A Primer on Compensation, Taxation and Bribery Related to the Employment of Expatriate Employees: Pitfalls and Opportunities

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Abstract

This paper will investigate several important aspects in the employment of expatriate employees in conducting international business. The choice of three discreet topics [expatriate compensation, taxation, and aspects of the Foreign Corrupt Practices Act] reflects the nature of issues that have immediate implications for an American who might be seeking a foreign employment opportunity with a Multinational Enterprise, a subsidiary, or related business operation (such as a joint venture or an international franchise) of an American company.

1. Expatriate Compensation

An expatriate (sometimes shortened to *expat*) is an employee temporarily or permanently working in a country other than that of the person's upbringing—termed the *host country*. As found used commonly in the context of international business, the term expatriate is often used in the case of professionals or skilled workers sent abroad by their companies for a temporary work assignment, rather than for the larger category of immigrants or migrant workers who may be seeking permanently to change their residence, largely for economic reasons. [These employees are sometimes referred to as "*economic migrants*."] According to Fahmy (2014), an expatriate employee will be chosen for an overseas assignment because of a combination of three characteristics: technical competence, adaptiveness, and leadership ability. Frazee (1998) notes that there may be an overarching corporate purpose in employing expatriate employees in foreign work assignments, sometimes referred to as home-country "ethnocentric staffing," even for brief periods of time. These may include:

"Filling a skills gap overseas;
Transferring technology and technical skills to the local workforce;
Developing a fast-tracker's management skills; and
Transferring the corporate vision to a cross-border location." (Frazee, 1998).

There are three major considerations that must be addressed in fashioning a compensation package for an American employee of a multinational enterprise (MNE) or a global corporation:

- The compensation package must allow the employee to maintain a reasonable standard of living in the foreign environment;
- The compensation package must reflect the potential enhanced job responsibilities of the foreign assignment; and
- The compensation package must ensure that, at a minimum, the "after tax" income of the employee will not be reduced as a result of the foreign work assignment. (Daniels, Radebaugh & Sullivan, 2007).

Many MNEs located in the United States employ what is commonly termed as a "balance sheet compensation plan" in order to manage the compensation of their expatriate employees. (Gould, 1997). Under a "balance sheet" plan, managers employ a similar methodology, as do economists, in applying the concept of purchasing power parity (PPP) to employee income analysis. (Giammalvo, 2005). PPP is "an economic theory that estimates the amount of adjustment needed on the exchange rate between countries in order for the exchange to be equivalent to each currency's purchasing power." (Investopedia, 2014).

The relevant version of PPP is calculated as:

Where: $S= P1/P2$

"S" represents exchange rate of currency 1 to currency 2
"P_1" represents the cost of good "x" in currency 1
"P_2" represents the cost of good "x" in currency 2

As noted in *Investopedia*, "In other words, the exchange rate adjusts so that an identical good in two different countries has the same price when expressed in the same currency." (Investopedia, 2014). For example, a cup of coffee that sells for C$1.50 in a Canadian city should cost US$1.00 in a U.S. city when the exchange rate between Canada and the U.S. is 1.50 USD/CDN.

The same principle may be applied to expatriate compensation so as to develop a salary structure that equalizes, as far as possible, purchasing power across countries so that expatriate employees will enjoy *at least* the same standard of living in their foreign employment (host country) posting as they experienced at home. (Latta, 1999).

1.1. Salary Purchasing Power Parity (SPPP)

Employing this general philosophy relating to salary equalization based on purchasing power, the *Salary Purchasing Power Parity* (SPPP) approach uses the principle of putting all expatriates within an organization on an equal footing regardless of their nationality and geographical location of employment. "The purpose of the SPPP approach is to ensure parity in the level of the purchasing power of the salary of expatriates doing the same job at the same level in different parts of the world, taking hardship, cost of living, and exchange rate differences into account." (Expatulator.com, 2014).

The SPPP approach is typically used by MNEs that compete against one another for employees with certain highly desirable or specialized skills sets. Such an MNE might employ a large number of expatriates at any given time, who typically might move from one international assignment to another. MNEs which use the SPPP approach typically establish a *single global pay scale* which is often the salary established for employees working in the MNE headquarters (home) country. The salary of the expatriate is then calculated by *adding* additional amounts for any recognized hardships, cost of living adjustments, and any exchange rate differential between the global headquarters or home company and the host country, if the currency in which the payment may be made is not that of the MNE.

