



# SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No. 296

Toshiba Corporation

v.

Deputy Commissioner of Income Tax

Reimbursement of salary paid to seconded employees, supported by proper employer - employee relationship and TDS compliance, cannot be taxed as FTS under the Income-tax Act or the India - Japan DTAA

07.02.2026



[2025] 181 taxmann.com 244 (Delhi - Trib.)

## Facts of the Case

- ❖ Assessee is a tax resident of Japan and is engaged globally in manufacturing and marketing of electronic systems, heavy electrical equipment, consumer products, and medical diagnostic equipment. During the relevant year, it seconded certain employees to its Indian group companies.
- ❖ A total of 26 employees were seconded to various Indian group entities. For administrative convenience, salaries of these employees were paid by the assessee in Japan and subsequently reimbursed by the Indian entities without any markup.
- ❖ Assessee received Rs.10,76,36,392 from Indian group companies as reimbursement of such salary costs. The Indian entities had issued appointment letters and entered into separate employment contracts with the seconded employees.
- ❖ Ld. AO treated these reimbursements as **Fees for Technical Services (FTS)** under section 9(1)(vii) of the Income-tax Act and Article 12(4) of the India–Japan DTAA.

## Assessee's Contention

- ❖ Assessee contended that the seconded employees were under full control and supervision of the Indian entities, which acted as their economic and legal employers during the secondment period.
- ❖ It was submitted that the Indian entities had issued appointment letters, paid salaries (partly in INR and partly in JPY), deducted TDS, and issued **Form 16** to the seconded employees.
- ❖ Assessee emphasized that reimbursements were made strictly on a cost-to-cost basis without any profit element, and therefore did not constitute consideration for services.
- ❖ Accordingly, it was argued that such reimbursements were in the nature of salary payments and expressly excluded from the scope of FTS under both domestic law and Article 12 of the India–Japan DTAA.

# Revenue's Contention

- ❖ Revenue argued that the secondment arrangement resulted in provision of technical services by the assessee to Indian entities through its employees.
- ❖ It was contended that the employees continued to have a lien with the assessee and were only temporarily assigned to Indian entities, thereby indicating service provision by the foreign company.
- ❖ Ld. AO relied on the decision of the Hon'ble Supreme Court in **C.C., C.E. & S.T., Bangalore v. Northern Operating Systems (P.) Ltd. [2022] 138 taxmann.com 359 (SC)** on the ground that the Supreme Court had examined secondment arrangements and held that such arrangements, in substance, amount to supply of manpower services by the foreign entity and considered as supply of service. Revenue sought to apply this principle, though rendered in the context of service tax, to contend that the secondment of employees by the foreign company resulted in provision of services to the Indian entities and, accordingly, that the salary reimbursements should be treated as consideration for services rather than as pure salary payments.
- ❖ On this basis, the Revenue sought to tax the reimbursements as FTS under section 9(1)(vii) and Article 12(4) of the DTAA.

# Legal provisions

## **Section 9(1)(vii) of the Income Tax Act, 1961:**

income by way of fees for technical services payable by—

- (a) the Government ; or
- (b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or
- (c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India.

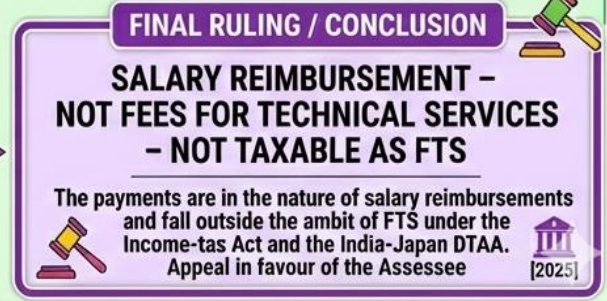
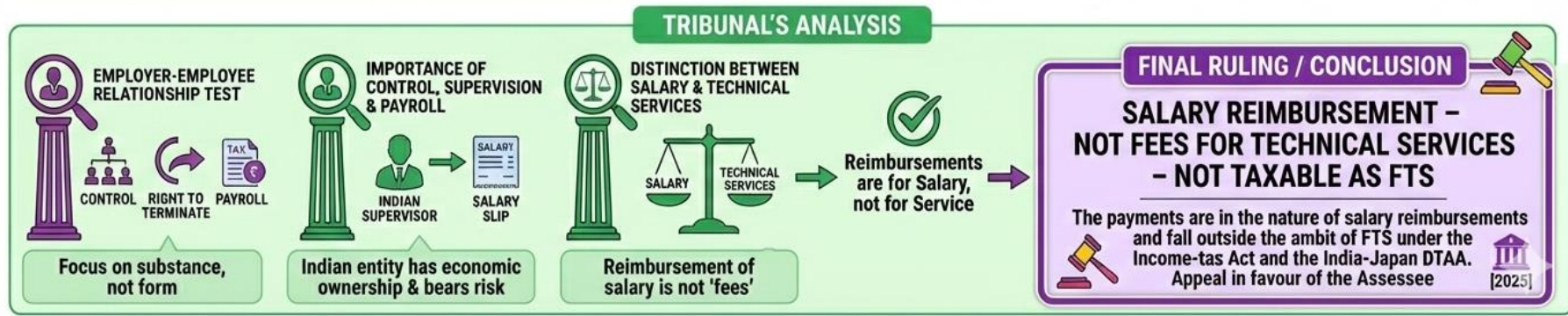
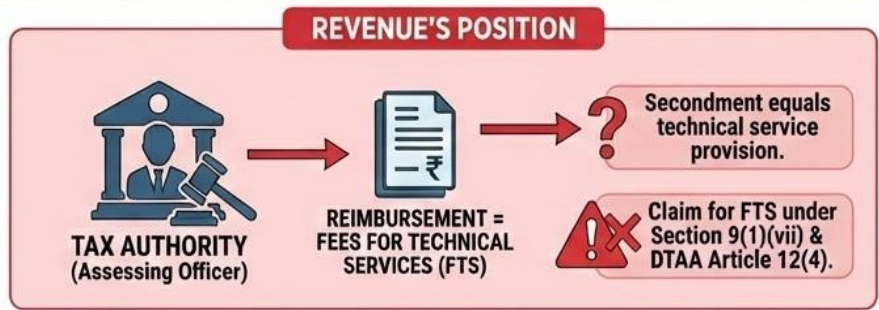
## **Article 12 of India – Japan DTAA:**

