



## **Secondment Arrangements – Recent ruling and key impact**

The Dbriefs Special Edition – Geography Updates series

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# Agenda

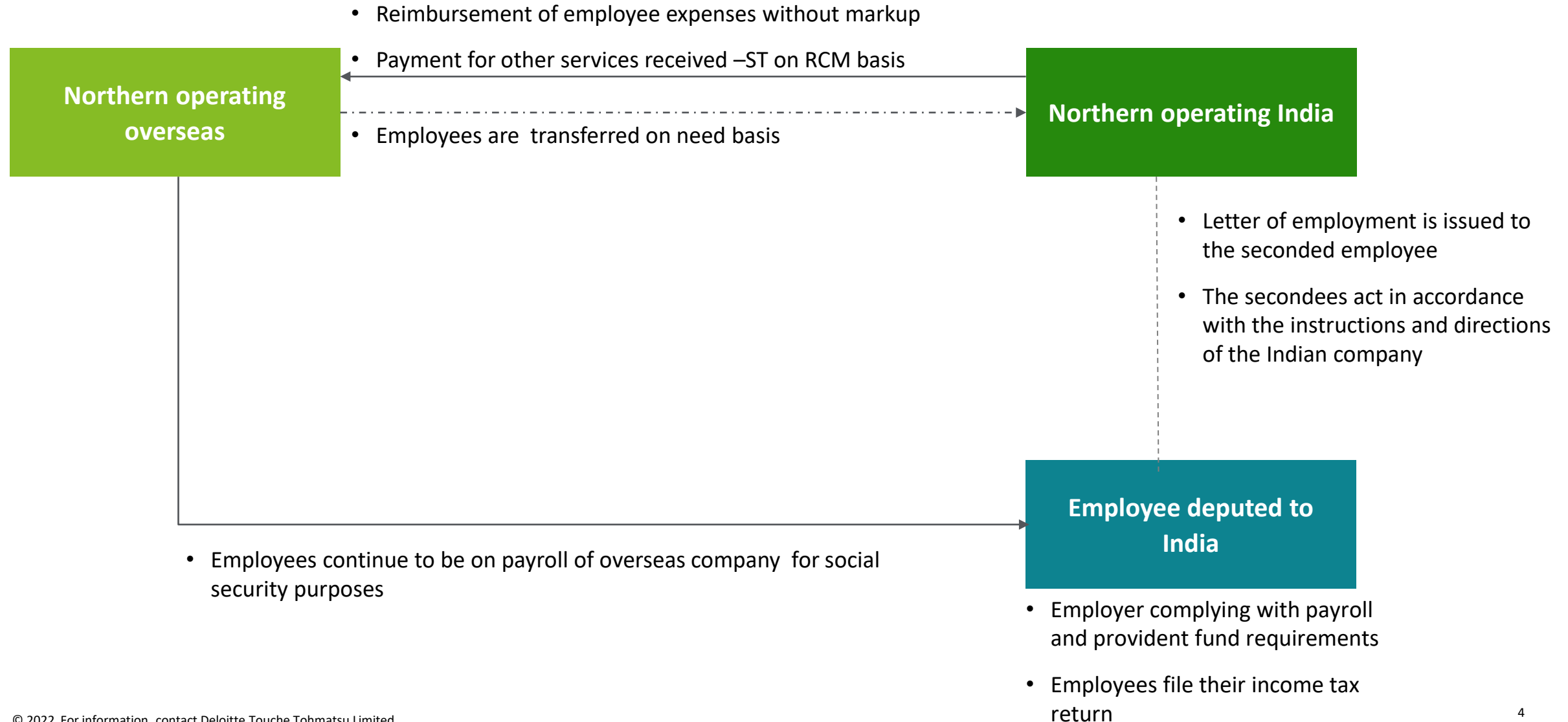
- Introduction and transaction overview
- Brief facts of the case
- Contentions of the revenue authorities and the tax payer
- Favourable orders – few select ones
- Favourable tribunal order – Northern's own case
- Analysis by the supreme court
- Facts considered by the supreme court
- Concept of economic employer
- Way forward
- Questions and answers

