



Global Business Tax Alert Sharp Insights

JV formed to secure a contract (with scope of JV partner distinctly outlined and entire scope of work is split and fulfilled through subcontractors) – Not to be taxed as an ‘Association of Persons’

Issue no: GBTA/40/2015

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Synopsis

The Delhi High Court in the case of Oriental Structural Engineers (P.) Ltd has held that where Joint Venture ('JV') was formed only to secure contract and where the scope of each JV partner's task was distinctly outlined and further, entire work was split between two JV partners and they completed task, through sub-contractors, JV was not an association of persons ('AOP') and not liable to be taxed on that basis.

Facts

- The assessee was a JV between two companies formed to undertake projects awarded by NHAI. The assessee reported NIL income for the relevant years and claimed refunds.
- From the Profit & Loss A/c of the assessee, it was noticed that the assessee had debited approximately 98% of the total contract receipts from NHAI towards payment to sub-contractors, i.e., the JV partners themselves and the balance receipts were utilised to make payments for work contract, taxes, sales tax/VAT, professional fees and audit fees, etc.
- The Assessing Officer ('AO') held that a proportion of the project receipts should be attributed to the assessee to whom tender had been awarded for the project; accordingly, 5% of the gross contractual receipts was taxed in assessee's hands in status of AOP.
- On appeal, Commissioner of Income-tax (Appeals) ('CIT(A)') reversed the order of the AO. The Tribunal affirmed the order of the CIT(A).

Issue before the High court

- Whether the JV formed only to secure contract, in terms of which scope of each JV partner's task was distinctly outlined and further, entire work was split between two JV partners and they completed task, through sub-contractors, could qualify as an AOP and liable to be taxed on that basis?

Ruling of the High Court

- The High Court observed that it had an occasion to consider the issue in assessee's case for assessment year 2004-05, in which the Court had made the observation that assessee was created as a JV for obtaining works from the NHAI and the arrangements were clear that the work was to be executed by the joint venture members directly without there being any requirement or necessity of the JV to carry out any activity itself.
- Further, the High Court relied on the decision in the case of Linde AG¹ wherein it was observed that unless the facts lead to a conclusion that there is sufficient joint participation for a common enterprise, it would not be appropriate to treat two or more persons as an AOP for the purposes of assessing them as separate taxable entity. Treating every instance of such cooperation between two or more persons as resulting in an AOP would militate against the purpose of considering an association as a separate tax entity. A mere co-operation of one person with another in serving one's business objective would not be sufficient to constitute an AOP merely because the business interests are common. A common enterprise, which is managed through some degree of joint participation, is an essential condition for constituting an Association of Persons.
- Accordingly, in the present case, the Delhi High Court opined that the consistent and concurring opinions of CIT(A) and Tribunal were that the JV was formed only to secure the contract, in terms of which the scope of each JV partner's task was distinctly outlined. Further, the entire work was split between the two JV partners; they completed the task, through sub-contracts and were responsible for the satisfaction of the NHAI. Therefore, the High Court applying the principles of the law declared in Linde AG

¹ Linde AG, Linde Engg. Division v. DDIT [\[2014\] 365 ITR 1/224 Taxman 43 \(Mag.\)/44 taxmann.com 244 \(Delhi\)](#)

(supra), held that the Tribunal did not fall into error of law, in holding that the JV was not an AOP and liable to be taxed on that basis.

Comments

The Delhi High Court decision is has upheld that mere forming a JV to secure a contract with defined scope, responsibility should not constitute an AOP.

This ruling may help the companies who typically bid for the large contracts of governments by way for forming a JV. However, it is important to have proper documentation of activities, risk and responsibilities of each of the JV partners.

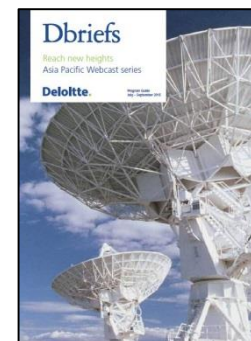
Source: CIT vs Oriental Structural Engineers (P.) Ltd [2015] 58 taxmann.com 77 (Delhi High Court)

Upcoming Dbriefs - Register

India's Finance Act and Recent Developments: The Road Ahead

Tuesday, 28 July, 2:30 PM – 3:30 PM IST

The proposals of the Indian Finance Act 2015 are now in force and there are significant developments for foreign investors. In addition to the amendments in law by the Finance Act, there have been several other developments on the tax front. What are the amendments in law and recent developments you need to be aware of? Stay up to date with the latest international tax developments in India.



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