

BEFORE THE AUTHORITY FOR ADVANCE RULINGS (INCOME TAX)

NEW DELHI

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PRESENT

Hon'ble Mr. Justice P.V.Reddi (Chairman)

Mr. A.Sinha (Member)

Mr. Rao Ranvijay Singh (Member)

A.A.R. NO. 745/2007 OF 20080731

Name and Address of Applicant

Geoconsult ZT GmbH

C/o Thingna & Contractor, CA, G-3, T.V.Industrial Estate,248/A, S.K.Ahire Marg,Mumbai

Commissioner concerned

Director of Income Tax (International Taxation), Mumbai

Present for the Department

Mr. Parag A. Vyas, Advocate

Present for the Applicant

Mr. Riaz Thingna, CA , Mr. Vijay dhingra, CA

RULING

(By Mr. Rao Ranvijay Singh)

Date of Ruling : Thursday, the 31st Day of July,2008

The applicant, M/s. Geoconsult ZT GMBH (in short G.C.or Geoconsult), is a company, incorporated in Austria, having its registered office at HISCTRA 5, A-5071, Walls Salsburg, Austria, and has filed an application under 245Q(1) of the Income-tax Act, 1961(in short the Act) in the prescribed proforma, seeking rulings on the questions referred to in the application.

2. Before we advert to the questions on which the rulings have been sought, it would be quite worthwhile to give a background of the factual matrix of the case.

3. The applicant, Geoconsult, has formed a joint venture (in short J.V.) with two Indian companies namely (a) M/s Rites Ltd. India, registered in Delhi and (b) M/s. Secon Pvt. Ltd. India, registered at Bangalore. This joint venture is specialized in providing project consultancy services. Further, Himachal Pradesh Road and Other Infrastructure Development Corporation Ltd. (in short HPRIDC) has awarded a contract to the applicant, to provide Consultancy services for Phase I & Phase II for the development of seven tunnels in Shimla as well as in other areas of Himachal Pradesh to carry out the implementation of the aforesaid work. The scope of work to be done by the applicant is set out in schedule III of the said agreement. The applicant, as per the averment, renders almost all the services from Austria and in order to coordinate with other members of the joint venture, an engineer has been deputed who undertakes periodical site visits. The applicant states that it has neither a 'fixed place of business nor an office' in India. It does not also perform any substantial activities in India. The employees are also not deputed in India for a considerable length of time. The applicant, as contended, does not have a 'permanent establishment' (P.E.) in India within the meaning of Article 5 of Double Taxation Avoidance Agreement (DTAA) between India and Austria. The applicant, however, submits that the income received by the J.V. for the services performed in connection with the agreement fall within the term 'fees for technical services' and is, therefore, subject to tax in India in accordance with Article 12 of the DTAA between India and Austria.

4. On the above facts and contentions, the applicant has sought advance ruling by the Authority on two questions framed by it – one relating to the applicability of Article 12 of DTAA and the other about the existence of P.E. in India. The application filed was considered by the Authority and the same was allowed under sub-section 2 of section 245(R) of the Act to enable the Authority to give final ruling under section 245R(4) of the Act. The applicant, in the course of hearing and in the written submissions made, sought for modification of the questions, which as recast, read as follows:-

1. "Whether the applicant can be said to have permanent establishment in India within the meaning of Double Taxation Avoidance Agreement between India and Austria?

2. If the answer to question 1 is in the affirmative, whether the income of the applicant under the agreement in question is attributable to such permanent establishment and be subjected to tax as business profits under Article 7 of the Double Taxation Avoidance Agreement between India and Austria?

3. If the answer to question 2 is negative, whether the income of the applicant under the agreement in question is liable to be taxed as fees for technical services under Article 12 of the Double Taxation Avoidance Agreement between India and Austria?"

We see no objection in modifying the questions, as suggested.

5. The applicant states in the statement of facts that it has been awarded a contract for consultancy services in respect of phase I and phase II above and has received the payment only for the rendering of managerial and consultancy services. As such, the

income earned by the applicant on this score is taxable as fees for technical services under section 9(1)(vii) of the Act read with Article 12 of the Treaty. It has also been emphasised that there is no Permanent Establishment (PE) as per Article 5 of the Treaty in this case.