# **Contract for service versus contract of service**

Taxability of reimbursements towards seconded employees under secondment contracts:  
supreme court ruling

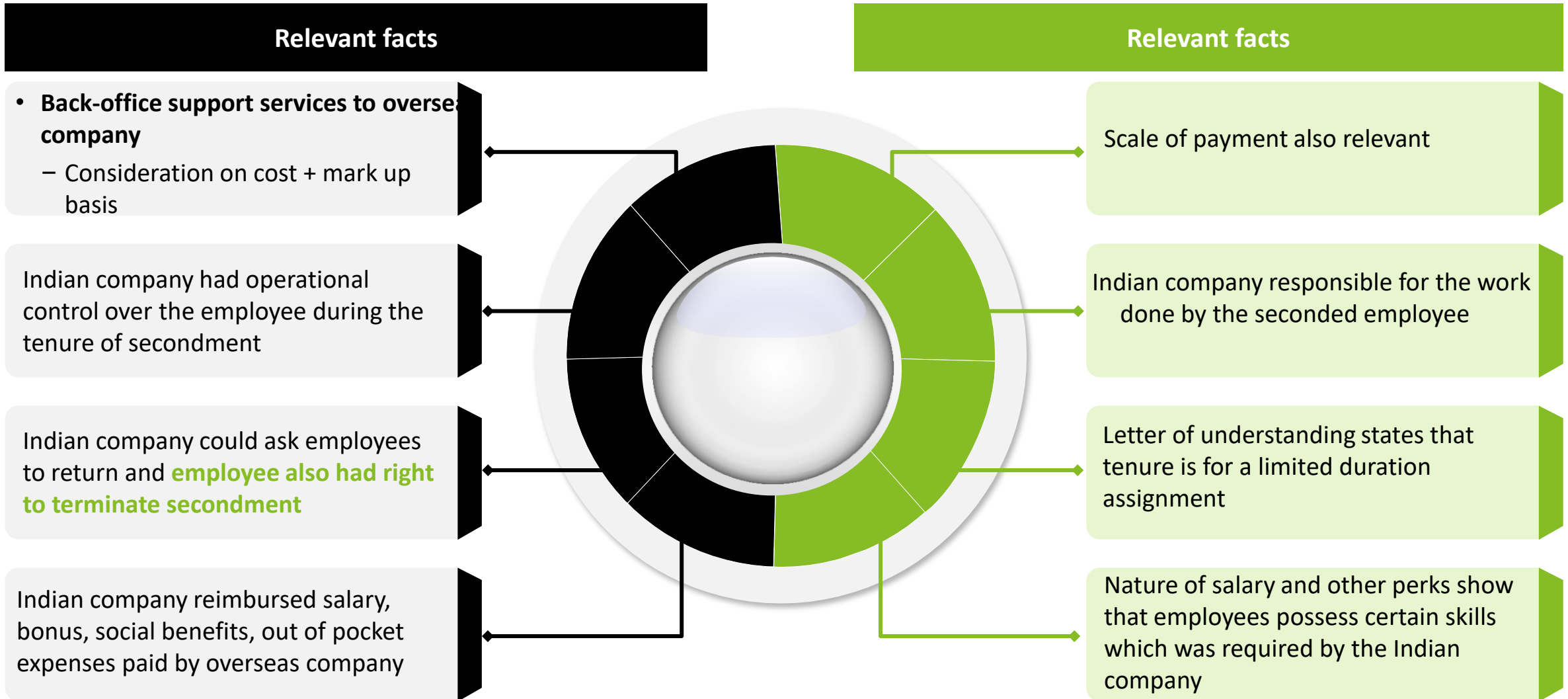
# Taxability of reimbursements under secondment contracts

