



PERMANENT ESTABLISHMENT EXPOSURE

Owing To Cross-Border Secondments
And Remote Working

Explanatory Guide To Understand And Manage PE Risk



With the pandemic finally gravitating towards the endemic stage, discussions on not just return to office, but even cross border employee mobility seem to be back and how!

The last 2 years have brought forth new opportunities in new geographies, stressed upon the financial considerations of international assignments and most importantly re-emphasized the need for optimal secondment structures to ensure compliance.

In one such interaction on optimizing a global ITES company's secondment program, we met with their perplexed Global Mobility Manager, Sameer.

The Reigning Issue On Sameer's Mind – Permanent Establishment (PE) Exposure

Just like many of you reading this right now, Sameer's company is also revamping their overseas secondment program. But he was so stressed with the fact that every single time their team started discussing, they would get stuck on the issue of Permanent Establishment (PE) exposure.






Sameer's question for Expat Orbit's team



So, what exactly is PE exposure? What are its implications for our organization? How do we then plan our secondment structures around this?

Well, theoretically speaking...

PE is a very wide concept. There could be various triggers for creating a PE, such as:

-  Setting up a branch office overseas
-  Having a fixed place of business in a foreign country
-  Dependent agents in a foreign country regularly concluding contracts for the home entity
-  Construction sites or installation projects in a foreign country
-  Rendering services abroad, through home entity personnel

Organisation for Economic Cooperation and Development's (OECD) definition of PE:

A **fixed place** through which the **business** of an enterprise is wholly or partly carried out.



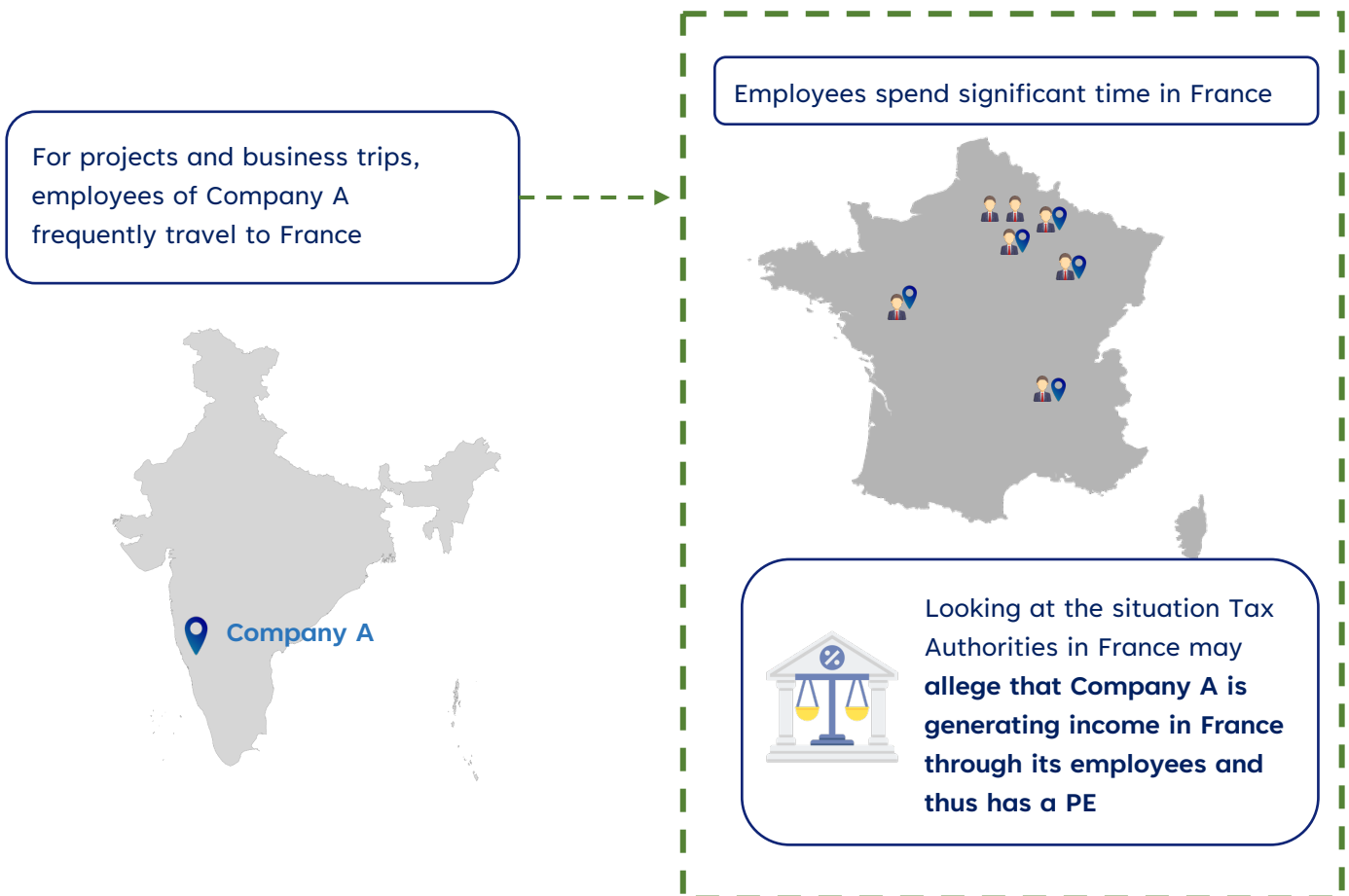
Are you as confused as Sameer with the above explanation?