6. In his comments dated 10.10.07, the Revenue, through the Jurisdictional Commissioner, i.e. Director of Income-tax(International Taxation), Mumbai, has, on the questions raised by the applicant, stated that the services provided by the JV partners to the client, HPRIDC, are in the nature of consultancy services. It has also been stated that as per the provisions of section 9(1)(vii) of the Act, the term "fees for technical services" has been defined as including "any lump sum consideration for the rendering of any managerial, technical or consultancy services". Since the services provided by the applicant are in the nature of 'consultancy services' as well as 'technical services', income arising to the applicant, therefrom, are deemed to accrue or arise in India and is also subject to tax therein. Since the applicant is a resident of Austria, it would, however, be entitled to the benefits of the provisions of DTAA between India and Austria. Article 12(4) of the DTAA, defines the term "fees for technical services" meaning "payments of any amount to any person other than payments to an employee of a person making payments, in consideration for the services of a managerial, technical or consultancy nature including the provisions of the services of technical or other personnel". The consultancy services provided by the applicant to HPRIDC may fall within the scope of definition of "fees for technical services", and as per Article 12(2) of the Treaty the Indian Government is empowered to deduct / withhold tax @ 10% on the gross amount of the fees for technical services received by the applicant, if there is no P.E. in India.

7. As regards the Permanent Establishment (PE) in India, revenue has contended that the applicant is necessarily required to carry out geological, technical investigations, field surveys, collection of seismological data, surveys for establishing topographical conditions/constraints on the proposed tunnel alignments. These services are necessarily to be carried out at the project sites by the team of ten technical personnel deployed by the applicant and such services necessitate their stay for sufficiently long periods of time in order to fulfill their technical obligations. The applicant, along with other partners, has been managing day-to-day activities of the joint venture including project co-ordination, liaisoning with the client on a regular basis etc. and it necessarily requires a permanent presence in India. Looking to the holistic nature of the activities to be carried out by the applicant with regard to the project, it is difficult to imagine how these services can be provided without having a permanent establishment in India within the meaning of Article 5 of the Indo-Austrian DTAA and that too without the regular deployment of technical & managerial personnel in India. The revenue has further stated that as per Clause 20 of Schedule 1 of the Agreement between the JV parties, the address of the Joint Venture is shown as "c/o Dr. Friedrich Prinzl, D1/35, Vasant Vihar, New Delhi-110057, India". Dr. Prinzl is not only the leader of the Geoconsult Team deputed for the project but is also their authorized representative/signatory as well as the overall project Director. The Commissioner submits that the office address of the JV is seemingly the address of the PE of the applicant in India from where its activities as well as those of the joint venture are carried out. The jurisdictional Commissioner has

further emphasized that it is totally incorrect to say that the activities in India are only preparatory/auxiliary in nature and are, accordingly, excluded by Article 5(4)(e) of the DTAA. According to the Commissioner, looking at the activities to be performed by the JV for HPRIDC, it is evident that the work to be performed by the applicant constitutes the major part of the contract and is an integral part of the same. This is also borne out by the fact that the applicant is to receive one half of the total fees to be paid by HPRIDC and the other half is to be shared by the other two JV partners.

8. Summing up, the jurisdictional Commissioner has concluded that the applicant has a PE in India and the fees received by HPRIDC are attributable to such PE and is thus taxable in India as "profits & gains of business or profession" under Article 7 read with sec. 44DA of the Act as per the rates in force.

9. Before the case was taken up for hearing on merits under section 245R(4) of the Act on 20.10.2007, through a letter dated 15.10.2007, the Director of Income-tax(International Taxation),Mumbai, submitted that the 'J.V.', which has received the contract from the HPRIDC is, in fact, assessable as an 'Association of Persons' (AOP) under the provisions of the Income-tax Act. In other words, the jurisdictional Commissioner has emphasized that the entire income received by the joint venture from HPRIDC for the performance of the contract/obligations is assessable in the status of an AOP and is liable to be taxed in consonance with the provisions of the Act.