## Transaction overview



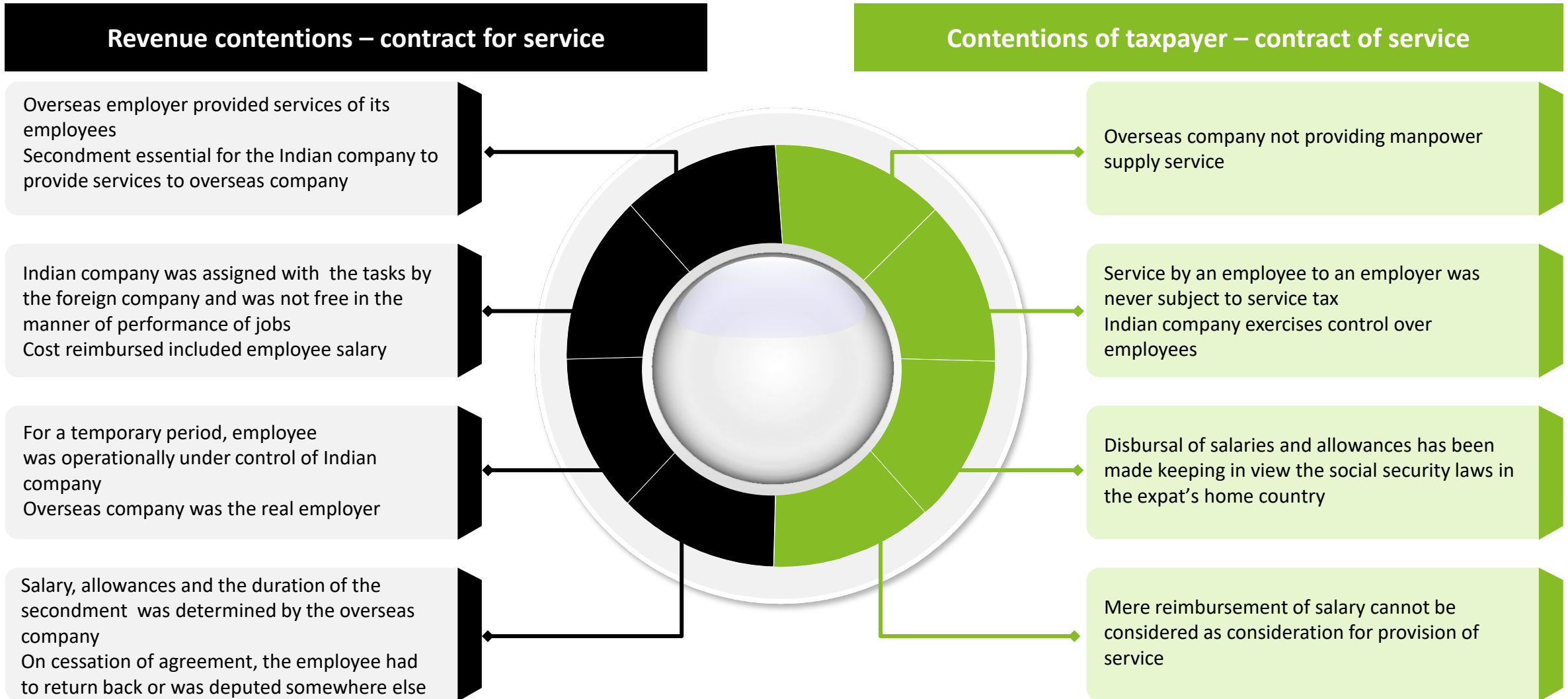
# Taxability of reimbursements under secondment contracts

## Brief facts of the case



# Taxability of reimbursements under secondment contracts

## Contentions of the revenue authorities and the taxpayer



# Taxability of reimbursements under secondment contracts

Favourable orders – few select ones

## Analysis and discussion

### Volkswagen – earlier favorable Tribunal order

- Employer employee relationship – no manpower supply service
- **Facts**
  - Seconded employee works under control and supervision of Indian company
  - Indian company had right to terminate services
  - Employment in personal capacity
  - Salary decided by Indian company
  - To the extent of salary paid by foreign company – Indian company reimbursed the benefits