Don't worry. Just read along

Simplifying PE In Case of Cross Border Secondments

In the context of cross border movement of expatriates, PE is an international tax concept wherein the **host country may tax income of home entity to the extent it is generated or relates to activities performed by its personnel in the host country.**

Illustrative Example of PE Exposure



Resultant PE Risk

Despite **no base or entity in France**, Tax Authorities may want to **tax income of Company A to the extent it relates to the income generated from operations or projects in France**

But global assignments can not be avoided!

Cross border movement of executives is eminent for global operations. In fact, to meet business requirements and optimize costs, mobility professionals like Sameer carve out different assignment structures



The Thumb Rule To Assess PE Risk

In cross border secondments, **the concept of PE revolves around the presence of home entity personnel in the host country;**

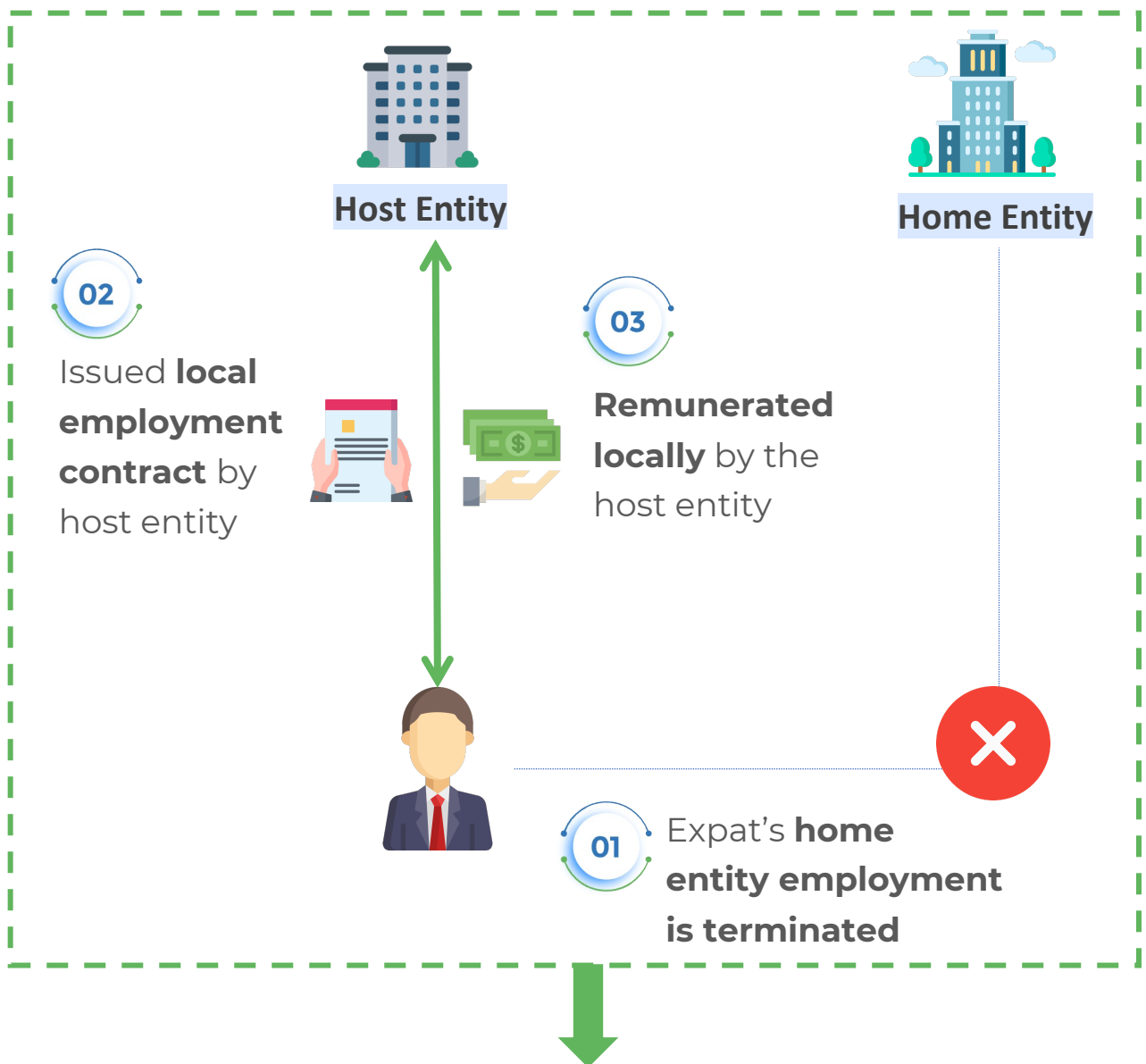