The resulting salary is often termed as the "*assignment package.*" This amount is then taxed in the host country, taking into account any statutory and non-statutory deductions or allowances made, in order to arrive at the *net pay assignment package* paid to the expatriate.

2. Compensation Plans

Employers have traditionally used three methods in implementing a "balance sheet" compensation plan. (Herod, 2008). The first is the "*home base method.*" This method will calculate the expatriate's compensation on the basis of the salary received in a comparable job in the expatriate's home city. This method essentially ignores the fact that an employee has taken a job in an overseas assignment. Daniels et al. (2007, p. 723) report that "the home based method is the most prevalent expatriate compensation plan." It may also be the easiest to implement for an employer.

According to a seminal article by Frazee (1998), generally, "a pure home-based balance sheet calculation of expatriate pay" would work in the following manner:

1. "Start with home-based gross income, including bonuses.
2. Deduct home tax, social security and pension contributions (either a hypothetical tax or a real tax).
3. Add or subtract a cost-of-living allowance. Usually, companies don't subtract. Instead, they allow the expatriate to benefit from the negative differential.
4. Add a housing allowance, either with or without a housing norm deduction.
5. Add incentive premiums, including general mobility premiums and sometimes hardship premiums.
6. Add or subtract to equalize taxes. In other words, gross the net salary to protect against the double tax obligations in the home and host countries." (Frazee, 1998).

A second method is termed the "*headquarters-based method.*" (Du, Deloof & Jorrison, 2012). Under this analysis, the expatriate's salary will be set in terms of the salary of an employee doing a comparable job in the city where the MNE is headquartered. This method will guaranty that the employee will be able to live as well in the country of their job assignment as they did in their home country.

Implicitly, the "headquarters-based method" will be most appropriate where the cost-of-living in the expatriate's home country is equal to or less than the cost-of-living in the country of the expatriate's employment.

A third method of implementation is termed the "*host base method*." This method is also known as destination pricing or localization. Under this method, the expatriate's compensation is based on the prevailing wage or pay scale in the location of the expatriate's foreign work assignment for an employee performing similar responsibilities. Under this method, the expatriate employee may receive certain negotiated foreign employment-based premiums, allowances, benefits (Blake, 2002), or taxation equalization compensation.

According to ECA International (2010), salary and benefit provisions "can also differ dramatically within host-based salary systems. In fact, while it is unlikely that two local packages will be exactly alike, each package can be categorized into four main types:

- "Local market rate for salaries and benefits;
- Expatriate market rate for salaries and benefits;
- Local salary plus expatriate benefits; and
- A mixture of these, referencing both local and expatriate market rates." (ECA International, 2010).

3. Key Components of Expatriate Compensation Packages

Under most salary plans, the expatriate's compensation package will consist of the following:

- *Base Salary*: The expatriate's base salary will normally fall into the same general range as the base salary under one of the three methods described above.
- *Foreign Service Premium Payment*: The foreign service premium is an amount of extra pay that the MNE offers to the expatriate for taking up a work assignment outside of the home country. Many firms report the payment of foreign service premiums in the range of 10 to 30 percent of the base salary. As Yang-Soo (2008) notes, expatriate employees may encounter some severe psychological challenges related to verbal communication, nonverbal communication, language barriers, "culture shock," behavioral issues, and work styles. (Hunter and Lozada, 2012). This supplement may also be termed as the "*hardship premium*.
- *Allowances*: Expatriate employees will often receive a cost-of-living allowance, sometimes termed as a "goods-and-services differential" (Molnar, 2001), in order to compensate for an unusually high cost of living in a particular city. A consensus comprehensive list of these "high cost of living locales" might include: Tokyo, Stavanger (Norway), Moscow, Zurich, Paris, Juba (South Sudan), New York City, Copenhagen, Canberra (Australia), and Stockholm (Sweden). (*See* Haque, 2014; Runzheimer International, 2014).

As time goes on, this cost-of-living allowance might be gradually reduced or even eliminated, as the expatriate learns to adapt spending patterns to the local environment.

