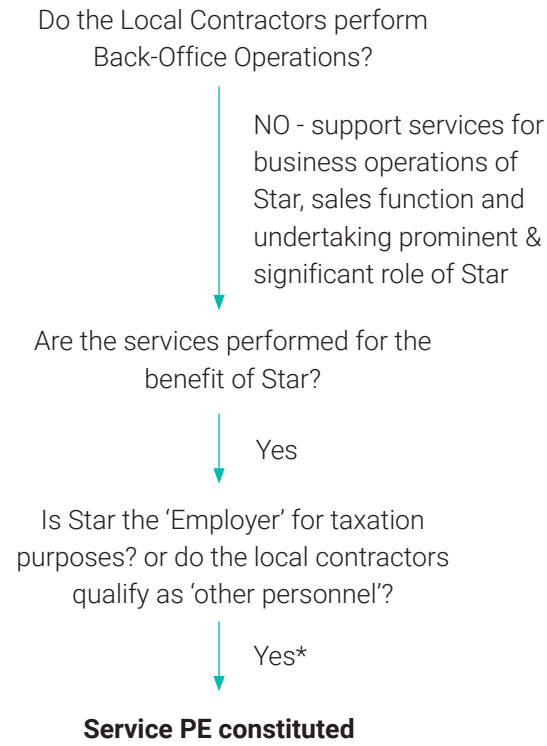
**Illustrations**

Let us now discuss some cases with illustrations to understand the nuances of Service PE in more detail.

**Case 1: Personnel hired locally in India to perform front-office operations**

**Facts:** Star Inc, a software solutions provider incorporated in US, with no physical presence in India, enters into an arrangement with Sun India to source local contractors in India for providing maintenance, growth, development and support to Star’s software products worldwide.

**Service PE Analysis:**



**\* Factual Matrix for ‘Employer-Employee Test’/ ‘Other Personnel’ Test:**

- Local contractors are formally employed with Sun India,
- Local contractors are subject to day-to-day control, direction, supervision, review, etc., of Star and exclusively work for Star.
- Salary is disbursed by Sun India, which is reimbursed from Star at a markup,

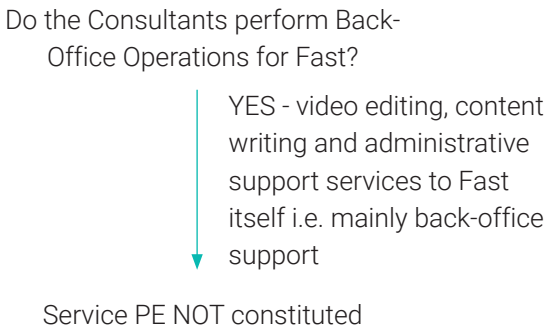
**Others**

- Local contractors are working from home and equipment for discharging their role and work is provided by Sun India,
- Right to terminate employment of local contractors with Sun India.

**Case 2: Personnel hired locally in India to render back-office support to FE itself**

**Facts:** Fast Inc, a US entity, offers online certification training programs and has no physical presence, customers, or direct operations in India. Five consultants are hired locally in India from a third-party recruitment agency firm Slow India.

**Service PE Analysis:**



### Case 3: Subcontracting of work to Indian Subsidiary solely operating for FE

Facts: Moon Inc., a Canadian company, conducts market survey and collects data on thousands of products and services around the world for its clients viz. market research companies and has a subsidiary, Moon India. Moon Inc. subcontracts the execution of the work (both for its global and local projects) to Moon India, without undertaking any business activity itself. Moon India cross charges Moon Inc., at a markup on the costs incurred.

#### Service PE Analysis:

Do the full-time employees perform Back-Office Operations for Moon Inc.?

NO - services being rendered may seem back-office operations, but from an overall perspective it constitutes the core business of Moon Inc

Are the services performed for the benefit of Moon Inc.?

Yes

Is Moon Inc. the 'Employer' for taxation purposes or do the full-time employees qualify as 'other personnel'?

Yes\*

**Service PE constituted**

#### \* Factual Matrix for 'Employer-Employee'/ 'Other Personnel' Test:

- The employees of Moon India render services to worldwide customers of Moon Inc. (including those in India),
- Moon Inc. has no employees on its payroll,
- Moon India has forty full time employees, retaining exclusive rights to hire and terminate them,
- These employees work under the supervision and direction of the directors of Moon Inc. and report to them with the sales work.

Authorised by

**AMEET BAID**  
ASA

**PRAGYA BANSAL**  
ASA

**SAAHIL MEHRA**  
ASA