or to put it differently,

If expatriates continue to maintain **employment, or deeper nexus with the home entity while on an assignment to the host country,** the risk of PE exposure would continue to hover around the home entity.



The Best-case Scenario With No PE Risk?

Localization – Hiring expats directly in host entity



No nexus with the home entity, thereby completely eliminating PE exposure

But what if localization is not always the solution?



Completely eliminating the nexus with home entity is just not possible! There are many practical challenges that do not make it possible to always adopt localization in our organization.

How can such situations be addressed?



Business travels and **secondments** for short terms projects



Secondment for specific business objectives such as **training or career development**



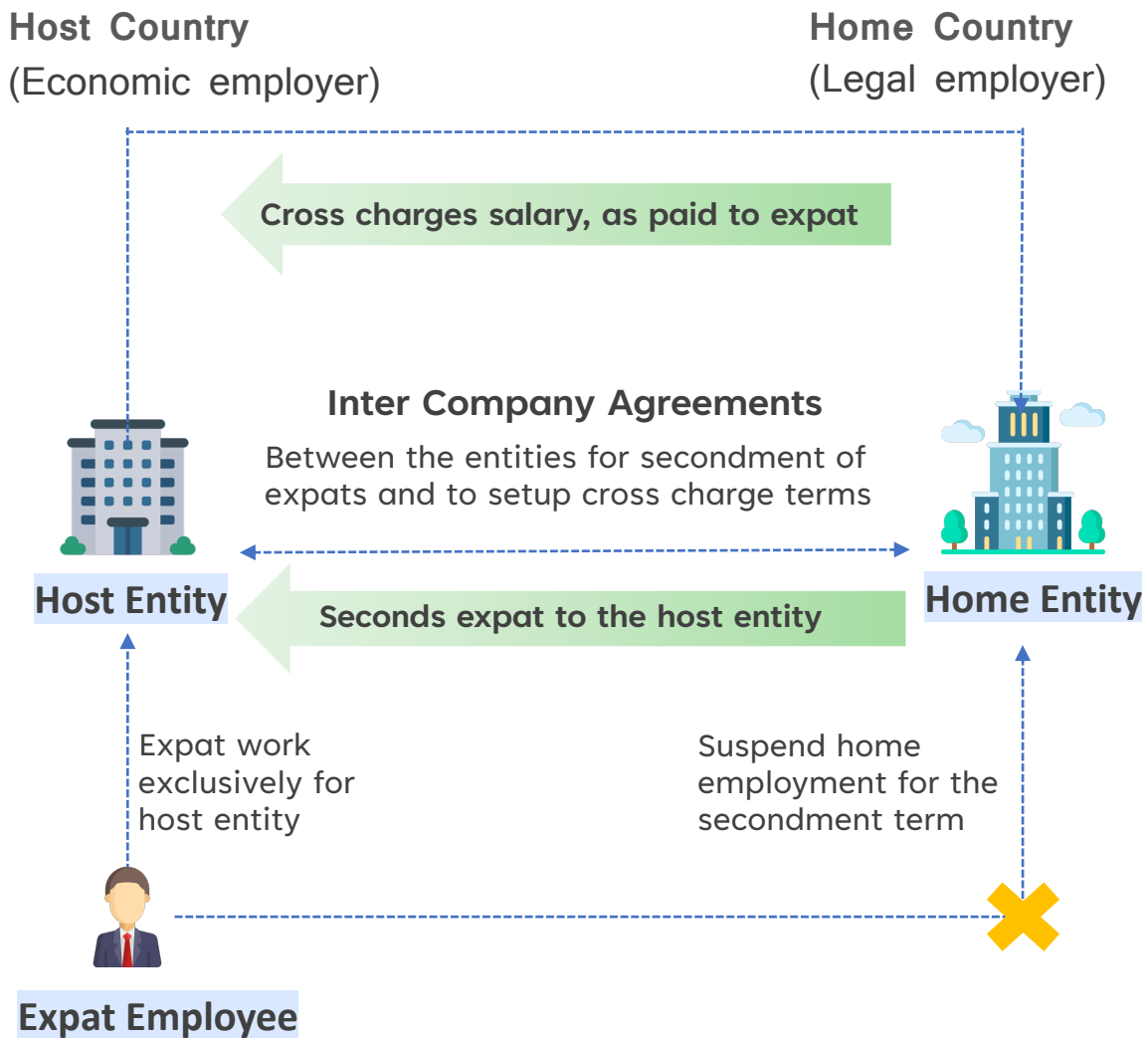
Due to family obligations, exchange rate fluctuations, home country social security benefits, **expat prefers to be remunerated in the home country**