Other types of so–called "hardship allowances" might be offered. A typical hardship allowance might be a housing allowance. It may be especially expensive for an employee to rent suitable accommodations (for example, with bathrooms, kitchens, or laundry facilities) comparable to those enjoyed in the United States.

Another type of allowance may be referred to as "combat pay"—that is, compensation that is offered to an employee for taking on an assignment in an especially difficult environment or in a dangerous location. Judy Clark (2002) reported on this aspect of the relationship of expatriate employment and political risk. Some of the most important considerations include: kidnapping, the purchase of ransom insurance, safety training programs, payment for home security systems or security guards, and other special measures required to assure the safety of employees and their families.

Finally, expatriate employees may be in line for many other miscellaneous enhancements such as travel allowances, job location assistance for a spouse, medical benefits, education allowances for children of expatriate employees, club memberships, and special vacation travel costs. Daniels et al. (2007) report that one-quarter of MNEs provide spouses of their expatriate employees with reimbursement of job-search expenses. (Maitland, 1999).

- *Fringe Benefits*: Two of the major issues—medical and retirement benefits—are usually offered to the expatriate employee on the same basis as at home employees, as opposed to those customarily offered to employees in the host country.

4. Tax Considerations: Tax Differentials and Implications: An Overview

As Daniels et al. (2007, p. 725) state: "The ultimate objective of expatriate compensation adjustments is to ensure that expatriate' after-tax income and, presumably, their job motivation will not suffer because of the costs created by foreign assignments." This consideration is especially relevant if the rate of taxation in the country of the foreign assignment is more than that of the home country. This is known as the principle of "tax equalization," which can become both the most important and most costly component of compensation for the expatriate employee. This part of the study concerns issues related to reciprocal tax treaty arrangements which attempt to deal with varied tax treatment of expatriate income.

International tax treaties should, at a minimum:
Define which taxes are covered;
Determine who is a resident of a country and thus eligible for the benefits of the arrangement;
Reduce the amount of tax withheld from certain types of income, including interest, dividends, and royalties (capital gains) paid by a resident of one country to residents of the other country; (*contra*, Laity, 2009, p. 217)

Limit the imposition of the tax imposed by one country on the business income of a resident of the other country to that income from a permanent establishment in the first country;

Define the categories of income of individuals who are residents of one country which will be taxed in the other country, including salary and wages, income from self-employment, pension income, and other sources of income;

Provide for exemption from taxation for income derived from activities of certain types of organizations or individuals; and

Provide a procedural framework for tax enforcement and for the resolution of any disputes that might arise between an individual and a taxing authority.

Many of these issues are addressed in the United States through the mechanism of the *Foreign Tax Credit* or FTC. The purpose of the Foreign Tax Credit is to provide relief from double taxation for employees who are serving in an international assignment. (Fleming, Peroni & Shay, 2001). Since the U.S. tax code taxes "income from all sources" (Hines, 2009), double taxation may occur when the United States taxes foreign-source income and the host country moves to tax the same income as well. The reciprocal is also true. The FTC will limit the overall tax rate on foreign-source income to the higher of the taxpayer's foreign or U.S. tax rate. The United States does not impose any additional tax on foreign income when the foreign tax rate is higher than the U.S. rate. However, if the tax rate on the foreign-source income is lower than the U.S. tax rate, the FTC causes the overall tax on the foreign income to approximate the U.S. rate.

The IRS has provided this table to summarize the relevant Internal Revenue Code sections that authorize and potentially limit the FTC:

Summary of IRC Sections Authorizing and Limiting the FTC:

Code Section	**Description**
901	Allows direct credit for taxes paid to a foreign country by a U.S. taxpayer based on realized net income.
902	Allows deemed paid or indirect credit for foreign taxes based on the proportion of taxes paid by a corporation on its distributed earnings and profits.
903	Allows direct credit for taxes (typically foreign withholding taxes) based on gross receipts and paid "in lieu of" the generally imposed net income tax.
904	Limits the amount of credit available in each year, including carryovers of credit.
905	Provides guidelines on foreign tax adjustments, redeterminations and proof of credits.
906	Allows the foreign tax credit for nonresident alien individuals and foreign corporations engaged in a trade or business in the United States.
907	Contains credit limitation for foreign oil and gas income.
960	Allows an indirect credit for deemed distributions.

