

Working in India: the conundrum of pecuniary limits on expat salary

Introduction

India is, after China, the fastest growing economy in the world. The country is witnessing development at a stupendous pace. The explosive growth of MNCs who have entered the Indian market has created a wide range of employment opportunities, both for Indians and foreigners. Globalization has brought a large number of foreign “work-force” into India. Now, India too has specific requirements concerning employment visas for such expatriates. The Ministry of Home Affairs (“MHA”) sets out the conditions to be fulfilled by foreign nationals prior to issuing employment visas.

This bulletin is limited in scope and discusses briefly the ramifications surrounding imposition of minimum salary payable in India on foreign citizens working in the country who usually prefer to be paid the entire salary “back home.”

Quantum payable in India: ambiguity

An employment visa is granted to foreigners who fulfill the conditions prescribed by the MHA. The MHA requires the applicant to be a skilled and a qualified professional who must be appointed at a senior level, say a technical expert in a project requiring training in cutting-edge technology. It is important to note that the Indian diplomatic missions are not generally keen to grant visas for which a large number of qualified Indians are available, nor do they issue an employment visa for routine, ordinary, secretarial or clerical jobs.

As per applicable law and policy, any expatriate’s stay in India is contingent on two things – a valid, **employment** visa which, therefore, makes it imperative that the foreign national has an employment contract with the Indian employer which may well be a subsidiary of a foreign company. Under Indian law no contract is valid without consideration (salary in the case of an employment contract). Further, the exchange control regulations do not allow Indian entities to pay their employees based in India in non-Indian currency. These aspects need to be juggled with the natural inclination of expats to be paid wholly or substantially in their home country. An employee in India needs to be paid in local currency by the employer. Law does not permit a person to be employed by an Indian company and paid by a foreign company (even the parent company) outside India in a foreign bank account. Once an employment contract is executed with an Indian entity, it is the primary responsibility of such entity to pay salary in Indian rupees to its employees.

Apart from contractual considerations, it is also pertinent to consider a notification that could impact the quantum of expat salaries to be paid in India. On September 30, 2009 the Reserve Bank of India (“RBI”) issued a notification which stipulates that a foreign citizen who is resident in India **and** employed with an Indian company, can remit his entire salary received in India in Indian rupees, to any foreign currency account in a bank outside India as long as such foreign citizen pays income tax on his entire salary accrued in India. In

recent months many foreigners working in India have interpreted that notification as Indian government's given light to be paid overseas so long as they pay tax in India. But, our view is that the notification only allows an expat resident in India to **(a)** open/hold/maintain a foreign currency account with a foreign bank located outside India; and **(b)** remit his Indian salary to such foreign currency account. The additional obligation is that the expat must pay tax in India on the entire salary. The obligation is not on the employer to pay the employee directly in his foreign currency account but, rather on the employee to remit the salary.

In light of the above background, it is interesting also to note that recently the Ministry of External Affairs (“**MEA**”)¹ has relied upon an undisclosed policy that mandates a minimum annual salary of US\$ 25,000 or INR 1.1 million as a compulsory requirement for obtaining an employment visa.² The pecuniary limit on salary payable in India as a condition for grant of an employment visa is bound to impact several foreign nationals working in India. However, there is confusion regarding the application of the policy because it has not been published and neither is it in the public domain. To confound the situation, media reports suggest that such policy has been withdrawn! Nonetheless, on July 2, 2010 a Ukrainian citizen's request for a visa was rejected by the Indian Embassy in Kiev as her annual salary was below the stipulated annual sum of US\$ 25,000.³ The lady has approached the Bombay High Court against the MEA, challenging this “policy.” In her case, the quantum of the annual salary was lower than the stipulated figure of US \$25,000. The Bombay High Court has given the Union Government three weeks to file a reply. During the pendency of the case, it will be fascinating to see what this means for companies with numerous expatriates or even a single expat.

Going Forward

While the judicial process charts its own course and the judgment will, potentially, set precedent for many foreigners – existing and potential – working in India or looking to work here, the conundrum remains in the interim allowing different organizations to take positions that works best for the parties involved. Drafting an employment contract for expats just got difficult! It is perfectly logical and necessary to pay an individual's salary in India, or at least some part of it and, therefore, the government must impose and retain a pecuniary limit on expat contracts. While hiring foreign workers, employers and employees need to pay attention to several considerations including the stringent visa requirements, quantum of salary to be paid in India, implications on individual income-tax, and compliance with foreign exchange norms if the employee decides to remit the entire salary back to home country. The MHA and MEA and the other relevant departments need to come together and provide clarity by issuing a single, comprehensive policy.

Authored by:
Priti Suri

¹ Operating in the background, the MHA has the highest power to determine whether a foreigner should or should not be issued a work visa.

² <http://economictimes.indiatimes.com/articleshow/6117085.cms>, last accessed on July 6, 2010

³ <http://economictimes.indiatimes.com/articleshow/6117085.cms>, visited on July 6, 2010