Just like Sameer's, most global organizations would face such situations and find it difficult to completely cut ties between home entity and the expat.

Time to introduce the concept of Legal and Economic employer in cross border secondments

The Concept Of Legal And Economic Employer



Secondment Arrangement Explained



01 Home entity **seconds** expat to host entity



02 Host entity offers local employment to expat



03 Host entity **controls and supervises** expat, evaluates performance and assume risks and rewards of his efforts



04 Salary initially **paid by home entity** is then **cross charged to the host entity**

In Summary,

Host entity qualifies as ‘Economic Employer’ if:



Host Entity

- ✓ Supervises expat’s performance
- ✓ Assumes risk and rewards of expat’s efforts
- ✓ Bears economic costs of expat’s assignment

Home entity qualifies as ‘Legal Employer’ if:



Home Entity

- ✓ Maintains only legal relationship with expat, as a result of suspending employment and seconding the expat to the host entity

As long as the host entity maintains employment association with the expat as an Economic Employer the PE risk would be relatively lower.

However, it is important that **the overall secondment structure should in substance and documentation project the host entity as an Economic Employer.**

Certain Additional Parameters To Consider

It will be prudent for Sameer and global mobility teams to consider the impact of several additional parameters, which could help determine how the PE risk would stand in the proposed secondment structure



Checking or unchecking **any specific parameter may not alter the PE risk.**



It is essential that a **holistic review** of the aforesaid parameters are carried out to ensure that the **entire secondment structure in substance, reflects a deeper nexus between the expat and the host entity.**



Got it! But what about the demands of the post COVID world, where we can not go the traditional secondment route?

There are situations now, where we don't even have an entity in the host country!



Companies looking at **hiring remote workers in countries with no local entity**



Deployment required to **execute client project overseas** or to **setup venture in new geography** wherein there is **no subsidiary or group entity** to support the secondment



In post covid environment, **employees continue to work remotely from their home country**

The Case Of ‘No Local Entity’ Explained



With the declining trend of COVID19, the Global Mobility world is surely evolving **declining** trend of traditional **long term assignments**, and an **upward** trend of **short term** and **cross border remote working** assignments.

Preference for remote assignments or Work From Home increases PE risk

Travel restrictions during pandemic compelled the countries to announce leniency and relaxations around PE exposure, since many expats were stranded overseas. But the trend of WFH and remote working is here to stay, in fact even preferable by companies and employees alike.