(Internal Revenue Code, 2006).

The United States has entered into tax treaties with a number of foreign countries to deal with issues related to double taxation. The premise of these treaties is the principle of *reciprocity*. Under relevant provisions of these treaties, residents of foreign countries are taxed at a reduced rate, or may be completely exempt from U.S. taxation, on certain types of income they receive from sources within the United States.

These reduced rates and exemptions will vary, based on the specific terms of the treaties entered into between the foreign country and the United States. Under these same treaties, residents or citizens of the United States will likewise be taxed at a reduced rate, or will be exempt from foreign taxes, on certain items of income they receive from sources within a foreign country. Most tax treaties contain what is known as a "saving clause," which prevents a citizen or resident of the United States from using the provisions of a tax treaty in order to avoid taxation of U.S. source income. Vanderbilt International (2014) notes that "most tax treaties have a saving clause and it is important to understand what the savings clause means. A saving clause preserves or "saves" the right of each country to tax its own residents as if no tax treaty existed. Therefore, if you become a resident alien for tax purposes in the USA, you generally lose any tax treaty benefits."

The main import of an international tax treaty may be its *negative implication*. If a particular treaty does *not* cover a particular kind of income, or if there is no treaty between a country and the United States, the taxpayer must pay tax on the income in the same manner and at the same rates under the applicable U.S. tax return.

Besides important federal tax implications, many individual states also tax income which is sourced in their states. The taxpayer who is attempting to take advantage of a FTC must consult the tax authorities of the state in which he or she derived income in order to ascertain whether any state tax applies to any of that income.

The following countries have entered into tax treaties with the United States:

Armenia
Australia
Austria
Azerbaijan
Bangladesh
Barbados
Belarus
Belgium
Bulgaria
Canada
China
Cyprus
Czech Republic
Denmark
Egypt
Estonia
Finland
France
Georgia
Germany
Greece
Hungary
India
Indonesia
Ireland
Israel
Italy
Jamaica
Japan
Kazakhstan
Korea
Kyrgyzstan

Latvia
Lithuania
Luxembourg
Malta
Mexico
Moldova
Morocco
Netherlands
New Zealand
Norway
Pakistan
Philippines
Poland
Portugal
Romania
Russia
Slovak Republic
Slovenia
South Africa
Spain
Sri Lanka
Sweden
Switzerland
Tajikistan
Thailand
Trinidad
Tunisia
Turkey
Turkmenistan
Ukraine
United Kingdom
Venezuela

4.1. Foreign Earned Income Exclusion: Requirements

U.S. citizens may enjoy a special opportunity to *exclude* certain amounts from taxation: the *foreign earned income exclusion, the foreign housing exclusion* [Glossary Item I], *or the foreign housing deduction*. In order to avail him or herself of these potential exclusions, the taxpayer must have foreign earned income [See Glossary Item II], the tax home must be in a foreign country, and the taxpayer must meet one of the following tests:

- A U.S. citizen who is a bona fide resident of a foreign country or countries for an uninterrupted period that includes an entire tax year;
- A U.S. resident alien who is a citizen or national of a country with which the United States has an income tax treaty in effect and who is a bona fide resident of a foreign country or countries for an uninterrupted period that includes an entire tax year; or
- A U.S. citizen or a U.S. resident alien who is physically present in a foreign country or countries for at least 330 full days during any period of 12 consecutive months.

The most important of the exclusions may be the *Foreign Earned Income Exclusion*. The maximum amount of the Foreign Earned Income Exclusion under Internal Revenue Code (IRC) section 911 has also been indexed to inflation. The following amounts reflect this indexed amount: $91,500 for 2010, $92,900 for 2011, and $95,100 for 2012, $97,600 for 2013. The exclusion may be the most attractive aspect of an overseas assignment by an expatriate employee.