### Computer science corporation – earlier favorable high court order


- Services not provided by manpower supply company – not taxable
- **Facts**
  - Employees transferred for duration of contract
  - Letter of employment issued
  - Social security benefits remitted to foreign company
  - Tax deducted as per income tax laws, contribution to provident fund made

### Other favorable orders – position settled till supreme court

- The position regarding non-taxability of secondment contract was largely settled under service tax due to favorable rulings
- The aforesaid judgments were followed in subsequent cases
- Position under GST law similar to service tax law

# Taxability of reimbursements under secondment contracts

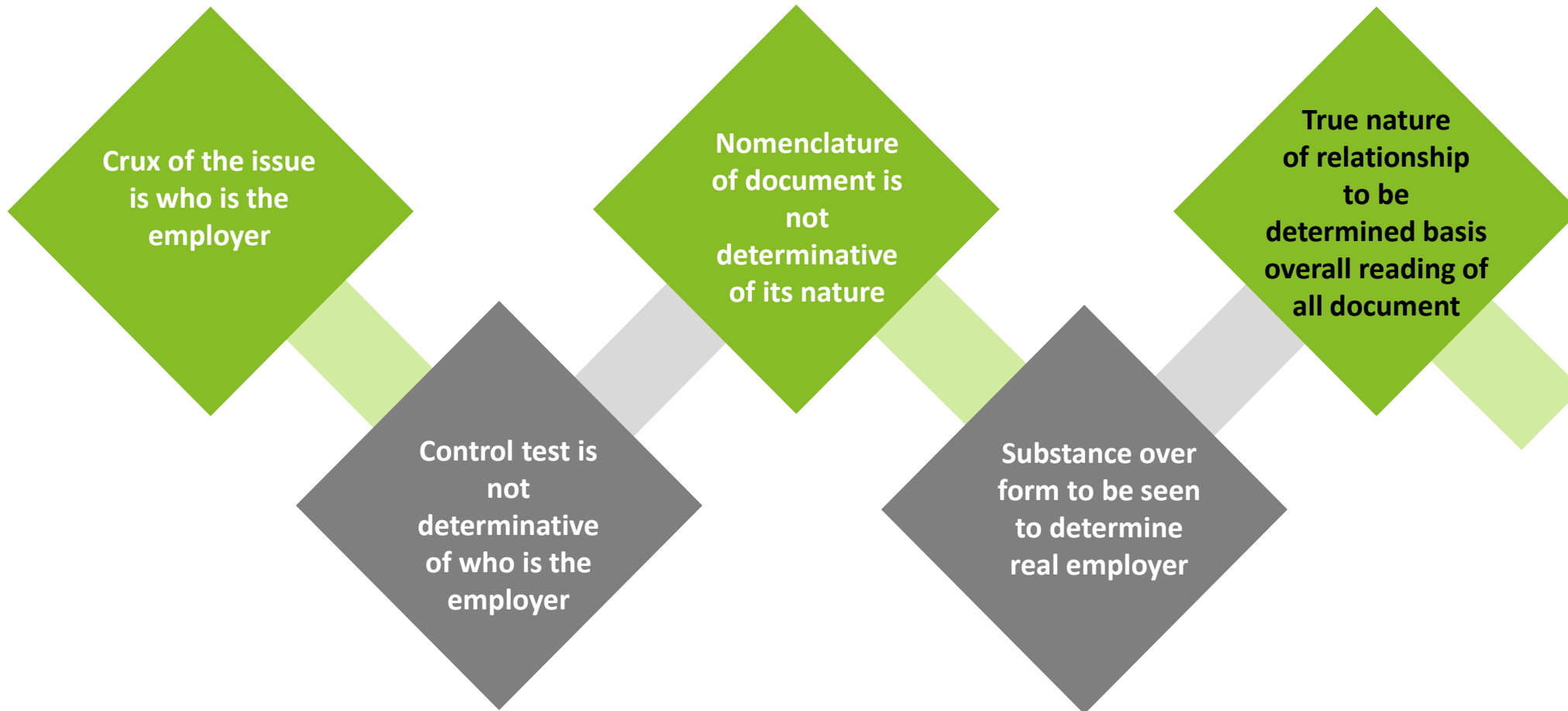
## Favourable tribunal order – Northern's own case