4. The term 'fees for technical services' as used in this article means payments of any amount to any person other than payments to an employee of a person making payments and to any individual for independent personal services referred to in article 14, in consideration for the services of a managerial, technical or consultancy nature, including the provisions of services of technical or other personnel.

# Ruling

- ❖ Hon'ble Tribunal observed that the assessee had produced substantial documentary evidence establishing a clear **employee - employer relationship** between the seconded employees and Indian entities.
- ❖ It noted that employment contracts, appointment letters, and Form 16 demonstrated that salaries were paid by Indian companies and were subject to TDS under section 192 of the Act.
- ❖ Hon'ble Tribunal held that once payments are characterized as salary, they fall outside the definition of FTS under Article 12(4) of the India–Japan DTAA, which expressly excludes payments to employees.
- ❖ Distinguishing the *Northern Operating Systems* ruling as being rendered in the context of indirect tax, the Hon'ble Bench held that salary reimbursements could not be recharacterized as FTS. The addition was therefore deleted.

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# Our Comments

- ❖ It is to be noted that where seconded employees function under the control and supervision of the Indian entity, the relationship is that of employer and employee, irrespective of the initial payment of salary by the foreign group company.
  
- ❖ An **employer– employee relationship** is established where an entity:
  - Control and supervision of day-to-day work
  - Right to appoint and terminate
  - Salary cost borne by the entity
  - Payroll and tax compliance
  - Integration into the organization and business structure
  
- ❖ Further, to determine an employer - employee relationship, it is necessary to examine both legal and economic employer factors as well.
  
- ❖ A **legal employer relationship** is established where the entity issues employment contracts or appointment letters, exercises the right to appoint, control, and terminate the employee, supervises day-to-day work, and complies with statutory obligations such as payroll processing, deduction of TDS, and issuance of Form 16.

# Our Comments

- ❖ An entity qualifies as the **economic employer** where it ultimately bears the salary cost (whether directly or through reimbursement), derives the economic and business benefit from the employee's services, integrates the employee into its organisational structure, and assumes commercial responsibility for the work performed.
- ❖ It is important to examine both aspects, as judicial precedents recognise that the legal employer and economic employer may not always be the same, and differing conclusions have been drawn based on facts. For instance, in **CIT v. Eli Lilly & Co. (India) (P.) Ltd. [2009] 312 ITR 225 (SC)**, the Court held that even where the foreign entity remained the legal employer, **the Indian entity could be treated as the economic employer for tax purposes.**

## Our Comments

- ❖ Further, even if ***social security and similar benefits*** continue to be paid in the foreign country, this alone does not change the employment position in India. Such payments are usually made due to home-country rules or administrative convenience in secondment arrangements. At most, they may raise a question for the tax authorities, but they are not decisive. Where the Indian entity controls the work, has the right to terminate, bears the salary cost, deducts tax in India, and benefits from the employee's services, foreign social security payments are merely incidental and do not override the Indian employer - employee relationship.
- ❖ Further, employment contracts, appointment letters, and salary slips (Form 16) played a crucial role in proving that the payments were genuine salary reimbursements.

<b>Section/Article</b>	Section 9 and Article 12
<b>DTAA/Country</b>	India-Japan DTAA
<b>Court</b>	ITAT Delhi
<b>Date of decision</b>	01-12-2025

**Note:** Case law name in **Red**- in favor of the revenue, **Green**-In favor of the Assessee, **Orange** = Partial



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