10. In course of the hearing of the case on merits, the learned counsel, on behalf of revenue, has strenuously argued that the status of the JV should be treated as an AOP in accordance with section 2(31)(v) of the Act read with the Explanation appended thereto. He also emphasized the fact that the JV has all the ingredients present in the agreement for conclusively treating a 'person' as an AOP. As per the Revenue, where there is a combination of persons forming a joint enterprise and where there is common purpose/common action, the same is to be regarded as AOP. The Revenue submitted that the question whether the J.V. (GC – Rites – Secon) can be regarded as an A.O.P. should be decided first. The learned counsel on behalf of the applicant had also no objection if the Authority gives ruling in respect of the question whether J.V. is assessable in the status of an A.O.P.

11. Accordingly, the following question is framed for consideration, at the outset, in addition to those set out in paragraph 4 supra.

(i) Whether, in the factual as well as the legal matrix, the Joint Venture can be treated as an association of persons (A.O.P.) in consonance with section 2(31)(v) read with the Explanation to section 2 of the Act and liable to be assessed as such under the Income-tax Act?

This will be treated as 1st question.

12. The learned counsels for both the parties, as per the Proceedings record, agreed that if the applicant was to be treated as an A.O.P. the other questions do not arise for consideration.

13. The Revenue has strongly contended that as per the terms/clauses of the contract agreement the service agreement between the client (HPRIDC) and the J.V. Consultant (Geoconsult – Rites Ltd. – Secon Ltd.), the concept of J.V. being an A.O.P. does float to the surface, in as much as there is an 'association' for the common purpose, common action and the common management scheme with an object to produce profits or gains. It has also been contended that their common action or management is for the development of seven tunnels in Shimla and other parts of Himachal Pradesh with the input of technical/professional expertise through the deployment of technical personnel, environmental specialists and social impact specialists. The learned counsel for the revenue has emphasized the fact that the members of the J.V. are jointly and severally responsible (Ref. Clause 12.1 of the Service Agreement) and if a member delays or fails to fulfill its obligations, he shall be deemed to be in default and shall indemnify the other Member in respect of the consequences. (Ref.: Clause 12.2). The revenue has also drawn attention to Para I of Schedule '3' of the Agreement which also lays down that all the parties shall be jointly and severally liable for the satisfactory and successful execution / completion of the work in all respects.

14. The revenue has further tried to drive the point home that the detailed allocation of the work, as given in the service agreement (Annexure I to Schedule 4), amply establishes the fact that the members of the J.V., in various areas of the work, share various work responsibilities amongst themselves. To be specific, the prime responsibility of Rites Ltd. is in respect of economic and financial analysis, traffic engineering analysis, environmental servicing, surveys etc. Besides, Geoconsult, does primary work relating to collection of topographic maps, seismological data, satellite enquiries and designing reports etc. Rites Ltd. has got the prime responsibilities relating to economic and financial analysis comprising of Traffic Surveys, socio-economic profile of the area vis a vis the impact of the project and it also does baseline surveys, inclusive detailed environmental studies etc. Further, preparation of preliminary design report, detailed design specifications/construction plan and topographic etc. reports are done by Secon Ltd. In other words, all J.V partners are working in tandem with each other.

15. The Revenue submitted that M/s. Rites Ltd. and M/s. Secon Ltd. (2nd and 3rd Party) are responsible for invoicing to the lead partner (Geoconsult) for their services as per the contract and the lead partner is required to prepare a consolidated invoice to be submitted to the client (Ref.: Clause 1 of schedule 4). It has also been argued that distribution of fees earned by the J.V. is also distinctly discernible – Geoconsult (50%), Rites (20%) – Secon (30%).

16. The reliance by the applicant's counsel on the earlier decision of the AAR, in the case of Van Oord ACZBV, reported in 248 I.T.R. 399(AAR) is distinguishable on facts as well as on the legal aspect, as contends the Revenue. The Authority's decision is distinguishable on the facts in the sense that in Van Oord's case(supra), essential ingredients i.e. Joint Management, joint liability and sharing/production of profits were not much explicit, and on the basis of the clauses therein, the Authority held that the object was not to 'produce income'. As against the case of Van Oord (Supra), in the instant contract, there is clearly an object to produce profit and the gross revenue is shared in a specified ratio. (50:20:30). The fact that individual expenses are to be borne by the J.V. Partners is not relevant and what is important is the sharing of the gross revenue/profits. In fact, the sharing of profits or gains can mean sharing of the receipts also. Though in the instant case, the sharing of gross revenue or gains is clearly there, the Revenue submits that with the insertion of the Explanation to Section 2(31) w.e.f. 1.4.2000, the ingredient to produce income, is no longer required. In other words, what is required is (a) common business purpose and (b) common management.

