GLOBAL CAPABILITIES CENTRES(GCCS): NAVIGATING U.S. IMMIGRATION BARRIERS THROUGH OFFSHORE TALENT HUBS
Part 1- Direct Tax

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Introduction

India has long been recognized as a global hub of highly trained and skilled workforce, especially in technology, finance, and business services. This talent pool has been a key driver behind the success of many multinational corporations, particularly those based in the United States. However, recent tightening of the H1B visa regime by the US government has introduced significant challenges for companies seeking to bring Indian talent to their domestic operations.

The H1B visa—once a key channel for bringing specialized Indian expertise to the U.S.—now faces stricter regulations, higher rejection rates, and more demanding eligibility criteria. These developments have prompted organizations to explore alternative methods for engaging with Indian talent without depending on U.S. immigration approvals.
Global Capability Centres (GCCs) have become an effective strategic response to these constraints. These offshore entities allow multinational corporations to carry out essential operations such as information technology, analytics, finance, research and development, and customer service within India. GCCs enable US companies to directly employ and manage Indian talent on Indian soil, bypassing the limitations imposed by H1B visa restrictions.
Kochhar & Co. is commencing a new series on Global Capability Centres (GCCs), offering insights into key legal issues. In this edition, we spotlight the direct tax implications that businesses need to know.

Key Tax Issues

While GCCs offer operational and business advantages, it is crucial to address key tax issues under Indian law that may arise:

1. **Permanent Establishment Risks**

   One major tax concern is the risk of the arrangement resulting in a Permanent Establishment (PE) in India for the foreign enterprise. Article 5 of India-US Tax Treaty defines PE as a fixed place from where business of a foreign enterprise is conducted partially or wholly. PEs can be of broadly of three types, namely:

a) **Fixed Place PE**: -A Fixed Place PE includes a place of management, an office, a branch, other similar premises including place of location of Servers and machinery etc. For this purpose, it is sufficient if the place is at the disposal of the foreign company or its employees even if it is not owned or rented by it.

b) **Service PE**: -A Service PE arises when employees or other personnel of the foreign company render services (including managerial services but excluding technical services) from India for a period exceeding a defined threshold period.

c) **Agency PE**: - An Agency PE arises when a foreign company appoints an agent in India whose activities are carried out wholly or almost wholly for the foreign company.

It is pertinent to mention here that the fact that an Indian company is being controlled by a US company, shall not by itself constitute Indian company a permanent establishment. It is only when the specific thresholds mentioned in the Article 5 of India US Tax treaty are breached, that PE is formed. It is therefore important to set out a clear scope of work for the Indian entity while dealing with GCCs.

2. Secondments & the Risk of PE

Secondment of foreign company employees to the GCCs or frequent interactions without clear boundaries can also inadvertently result in a PE, attracting tax on the foreign company's income attributable to the PE. Meticulously verified scope of work is essential to minimize the potential PE exposure.

Recently, the Hon'ble Supreme Court of India while assessing a case[1] for existence of PE wherein there was no specific place of disposal available to the foreign entity in India, took a substance over form approach and after analysing the specific clauses of the agreement under consideration, held that the test is not whether a formal right of use of physical space is granted, but whether, in substance, the premises were at the disposal of the foreign company and were used for conducting its core business functions. The Court also went on to negate the argument of the Foreign company that it was a separate entity on the basis that legal form does not override economic substance. The Hon'ble Court found that the extent of control, strategic decision-making, and influence exercised by the Foreign company clearly establish that business was carried on through the Indian Company premises, satisfying the conditions for fixed place PE. Though this judgement was delivered in very peculiar facts, defining precise scope of work becomes essential to minimize potential PE exposure.

3. Employer on Record & risk of PE

To access the Indian market during initial years of operation, certain foreign companies adopt the 'Employer on Record' (EOR) model, wherein local talent is engaged through a third-party EOR service provider.

A question has been cropping up lately as to whether EOR arrangements deployed by foreign companies in India provide sufficient safeguard against PE risks. In EOR arrangements the legal employer of the workforce is the Indian EOR, who also provides the workplace. It is therefore assumed that the risk of a Service PE and Fixed Place PE of the foreign company gets mitigated. However, in most such cases the economic employer of the EOR workforce remains the foreign company, which also retains control over day-to-day work and supervision. Therefore, if these arrangements are not carefully structured, they can still create PE exposure.

As mentioned above, Indian tax jurisprudence follows the principle of *"substance over form".* Therefore, where on facts it is found that the EOR workforce is providing services relating to core functions of the parent company such as, revenue-generating services, technical or consulting services, client management services, etc., there will still be a high risk of the arrangement being construed as a PE. These risks will be

[1] Supreme Court of India - Hyatt International Southwest Asia Ltd. Vs Additional Director Of Income Tax - 2025 INSC 891

further aggravated where the foreign company also retains day-to-day control, supervision, and decision-making over the EOR workforce.
The EOR type arrangements are safe only in cases of a limited number of employees, or for non-core functions, or for transitional periods. Even there, the roles of the foreign company and the EOR needs to be clearly delineated and documented. In cases of long-term arrangements, a proper PE risk assessment would be better to determine whether setting up a local subsidiary would be a safer option.

4. **Transfer Pricing:**

Since GCCs are typically part of an international corporate group, **transfer pricing regulations** under Indian tax laws become relevant. Transactions between the GCC and its foreign parent must comply with the **arm's length principle** ensuring that intercompany dealings mirror those between unrelated parties.
Comprehensive documentation, including **Functions, Assets, and Risks (FAR) analysis**, should be maintained to justify pricing decisions and cost allocations. Inadequate compliance could lead to tax adjustments, penalties, or litigation.
To mitigate transfer pricing disputes and enhance tax stability, companies can proactively pursue **Advance Pricing Agreements (APAs)** with the Indian tax authorities. APAs provide upfront certainty on transfer pricing methodologies, reducing the risk of protracted litigation and facilitating smoother cross-border operations.

5. **Withholding Tax on Royalty Payments and FTS**

If a GCC makes payment such as royalties or fees for technical or managerial services to the foreign company, Indian tax laws mandate **Tax Withholding**. Accurate classification of payments and timely withholding compliance are essential to avoid unnecessary tax liabilities or penalties. Article 12(3) of the India-USA DTAA defines royalty. Simply put, the term royalty under the treaty means payments of any kind received as a consideration for the use of, or the right to use , any intellectual property. Fee for Technical Services **('FTS')** has been termed as "fees for included services**"('FIS')** under the India-USA DTAA. The definition of FIS is very narrow as compared to the definition of FTS used in treaties based on UN model. In simple terms, for services to qualify as FIS under India-USA DTAA, not only there must be rendering of any technical or consultancy services, but these services should also **"make available"** technical knowledge/ expertise to the recipient. **'Make available'** clause in simple term means transmission of technical know-how of such services to the recipient so that the recipient can perform these services independently in future.

6. **Conclusion:**

GCCs have emerged as strategic response to the increasingly restrictive U.S. immigration policies, particularly the tightening of the H1B visa regime. When structured in compliance with Indian tax and other regulations, the GCC model offers a robust and legally sound framework to the foreign companies. A well-documented and tax-compliant GCC structure can serve as a highly effective tool for foreign companies seeking to optimize global operations while minimizing legal and fiscal risks.