Chapter 13

Social Security Agreements

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1. Introduction

Social security is an important consideration while structuring international assignments for employees. At times, secondment arrangements are structured to ensure that the expatriate employee continues to derive social security benefits in the home country during the period of assignment. Any social security benefit payable in the host country may become an added cost to the employer, especially in situations where there are restrictions for withdrawal. It is in this context that social security agreements ("**SSAs**") executed between countries come into perspective and they need to be carefully evaluated to help reduce the financial implications.

2. Social Security

The International Labour Organisation defines 'social security' as the protection which society provides for its members, through a series of public measures, against economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity old-age and death; the provision of medical care; and the provision of subsidies for families with children.

3. Social Security Legislation in India

Social security legislation in India originate from the Directive Principles of State Policy as contained in the Constitution of India ("**Directive Principles**"). The Directive Principles require the State to, *inter alia*,

(a) secure a social order for the promotion of welfare of the people[1];

(b) within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want[2]; and

(c) make provision for securing just and humane conditions of work and for maternity relief[3].

1. Article 38 of the Constitution of India
2. Article 41 of the Constitution of India
3. Article 42 of the Constitution of India

While the Directive Principles are not directly enforceable in a court of law, the principles are considered to be fundamental in the governance of the country.

The key social security statutes in India with respect to employees are:

(i) The Employees' Provident Fund and Miscellaneous Provisions Act, 1952;

(ii) The Employees' State Insurance Act, 1948;

(iii) The Employees' Compensation Act, 1923;

(iv) The Maternity Benefit Act, 1961; and

(v) The Payment of Gratuity Act, 1972

4. The Employees' Provident Fund and Miscellaneous Provisions Act, 1956 ("EPF Act")

The EPF Act is India's most significant social security legislation. It has been enacted so as to provide for the institution of provident funds, pension fund and deposit-linked insurance fund for employees in factories and other establishments. The EPF Act is administered by the Government of India through the Employees' Provident Fund Organisation[4] ("**EPFO**"). An establishment in India, employing a minimum of 20 employees is required to register with the EPFO and make provident fund ("**PF**") contributions for eligible employees. Establishments employing less than 20 persons may voluntarily register with the EPFO and upon voluntarily registration, the EPF Act shall apply as if the registration were mandatory. Certain large organizations that have their own mechanism to provide PF benefits to their employees can seek an exemption from complying with the provisions of the EPF Act. Such exemptions are ordinarily granted if the company's internal PF mechanism is commensurate with or more beneficial to employees than that stipulated under the EPF Act.

Indian nationals working in India, who earn a salary of up to INR 6,500 per month or who have, at any time during their employment become a member of the EPFO (including with previous employers) and continue with such membership , are entitled to the

4. http://www.epfindia.com/

benefits under the EPF Act. Excluded employees are also eligible to avail of the benefits under the EPF Act on a voluntary basis. The statute contemplates a statutory social security scheme whereby both the employer and the employee are required to contribute 12% of the basic wages, dearness allowance, retaining allowance to the EPFO.

It is the employer's obligation to deduct the contributions from the employee's wages and remit the same to the EPFO within the specified time frame. Employers are also required to make periodic filings with the EPFO. The PF contributions made are split by the EPFO towards a provident fund scheme, pension scheme and deposit-linked insurance scheme. The Government of India also makes a contribution towards the pension scheme envisaged under the EPF Act.

5. The EPF Act and International Workers

The Government of India, in October 2008, amended[5] the schemes under the EPF Act to bring international workers or expatriates ("**IW**") within the ambit of the statute. Pursuant to the amendment, expatriate employees working in India are required to make PF and pension contributions in India, of 12% of the IW's total salary, with the exception of exclusions under social security agreements and bilateral economic partnership agreements (that have been executed before October 1, 2008). A matching contribution is to be made by the employer for each IW.

The total salary for the purpose of computing the contribution comprises of the following components actually drawn during the whole month whether paid on daily, weekly, fortnightly or monthly basis:

- Basic wages;
- Dearness allowance (i.e., a cash payment made to an employee on account of a rise in the cost of living);
- Retaining allowance; and
- Cash value of any food concession.