5. Implications of the Foreign Corrupt Practices Act or Fcpa

Besides the many benefits and opportunities that may be available to expatriate employees in accepting a foreign assignment, employees of an MNC must be made aware that their actions or conduct will be under intense scrutiny. In the mid-1970s, the United States Congress found through a series of legislative hearings that many American companies were not just *lobbying* foreign governments and politicians in order to secure business but were actually *bribing* foreign governmental officials in order to procure lucrative business contracts. (The Lockheed Corporation was found to one of the main and most aggressive offenders. (Rich & Janos, 1994)).

The Congress, in fact, found the instances of bribery to be both "pervasive and troubling." (Hunter, Mest & Shannon, 2011). These findings resulted in the passage of the *Foreign Corrupt Practices Act of 1977.*

There are two key elements of the FCPA:

1. The Act requires corporations to *keep accurate books and records* of all foreign transactions and *install internal accounting controls* in order to assure that all transactions and payments are both lawful and accurate;
2. The Act makes it illegal for an American company or their officers, directors, agents or employees either directly or through any intermediaries to bribe or attempt to bribe a foreign official, a foreign political party official, or a candidate for foreign political office for the purpose of obtaining or retaining business, or directing business to another party.

There is an important affirmative defense to a charge that a company or an individual has violated the FCPA: payments to secure routine, ministerial, or clerical actions are *not* illegal under a major amendment to the FCPA, the *1988 Trade Act*. Examples of what may be classified as "routine actions" may include: obtaining permits, licenses or other official government documents; processing governmental payments, such as visas or work orders (Corr & Lawler, 1999, p. 1270); providing police protection; arranging for mail pick-up and delivery; providing phone service, power or water supplies; loading or unloading of cargo; protecting perishable products; and scheduling inspections associated with contract performance or transit of goods.

Payments for these and other related services are sometimes called *facilitation* or "grease payments," as opposed to bribes. Under the 1998 Amendments, a more explicit exception was written into the statute making it clear that the anti-bribery provisions "shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official…." (Koehler, 2010).

Under the 1998 amendments to the FCPA, the *International Anti-Bribery Act of 1998*, which was designed to implement the anti-bribery conventions of the Organization for Economic Co-operation and Development [OECD], likewise, there is a second major defense: if the payment is lawful under the written law of a foreign country or the money was spent as part of demonstrating a product or a bona fide expenditure relating to performing a contractual obligation, it is normally *not* illegal. (Simpson Thacher & Bartlett, 1998).

There are both *criminal and civil implications* to the FCPA. Consequences for violating the Foreign Corrupt Practices Act are severe. A violation of the FCPA can result in significant fines and penalties. For example, a company can face a criminal fine up to $2 million per violation of the anti-bribery provisions and individuals found culpable can be subject to a criminal fine of up to $250,000 per violation, as well as imprisonment for up to five years. In addition, willful violations of the "Books and Records and Internal Control" provisions can result in criminal fine of up to $25 million for a company and a criminal fine up to $5 million as well as imprisonment for up to 20 years for culpable individuals. (Foley & Haynes, 2009).

Yet, enforcement under the FCPA is one of the murkiest areas of international business and international business law. Extraterritorial legislative solutions have proven "ineffectual and unwieldy." (Salbu, 2000, p. 679). Even at an early date, Bruce L. Barker (1999), writing for the *Washington Post*, noted that the FCPA has "failed in its mission" and observing that expatriate executives "routinely flout" it. In recent years, however, there seems to have been a renewed interest in serious enforcement actions and has involved such American iconic corporations as *Siemens* and *Halliburton*. (Hunter, Mest & Shannon, 2011).

At the same time, many American corporate executive complain that the FCPA is a significant impediment to conducting business overseas and that the FCPA is a not too thinly veiled attempt by the United States to apply its moral principles to other societies or to other cultures in which bribery and corruption are both endemic and pervasive—and a necessary component of a successful international business operation.