While hiring without boundaries (outside of Company’s base entity), certainly increases access to the best global talents; it also implies that there will be **employees working for the Company in multiple geographies across the globe, thereby exposing it to PE risk in each such country.**

However, OECD’s guidance notes issued in April 2020 and January 2021 deal with some practical situations in detail. These could certainly act as a guidepost, if not a definite solution.



Cross border remote working from home offices

Considering **fixed place of business test**, employees temporarily working from their home office, due to COVID-19 restrictions, should not create new PE exposure for the home entity.

Remote working during travel restrictions lacked permanence and such home offices are not at the disposal of the employer.

Post covid implication

OECD makes reference to an example where the employee continues to work from home office for an overseas employer. Even in this situation, a view can be taken that **home office is not considered to be at the disposal of their employer, as the latter did not require its use for business activities.**

Thus there is **relatively lower risk of creating a fixed place of business PE** for the employer



Activities performed by remote workers

There could certainly be **situations where roles and activities of remote workers are substantial enough to create PE exposure for the home entity**, particularly where the workers habitually conclude contracts on behalf of the home entity.

OECD's guidance - If employee continues to **work from home for a non-resident employer** after the COVID-19 pandemic and **habitually concludes contracts on behalf of the enterprise**, it would be more likely that **dependent agent PE exposure may get triggered** for the home entity.



Spanish General Directorate of Taxes (GDT)'s unpublished *ruling of Jan 2022, which expressly referred to OECD guidance

Facts Of The Case

- ① The employee while employed with a UK company continued to work from Spain due to lockdown
- ① However, for personal reasons, once the lockdown and travel ban were lifted, the employee decided, to stay in Spain
- ① Afterwards, the UK company requested the employee to return to the UK but the employee refused and resigned
- ① The employee was present in Spain for more than 183 days and the UK company did not bear any costs connected to the employee's working remotely from Spain

The UK company requested the GDT to address whether the presence of the employee in Spain would create a PE.

Ruling - The presence of an employee working remotely from home due to the COVID-19 pandemic does not result in a PE in Spain.

The GDT concluded that during the COVID-19 pandemic, considering the extraordinary situation, working from home **would not create a PE in Spain for the UK company because such activity lacks a sufficient degree of permanency or continuity.**

In Case Of Continued Remote Working Post Lifting of Ban

GDT concluded that the **employee's home office was not at the disposal of the UK company** based on the following reasons:

- 🕒 **Working from Spain** was a personal decision of the employee and was **not imposed by the UK company**
- 🕒 The UK company **did not bear any costs**
- 🕒 The UK company has an **office in the UK**, which could have been used by the employee to develop his work, **without the need to be in Spain**



Looks like the problem of PE exposure can certainly be managed with appropriate secondment structures and policies.

Any final checkpoints to consider while finalizing internal policies?

Some Additional Checkpoints To Consider

- 🕒 Evaluate country specific risk by consulting local tax experts
- 🕒 Develop a comprehensive remote working policy
- 🕒 Explore alternative secondment arrangements

Evaluate risk, consult local tax professionals

To expand globally it is important for organizations to engage agents, employees and contractors overseas.

However, it is equally important to efficiently manage compliances and local regulations applicable at each overseas geography.

PE related regulations in particular are governed to a greater extent by local tax laws. Applicable tax treaties between the home and host countries, can help mitigate risks and avoid double taxation.

Thus, while planning overseas secondments or recruiting talent overseas to work remotely, it is always recommended to seek advice from local tax professionals at the respective host location.

Develop a comprehensive remote working policy

Increasing adoption of remote working necessitates country specific approach. Each remote location could have different degree of compliance exposure for the home entity and certainly a different set of employee centric tax, immigration, and social security compliances.

One size fits all approach will definitely not work here.

It should also consider opting for real-time tracking of employee location and opting for destinations with relaxed regulations.



Over 25 countries across America, Europe and APAC are offering tax-exempt **nomad or remote working visas**. It would be prudent to consider these locations while recruiting remote working talent overseas.

[Check out remote working visas for overseas secondments](#)

Explore alternative secondment arrangements

If cross border remote work or expat employee assignments to geographies with no local entity, are for non-core or non-managerial roles (such as trainings, backend operations, content creation, lead generations, business development etc), alternative hiring arrangements can also be considered.