Based on certain circulars and clarifications issued by the EPFO in recent times, it is being argued that certain allowances of a fixed nature (such as conveyance allowance, special allowance, etc.)

5. http://epfindia.nic.in/Circulars/notification_schemes.pdf

that form part of the total salary, may also have to be included for the purpose of computing provident fund contributions.

As per the Frequently Asked Questions[6] issued by the EPFO, the requirement to contribute arises irrespective of where the salary is paid. In case of a split payroll, the contribution shall be paid on the total salary earned by the employee in the establishment covered in India.

Also, IWs are allowed to withdraw the provident fund accumulations only:

- upon retirement from service in the establishment at any time after the attainment of 58 years of age;
- upon retirement on account of permanent and total incapacity for work due to bodily or mental incapacity; and
- in respect of the member covered under an SSA, on such grounds as specified in such agreement.

6. Social Security Agreements ("SSA") and Certificate of Coverage ("COC")

An SSA (also known as Totalisation Agreement) is a bilateral instrument to protect the social security interests of workers posted in another country. Indian employees, who are posted to other countries by their Indian employers, without terminating the contract of employment, continue to make social security contribution in India as per Indian law. On account of the assignment undertaken in the other country, they may also be required to make social security contribution under the host country's laws. Ordinarily, such employees do not derive any benefit from such contributions made outside India on account of restrictions on withdrawal and stipulations pertaining to duration of stay. Being a reciprocal arrangement, an SSA is intended to provide for avoidance of double coverage i.e., coverage under the social security laws of both the home and host countries. Ordinarily, an SSA addresses 3 issues, i.e.:

(i) Detachment: An exemption, allowed to employees sent on an assignment to another country, from social security contribution

6. http://epfindia.nic.in/IntWorkersNew/UpdFAQ_IntWorker_25052012.pdf

in the host country, provided they are complying with the social security system of the home country.

(ii) Exportability of Pension: A provision allowing employees sent on assignment to another country, and who are making social security contributions under such host country's regime, to export the benefits to their home countries or to beneficiaries in a third country, on completion of their assignment or on retirement.

(iii) Totalisation of Benefits: The period of service rendered by an employee in a foreign country is counted for determining the eligibility for benefits, but the quantum of payment is restricted to the length of service, on pro-rata basis.

A certificate of coverage or a detachment certificate is a document that must be obtained by an IW so as to avail the benefits under the applicable SSA. A COC is issued in the employee's home country by the social security authority in accordance with the provisions of the relevant SSA. The COC acts as a proof of detachment, pursuant to which, exemptions from the applicable social security compliances at the host country are allowed.

7. International Worker and an Excluded Employee

The amendment to the EPF Act in 2008 introduced the term IW. An IW, as per the EPF Act, may be either an Indian worker or a foreign national. An IW is:

(i) An Indian employee having worked or going to work in a foreign country with which India has entered into a social security agreement and being eligible to avail the benefits under social security programme of that country, by virtue of the eligibility gained or going to gain, under the said agreement; or

(ii) An employee other than an Indian employee, holding other than an Indian Passport, working for an establishment in India to which the EPF Act applies.

Certain expatriate employees are exempted from PF contributions in India and such employees have been referred to as 'excluded employees' under the EPF Act. An excluded employee is:

(i) An International Worker, who is contributing to a social security programme of his/her country of origin, either as a citizen or resident, with whom India has entered into a social security agreement on a reciprocity basis and enjoying the status of detached worker for the period and terms as specified in such agreement; or

(ii) An international worker, who is contributing to a social security programmed of his country of origin or residence, with whom India has entered into a bilateral comprehensive economic agreement prior to 1 October 2008, containing a clause on social security and which specifically exempts natural persons of either country to contribute to the social security fund of the host country.

