

**THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 20.05.2014

+ **W.P.(C) 4302/2013 & CM 9996/2013**

CTCI OVERSEAS CORPORATION LTD ... Petitioner

versus

**DIRECTOR OF INCOME TAX-I,
INTERNATIONAL TAXATION** ... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Deepak Chopra with Mr Harpreet
Singh Ajmani

For the Respondent : Mr Sanjeev Sabharwal, Senior Standing
Counsel with Mr Ruchir Bhatia

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. By way of this writ petition, the petitioner seeks quashing of the conclusion of the Authority for Advance Rulings in its ruling dated 01.02.2012, whereby it held that there existed an association of persons (AOP) between the petitioner (CTCI Overseas Corporation Limited, Hongkong) and CINDA Engineering and Construction Private Limited, India in terms of the consortium agreement dated 06.03.2009.



2. Insofar as the alternative prayer questioning the jurisdiction of the Authority for Advance Rulings to adjudicate on the existence of an AOP is concerned, the learned counsel for the petitioner has not pressed the same before us.

3. On the question of AOP, the Authority for Advance Rulings has concluded as under:-

“11. The Revenue has argued that the case of the applicant is covered under the provisions of the Act as the Government of India has not entered into a Tax Treaty under section 90(2) of the Act with the Government of Hong Kong. It has a business connection in India for the reasons that it is a part of the consortium constituting an AOP as also in terms of Explanation 2(b) to section 9(1)(i) of the Act since it is providing offshore supplies. We notice that under section 2(31) of the Act, the consortium of CINDA and CTCI forms an Association Of Persons (AOP) to carry out the project awarded by Petronet. Whether the consortium's object is to derive profit or share the profit in a particular manner is not relevant in view of the fiction created under the Explanation to section 2(31) of the Act. The responsibilities of the consortium members mentioned under the terms of the contract would also not affect conferring AOP status to the consortium in view of the formation of a consortium by CINDA and CTCI. That being so, the applicant can be said to have a business connection in India for the purpose of application of section 9(1) of the Act. As the applicant is excluded from the relief under section 90(2) of the Act, the fiscal jurisdiction to tax the offshore supplies would be governed under the Act.”



4. The above conclusion of the Authority for Advance Rulings cannot now stand in view of our decision in the case of *Linde AG, Linde Engineering Division v. Deputy Director of Income Tax: [WP(C) 3914/2012]* decided on 23.04.2014.

5. In *Linde (supra)*, this Court held as under:-

“33. Therefore, it emerges from the above discussion that the Association of Persons is one in which two or more persons join together for a common purpose or common action and there is a joint management or joint action by the said two or more persons. In order to treat persons as an association, it is necessary that the members must have a common intention and must act jointly for fulfilling the object of their joint enterprise.

34. However, it is also necessary to bear in mind that the purpose of treating two or more persons as an association of persons is to impose tax on the income that may be attributed to their joint enterprise. It is, thus, obvious that it would be necessary to consider the extent and the nature of the common purpose and the common action, in order to determine whether the said persons form an association for the purposes of imposing tax or not. As explained by the Calcutta High Court in *B. N. Elias (supra)*, the intention of the Legislature was to treat combinations of persons, who were engaged together in some joint enterprise but did not in law constitute partnerships, as a separate taxable entity. It is, thus, essential that an Association of Persons has the trappings of a partnership for conducting the joint enterprise which makes it amenable to be treated as a separate taxable entity. A person carrying on business may in the usual course cooperate with others for a common purpose. In many instances, the test of common purpose and common action, if literally applied, may also hold true. However, treating every instance of such cooperation between two or



more persons as resulting in an Association of Persons would militate against the purpose of considering an association as a separate tax entity. Whether an arrangement or collaborative exercise between two or more persons results in constituting an Association of Persons as a separate taxable entity would depend on the facts of each case including the nature and the extent of collaboration between them. The Supreme Court in Indira Balkrishna (supra) had also clarified that:-

“there is no formula of universal application as to what facts, how many of them and of what nature are necessary to come to a conclusion that there is an association of persons within the meaning of Section 3”.

35. It is obvious 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 Association of Persons for the purposes of assessing them as a separate taxable entity. A mere cooperation of one person with another in serving one's business objective would not be sufficient to constitute an Association of Persons 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.

36. It follows from the above discussions that before an association can be considered as a separate taxable entity (i.e an Association of Persons), the same must exhibit the following essential features:

- (i) must be constituted by two or more persons.
- (ii) The constituent members must have come together for a common purpose.



- (iii) the association must move by common action and there must be some scheme of common management.
- (iv) the cooperation and association amongst the constituent members must not be perfunctory and/or merely in form. The association amongst members must be real and substantial which is sufficient to treat the association as a separate homogenous taxable entity.”

6. The question as to whether the petitioner herein and CINDA constituted an AOP would have to be examined on the basis of the above principles. Since the matter was not examined in this light by the Authority for Advance Rulings, it would be appropriate that the matter with regard to the question of AOP is remitted to the said Authority to return a finding, on facts, based upon the above legal principles. It is ordered accordingly.

7. We make it clear that the only issue urged before us was the question with regard to the existence of an AOP as a taxable entity. No other issue was agitated before us either by the petitioner or by the respondent. Consequently, this writ petition is disposed of with the direction that the finding of the Authority for Advance Rulings in the impugned ruling dated 01.02.2012 concerning the AOP issue is set aside



and the matter is remitted to the said authority for the limited purpose of determining, on facts, as to whether the petitioner and CINDA constituted an AOP in terms of the legal principles set down in *Linde (supra)*.

There shall be no order as to costs.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

MAY 20, 2014
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