- 
- Only service provided by a manpower recruitment or supply agency taxable
  - The group companies were not engaged in supply of manpower
  - Those seconded working in the capacity of employees. Salary received from overseas company only for disbursement purposes
  - Taxes deducted and paid in India. Contribution to provident fund made
  - Contributions also made towards social security and other benefits under the laws applicable abroad
  - The employee-employer relationship existed between Indian company and seconded employee
  - Tribunal held that transaction was not liable to service tax in India
  - Reliance was placed on earlier favorable orders – Volkswagen, computer science corporation



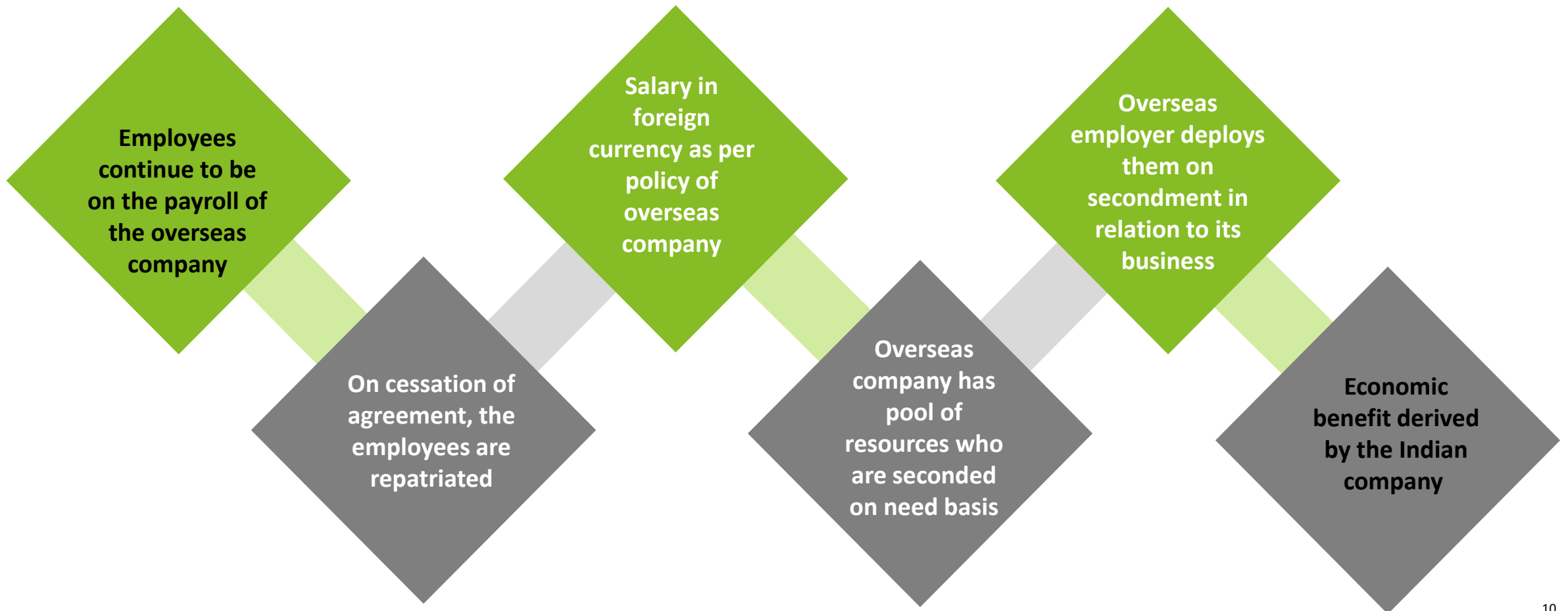
# Taxability of reimbursements under secondment contracts