For example:

- A company is sending employee A for duration of 1 year to Belgium. India has an SSA with Belgium and Employee A shall therefore qualify as an 'international worker'.
- Employee B, a Belgian national, is sent to India by his company on an assignment for a period of a year. In the absence of the India-Belgium SSA, Employee B and his Indian employer would have had to comply with the EPF Act and contribute 12% each, of the total salary. Since India has in effect an SSA with Belgium, it would be possible for Employee B to qualify as an 'excluded employee' by obtaining a certificate of coverage from the social security authorities at Belgium and thereby avoid incurring social security expenses in India.

8. India's SSAs with other countries

Currently, SSAs with the following countries are in effect:

#	Country	Effective Date
1.	Belgium	1 September, 2009
2.	Germany	1 October, 2009
3.	Switzerland	29 January, 2011
4.	Denmark	1 May, 2011
5.	Luxembourg	1 June, 2011
6.	France	1 July, 2011
7.	Republic of Korea	1 November, 2011
8.	Netherlands	1 December, 2011

Set out below are key features of the aforementioned SSAs.

8.1 SSA with Belgium

The SSA with Belgium was signed on 3 November, 2006 and came into effect on 1 September, 2009. The salient features of the SSA are:

(i) The employees of the home country deputed by their employers, on short-term assignments for a pre-determined period of up to 60 months, need not remit social security contribution in the host country. For example, if an Indian employer sends an employee to work for an employer in Belgium for less than 5 years, the employer and the employee will continue to comply with the Indian social security laws and will not have to make contributions in Belgium.

(ii) Export of pension due under the legislations of one country to the other country, where the member might choose to live, is possible.

(iii) Totalisation of the contribution periods earned while in service in both the countries for the purpose of deciding eligibility to benefits is possible under certain circumstances.

(iv) The employers are saved from making double social security contributions for the same set of employees, thereby enhancing the competitiveness of the products and services.

8.2 SSA with Germany

The SSA with Germany was executed on 8 October, 2008 and came into effect on 1 October, 2009. This agreement however covered only the detachment provisions, as per which, individuals on short term contract up to 48 months (extendable to 60 months with the prior consent of the appropriate authority) can avail detachment from host country social security. Since this agreement did not address exportability of pension and totalisation of contribution periods, the Governments of India and Germany have negotiated and signed a comprehensive social security agreement on 13 October, 2011. This agreement is to subsume the SSA signed on 8 October 2009, however a notification bringing into effect the new agreement is still awaited. The new comprehensive agreement with Germany envisages the following benefits to Indian nationals working in Germany:

(i) The employees of the home country deputed by their employers, on short-term assignments for a pre-determined period of less than 5 years, need not remit social security contribution in the host country, For example, in case of deputation of an Indian employee to Germany vide a short term contract of up to five years, no social security contribution would need to be paid under the German law by the employee provided he continued to make social security payment in India.

(ii) The benefits under the SSA shall be available even when the Indian company sends its employees to Germany from a third country.

(iii) Indian workers shall be entitled to the export the social security benefit if they relocate to India after the completion of their service in Germany.

(iv) Self-employed Indians in Germany would also be entitled to export of social security benefit on their relocation to India.

(v) The period of contribution in one contracting state will be added to the period of contribution in the second contracting state for determining the eligibility for social security benefits (totalisation).

8.3 SSA with Switzerland

The SSA signed between India and the Swiss Federal Council on 3 September, 2009 was brought into effect from 29 January, 2011. The SSA includes within its scope posted persons, self-employed persons, public employees, travelling personnel employed in international transport and persons with diplomatic missions. As per the SSA, an individual ordinarily employed in Switzerland with a Swiss employer and seconded to India to provide services for the same employer, shall be subject only to the social security laws of Switzerland for a period of 72 months. Similarly, in case of an Indian employee seconded to Switzerland, the employee shall be eligible to remain on the social security system of India. This SSA also provides for refund of contributions at the time of relocation i.e., a Swiss national who is subject to the social security laws in India shall, at the time of relocation, be entitled to either cash payment of the benefits or payment in Switzerland or elsewhere, in accordance with Indian law.