Subject to local regulations and treaty provisions such situations could potentially have a lower PE risk.

To manage host specific employer related compliances, such employees can be recruited through **Virtual Employment** or an **Employer Of Records** in the host country.

So, PE Exposure Is Not To Be Overlooked, But Constantly Monitored

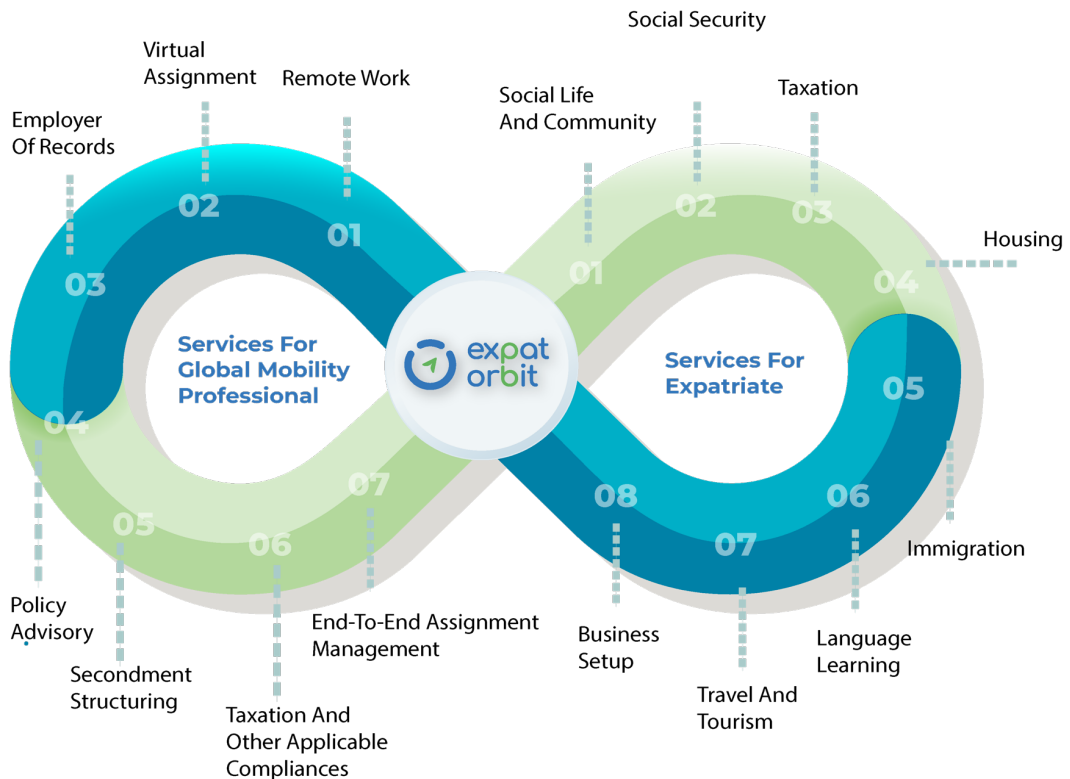
Secondment of employees overseas and cross border remote working if not efficiently managed could trigger PE exposure for the home entity. Along with reputational damage, companies may be exposed to higher tax liability, fines, interests and penalties.

But PE exposure can certainly be managed, if not completely eliminated.

The need is to put in place efficient and comprehensive global as well as country specific policies, as well as close monitoring of associated risks and compliances.


The Expat Orbit Way

Expat Orbit offers perfect balance between expertise, technology and extensive understanding of expatriate sensibilities to deliver innovative 360-degree expat assignment management solutions, customized for:



Our founding team :



Prateek Agarwal 
Co-founder and Head of International Compliances

Chartered Accountant, DISA

15+ years of dedicated experience in domestic and international compliances for clients across geographies as part of global consulting organisations like KPMG and iTrust



Henna Vij 
Co-founder and Head of Expat Experiences and Product Development

MBA, IIM Bangalore

12 years of experience working for, with, and as an expatriate across KPMG, Accenture, HSBC

Reach out to us:



info@expatorbit.com
prateek.agarwal@expatorbit.com
henna.vij@expatorbit.com



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