## Analysis by the supreme court



# Taxability of reimbursements under secondment contracts

## Facts considered by supreme court



## Polling question 1

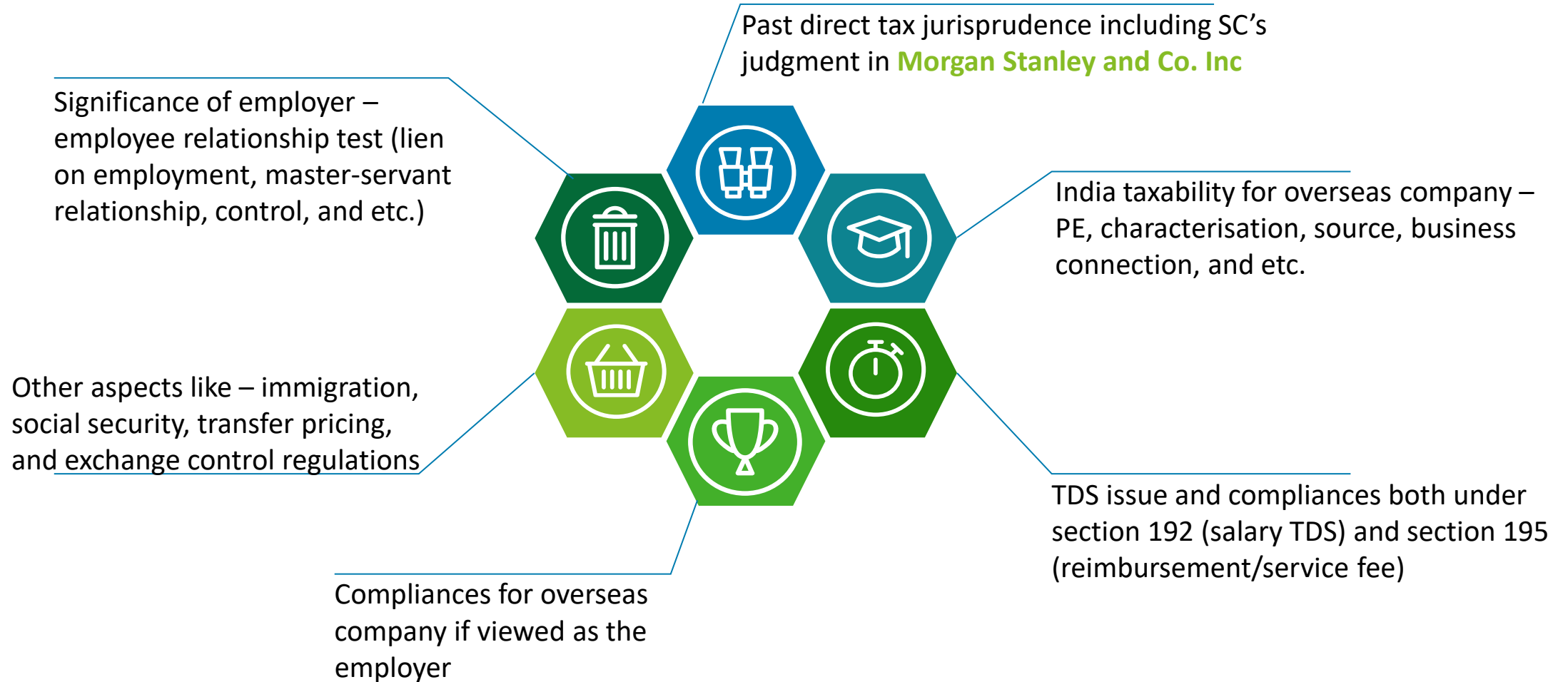
Does your company have secondment arrangements with Indian companies?