8.4 SSA with Denmark

The SSA signed between the Government of India and the Government of Denmark on 17 February, 2010 came into effect on 1 May, 2011. As per this SSA, an Indian national who is deputed to Denmark to work for the same employer, for a period of less than 5 years, shall be subject to India's social security laws and need not make contributions in Denmark. A Dutch national, deputed to India for a fixed term of less than three years will only be required to adhere to Denmark's social security laws. The SSA includes exportability of social security benefits under certain conditions and totalisation of periods of contribution.

8.5 SSA with Luxembourg

The SSA signed with the Government of Luxembourg on 30 September, 2009 came into effect on 1 June, 2011. As per this SSA, employees posted from either India to Luxembourg or vice versa, for a period of up to 5 years (extendable with the consent of the appropriate authority) to work for the same employer, shall be subject only to the social security laws of the home country. The SSA includes exportability of social security benefits under certain conditions and totalisation of periods of contribution.

8.6 SSA with France

The SSA signed with the French Government on 30 September, 2008 came into effect on 1 July, 2011. As per this SSA, employees posted from either India to France or vice versa, for a period of up to 5 years to work for the same employer, shall be subject only to the social security laws of the home country. The SSA includes exportability of social security benefits under certain conditions and totalisation of periods of contribution.

8.7 SSA with the Republic of Korea

The SSA with the Republic of Korea was executed on 19 October, 2010 and came into effect from 1 November 2011. This SSA provides a detachment benefit of up to five years in addition to exportability of social security benefits and totalisation of contribution period, subject to certain conditions. This SSA also provides that in case of independent professionals, the provisions of the Comprehensive Economic Partnership Agreement (CEPA), executed in January 2005, between India and Republic of Korea shall apply and that the provisions of SSA shall be applicable in case of any other category of workers. However, with the recent amendment of the definition of 'excluded employee'[7], the provisions of the CEPA shall extend to all IWs.

8.8 SSA with Netherlands

The SSA signed between India and Netherlands on 22 October, 2009 came into effect from 1 December, 2011. The SSA provides a benefit of detachment of up to 5 years, i.e., employees posted from either India to Netherlands or vice versa, for a period of

7. EPF (Third Amendment) Scheme, 2012

up to 5 years to work for the same employer, shall be subject only to the social security laws of the home country. While this SSA includes exportability of social security benefits under certain conditions, it does not provide for totalisation of periods of contribution.

The SSAs with Hungary, Czech Republic, Finland and Norway have been signed but are not yet effective. Based on news reports, it appears that the Indian Government is negotiating SSAs with countries like Sweden, Australia, USA and Canada.

9. Negotiations with USA and UK

India is persistently pursuing with USA to execute an SSA, keeping in mind that several Indian companies have been sending their employees there on secondment/deputation assignments. The current social security laws in the US, including the Employee Retirement Income Security Act of 1974, allow an employee to withdraw pension on only after a minimum qualifying period i.e. 10 years while the visa regime does not ordinarily permit the employee to stay beyond 10 years. Therefore, Indian employees who travel to USA for a period less than 10 years forego their social security contributions when they return. This has ended up being a significant issue on account of the large number of Indian employees in USA. It however seems that the US is hesitant in executing the agreement since it believes that India is likely to gain disproportionately from such an agreement.

We understand from news reports that the United Kingdom has refused to enter into an SSA with India anticipating an additional burden on their exchequer[8], particularly because there are significantly more Indian employees in the UK than British nationals in India.

10. Conclusion

India's sudden move to require IWs to contribute to the Indian social security system has been perceived internationally as a negative step, mainly because of the likely increase in the cost of deploying employees in India. That said, the step has encouraged many countries to negotiate and execute SSAs with India. The SSAs significantly benefit Indian workers employed abroad, especially those on short-term contracts.

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8. http://www.indianexpress.com/news/citing-fund-crunch-uk-says-no-to-social-security-pact/765462/

Application and interpretation of SSAs and the social security law in India with respect to expatriates is still nascent and evolving. There are open questions when it comes to secondment and deputation arrangements, especially in light of possible tax implications. Under certain circumstances, it is difficult to ascertain if relationships in the nature of employment and assignment and structures where employment in the home country is suspended and not terminated will trigger provisions of the EPF Act and the SSAs.