

Taxing JVs in India

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The concept of Association of Persons (AOP) (jointly executing ventures), though owing its genesis to laws governing taxation in the country, is not defined in the Income Tax Act, 1961. While there is a unique tax regime applicable to assessee being constituents, it has been left to the courts and revenue authorities to evolve a precise meaning to the concept of an AOP and to decide on the nature of taxability of such JVs and consortiums. This article highlights some of the issues arising in such taxation.

In the case of *CIT v. Indira Balkrishna*¹, the Supreme Court held that there is no formula of application as to what facts, how many of them and of what nature are necessary to come to a conclusion that there is an AOP, and the factual matrix of each case would finally decide whether an AOP existed or not. Even so, it was reasonably discernible from a string of decisions, especially of the Authority for Advanced Rulings (AAR), on what constituents of such ventures would reasonably be assessable as an AOP. Decisions of the AAR although binding only on the parties in question, have persuasive value in courts and before revenue officers in assessment proceedings.

However the recent decision of the AAR in *Linde AG v. DIT*², has caused some uncertainty in this regard, primarily because of a very different approach taken in interpreting facts similar to those in question in earlier references, and also because the Internal Consortium Agreements were not relied upon for arriving at the decision.

In *Linde AG*, the AAR held that a consortium formed, in response to a tender floated by a government entity (OPAL) for a turnkey project, was taxable as an AOP. The AAR, while acknowledging the scope of work of the consortium members was independent and mutually exclusive of the other (which division of work was recognised by OPAL) and, despite separate payments being made to the members directly by OPAL, held that such division does not split-up the contract entered into with OPAL by the consortium as a 'Contractor' under which joint liability was undertaken by the consortium. Furthermore, the coming together of two independent entities having diverse fields of

expertise for a common objective of earning income was viewed by the AAR as further evidence of the formation of the AOP.

A very different interpretation is seen in the AAR's rulings in *Re: Van Oord ACZBV*³ and in *Hyundai Rotem Co. and Mitsubishi Co. v. DIT*⁴. In both cases, as there was no control and connection between the work of the two members and as the nature of work of each was extremely distinct and mutually exclusive from the other, the requisites of an AOP of carrying on business jointly and in collaboration were not fulfilled and the consortiums in both cases were held as not assessable as AOPs even though in *Hyundai Rotem*, joint and several liability was undertaken by the members.

Even in *Geoconsult ZT GmBH v. DIT*⁵, wherein the AAR held that the JV in question would constitute an AOP, it was emphasised that payments were made pursuant to a consolidated invoice raised by the JV and that there were overlapping responsibilities of the JV partners with no water-tight division with the partners assisting each other in most cases.

In addition, in all the above references, the Agreements between the consortium members were looked into and considered. In *Linde AG*, as the Consortium Agreement was not made a part of the Contract Documents executed with OPAL, it was held that such an Agreement remains an internal document and cannot alter the legal position emerging from the Contract Documents. It was further held that the MOU, although annexed to the Contract Documents, cannot supersede or override the Contract Documents.

In view of *Linde AG*, it is thus not enough for companies not intending to be assessed as AOPs, to clearly set out the division of work and income in the Consortium Documents. Care must be taken to not only append such Consortium Documents to all contracts executed by the consortium with third parties, but provisions of the Consortium Documents must also be incorporated into such contracts to lessen the chances of assessment as an AOP.

Footnotes

1. [1960] 39 ITR 546 (SC)
2. AAR No. 962 of 2010 decided on March 20th, 2012
3. AAR No. 469 of 1999 decided on September 14th, 2000
4. [2010] 323 ITR 277 (AAR)
5. [2008] 304 ITR 283 (AAR)

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