- Yes, already have secondment arrangements
- Planning to enter into secondment arrangements
- No, not envisioned at this time
- Don't know/not applicable

# Taxability of reimbursements under secondment contracts

Supreme court of India ruled in the case of Northern operating systems Pvt Ltd

- Issues to be considered from corporate tax perspective



# Taxability of reimbursements under secondment contracts

## Economic employer versus legal employer

### Economic employer – OECD

- Factors to be considered to determine economic employer
  - Authority to instruct the individual regarding the manner of work performance
  - Control and responsibility for the place at which the work is performed
  - The remuneration is directly charged by the formal employer to
    - The enterprise
    - Provides tools and materials necessary for the work
  - Determine the number and qualifications of the individuals deputed
  - Right to select the individual
  - Right to terminate the contractual arrangements
  - Right to impose disciplinary sanctions
  - Determine the holidays and work schedule

### Indian court decisions

- The Indian decisions focus is on
  - Lien with home entity
  - Continuation of remuneration overseas
  - Right of termination

## Taxability of reimbursements under secondment contracts

Supreme court of India ruled in the case of Northern operating systems Pvt Ltd

- Illustrative list of documents and other pre-requisites required in secondment arrangement



Independent  
secondment  
agreement

Assignment  
letter

Letter requesting  
for continuation  
of salary overseas

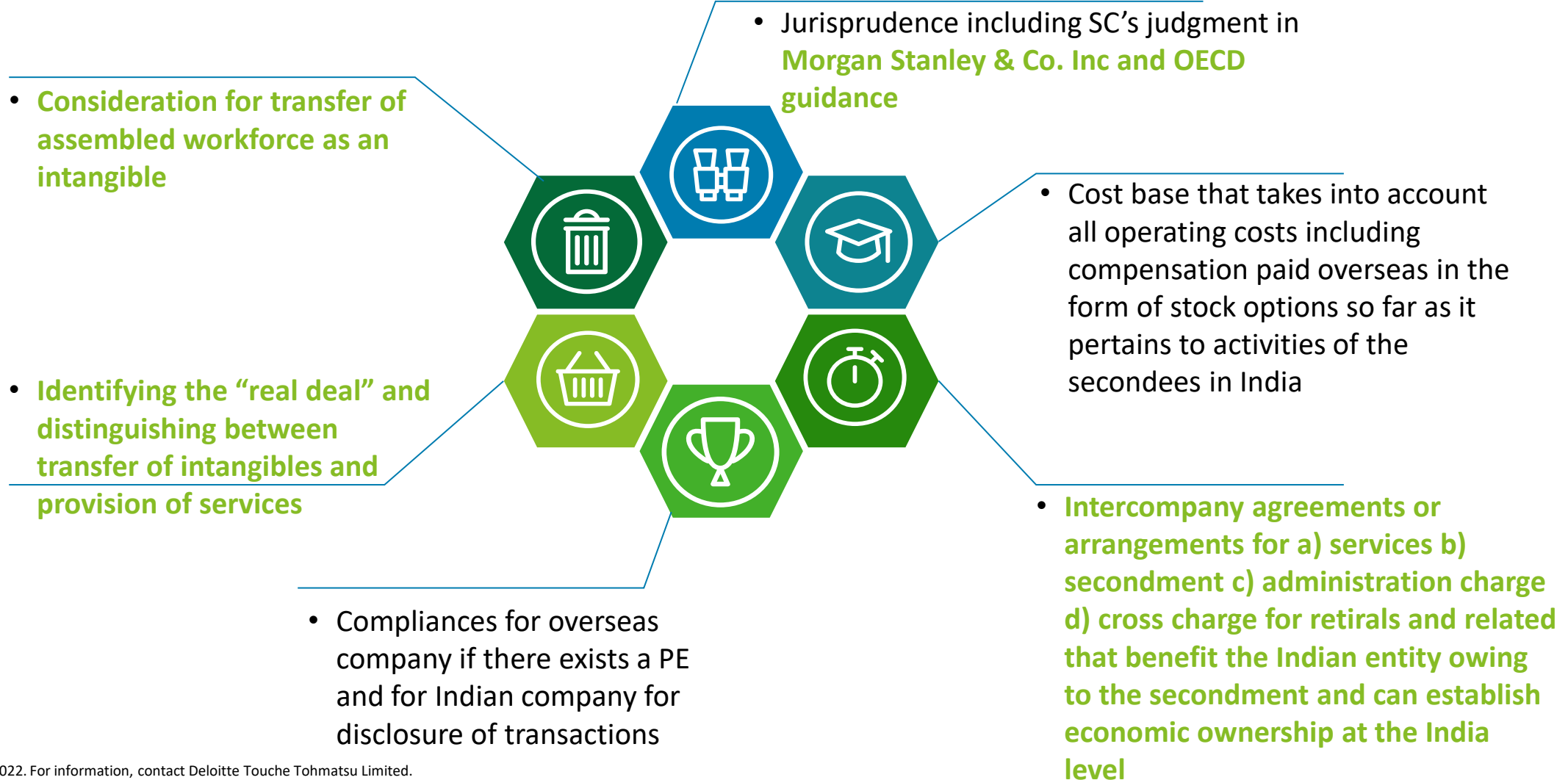
Local  
employment  
agreement

Debit notes;  
cross charge  
calculations

# Secondment arrangements

Supreme court of India ruled in the case of Northern operating systems Pvt Ltd

- Issues to be considered from transfer pricing perspective



## Polling question 2

Whether the employees seconded in your organisation are employed as per global employment terms or as per terms applicable to a regular Indian employee including the remuneration policy?

- Global employment terms
- Indian employment terms