(See generally, Transparency International, 2014). Whatever might be social responsibility or ethical debate, an expatriate employee should be clearly counseled by the management of his or her employer about the implications of the FCPA. These should, at a minimum include conveying the following information:

1. "All employees should be specifically aware of corporate policies relating to the payment of bribes or other corrupt practices and to the general outline of the FCPA.
2. Corporate leadership—starting with the CEO—must reinforce the clear message of "zero tolerance" to corporate corruption by emphasizing the company's commitment to full compliance with the FCPA.
3. All communications should be simple and direct in the form of an annual update or through the use of corporate newsletters, e-mails, or websites.
4. A company must create a "compliance team" with specific responsibilities and authorities in the area of compliance with the FCPA;
5. The corporation must then assure that efforts of the compliance team will be supported by an adequate staff, sufficient research capabilities, and that it is adequately funded.
6. A company's compliance team must have and has a clear mandate to prevent and report corruption." (Schroeder & Haidicke, 2009).

A company that employs expatriate employees must institute internal procedures that assure that corrupt practices are detected, rooted-out, and are subjected to punishment; and, perhaps more importantly, that positive ethical practices are publicized and rewarded by the culture of the MNE that utilizes expatriate employees.

One of the major consultants in the field of FCPA compliance, *Jones Walker*, suggests mandating FCPA compliance training for "key personnel" who are expected to *interface* with foreign officials on the company's behalf or who themselves *supervise* third parties who interface with foreign officials on the company's behalf. This training would be most important for an expatriate employee and should:

- "Conduct risk-based due diligence for all third-party agents and consultants, and centralize those efforts within the legal or compliance departments;
- Provide FCPA compliance training to any "high-risk" agents;
- Require agents to sign annual certifications attesting that they have not and will not violate anti-corruption laws;
- Involve multiple company departments in compliance efforts, for example, legal, internal audit, and accounting;
- Conduct periodic reviews and audits of the company's compliance systems to ensure that they are functioning and to look for ways to improve." (Cited in Schroeder & Haidicke, 2009).

6. Some Concluding Observations

Employing an expatriate employee may be an important strategic aspect of a decision to engage in some type of international business operation. In making this decision, there are several important issues that must be addressed. Surprisingly, "salary and benefits" is only one of them. In addition, the employee must be compensated in such a manner as not to negatively affect his or her earnings capacity by an unfavorable tax structure in the host country. Finally, there are any number of legal pitfalls that must be addressed with employees who might be tempted to engage in illegal or unethical conduct in securing lucrative international contracts with foreign officials or foreign governments.

The international manager who deals with "expats" must be well versed in all of these areas and sensitive to the special needs of prospective employees. By possessing comparative employment information on structuring salary and compensation packages, a basic yet solid understanding of the tax implications of a foreign assignment, and by understanding and recognizing the "red flags" that populate the landscape of foreign contracting, the MNE who employs the expat can successfully manage this important business relationship.

Glossary Item I:

The term "housing cost amount" means an amount equal to the excess of—

(A) the housing expenses of an individual for the taxable year to the extent such expenses do not exceed the amount determined under paragraph (2), over
(B) an amount equal to the product of—
(i) 16 percent of the amount (computed on a daily basis) in effect under subsection (b)(2)(D) for the calendar year in which such taxable year begins, multiplied by

(ii) the number of days of such taxable year within the applicable period described in subparagraph (A) or (B) of subsection (d)(1).

(2) Limitation

(A) In general

The amount determined under this paragraph is an amount equal to the product of—

(i) 30 percent (adjusted as may be provided under subparagraph (B)) of the amount (computed on a daily basis) in effect under subsection (b)(2)(D) for the calendar year in which the taxable year of the individual begins, multiplied by

(ii) the number of days of such taxable year within the applicable period described in subparagraph (A) or (B) of subsection (d)(1).

Glossary Item II:

The term "earned income" means wages, salaries, or professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered.

The term "foreign earned income" with respect to any individual means the amount received by such individual from sources within a foreign country or countries which constitute earned income attributable to services performed by such individual during the period described in subparagraph (A) or (B) of subsection (d)(1), whichever is applicable.

(B) Certain amounts not included in foreign earned income:

The foreign earned income for an individual shall not include amounts—

(i) received as a pension or annuity,

(ii) paid by the United States or an agency thereof to an employee of the United States or an agency thereof,

(iii) included in gross income by reason of section 402 (b) (relating to taxability of beneficiary of nonexempt trust) or section 403 (c) (relating to taxability of beneficiary under a nonqualified annuity), or

(iv) received after the close of the taxable year following the taxable year in which the services to which the amounts are attributable are performed.

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