# Taxability of reimbursements under secondment contracts

Supreme court of India ruled in the case of Northern operating systems Pvt Ltd

## Way forward

- Review of the secondment contracts to determine
  - Whether it is contract **for** service or contract **of** service
  - Obligation to pay GST on secondment contracts
  - Eligibility to claim input tax credit
  - Impact on pending service tax assessment/litigation
  - Impact on concluded service tax assessment
- Determining the requirement of “exit charge” due to the transfer and release of employee on secondment to the I company from the F company
- Determination of ALP if cost incurred by I company on seconded employee is paid to a related company
- Retiral benefits during the currency of the employment being borne by the overseas entity
- Review of intercompany contracts for services and free-of-cost items of compensation



- Align the facts on the ground with the documentation
- Examine roles and responsibilities of the expatriates
- Realign the secondment on facts and available jurisprudence (examine substantive and administrative aspects in equal measure)
- Review documentation employee taxability, immigration, and other compliances
- Review cross charges based on economic flows and ascertain their taxability and benchmarking
- Review tax exposures and compliances for F company including under allied laws
- Review of contracts and agreements between F company, I company and employee from the perspective of
  - Permanent establishment exposure
  - Withholding tax obligation under section 195 and section 192
  - Tax compliance to be undertaken by F company in India

## Polling question 3

What is your biggest concern in case of secondment arrangements?

- Permanent establishment risk
- Tax withholding on cross charges – treating payments as fees for technical services
- Substantiating cross charges and related documentation
- Indirect taxes
- Transfer pricing considerations
- Don't know/not applicable

# Questions and answers

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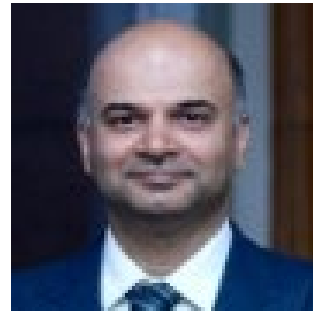
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