17. The learned counsel for the Revenue has also placed reliance on the decisions of the Apex Court in the case of C.I.T. vs. Indira Balkrishna, 39 I.T.R. 546 (SC), and in the case of Mohd. Noorullah vs. C.I.T., 42 I.T.R. 115 (SC) followed in the Murugesan vs. C.I.T. 88 I.T.R.432(SC) wherein it has been held that in order to constitute an A.O.P., persons must join in for common purpose or action or common mechanism and the object of the association must be to produce income. In the instant case, as contended, all the criteria laid down in the above judgments stand satisfied.

18. Summing up, the learned counsel for the revenue has contended that the entity to be assessed in India on the receipts from HPRIDC is the J.V. in the status of an A.O.P., based on the decision of the Supreme Court in the case of I.T.O. vs. Atchiaiah, 218 I.T.R. 239 (SC). It has thus conclusively been argued that the A.O.P. should be taxed @ 41% on the net basis, inclusive of the applicant's share.

19. Countering the contentions raised by the revenue, the learned counsel for the applicant has strongly contended that the J.V.(GC-Rites-Secon) can not be regarded as an A.O.P., primarily because of the fact that the contract has been awarded to the consortium/J.V. for the convenience of execution. Further, individual scope of work for each member has been separately identified and it clearly limits the 'nature of co-operation' to the extent of co-ordination only for the satisfactory completion of the whole project. It has also been emphasized that as per clause 6.2 of the contract Agreement dated 10th August'06, the members of the J.V. do not share the profits of the J.V., as the entire income goes separately to the members and not to the J.V. There is no provision in the J.V. agreement, which indicates the sharing of profits; as the members' fees are separately specified for the services to be rendered by each member and it is in this context only separate bills and invoices are raised, separate Bank accounts and separate guarantees have been provided. It has accordingly been stated that there is only 'sharing of revenue' instead of 'sharing of profits' and each member in the

consortium is executing a 'stand-alone' and independent portion of the over-all contract for the client and the only purpose of associating together is the client's insistence for the same. There is, in fact, no spirit of partnership or co-ventership which are crucial ingredients for establishing an A.O.P.

20. In additional submissions, the learned counsel for the applicant has contended that the concept of an A.O.P. tantamounts to only getting together of two independent entities under a loose arrangement to co-operate with each other and to co-ordinate their respective scope of work and if the ingredients of producing income or sharing of profits is not existing, the entity can't be regarded as an A.O.P. In other words, it has been emphasized that nothing has been done by J.V. to produce income (Ref. Indira Balkrishna 39 I.T.R. 546). The learned counsel has strongly placed reliance on the decision of the Authority in the case of Van Oord ACZ B.V. 248 ITR 399, AAR, and has emphasized the fact that the facts of the said case (Van Oord, Supra) govern the facts of the instant case. The decision of the Apex Court in the case of I.T.O. vs. Atchiah, 218 ITR, 239 cannot be given such a wide coverage so as to make it impossible for any A.O.P. to be taxed in the hands of individual Members. For this contention, the learned counsel has relied on the provisions of section 67A and section 86 of the Act and had argued that if the decision of the Apex Court in the case of Atchiah (218 ITR 337) were literally followed, these provisions (sec. 67 A and Sec.86) would become redundant. It has also been contended that in the case of the applicant, gross revenue itself is directly paid to the each member, so there will be no taxable income earned by the A.O.P.

21. As regards the P.E., it has been argued by the learned counsel for the applicant that Dr. Prinzel's role is quite limited to co-ordination and 'liaisoning activity' and does not involve execution of the actual project itself. Since Dr. Prinzel is totally involved in another project called PIR PANJAL Project entered into by this very J.V., he does not get time for the HPRIDC Project. Incidentally, the learned counsel for the applicant, in course of the hearing, admitted that Pir Panjal Project of J.V. with the client is being assessed in the status of A.O.P. However, in the instant project, there is neither 'fixed place of business or office' nor any place of management, branch etc., as enumerated in Article 5 of the DTAA. Consequently, there is no PE in India, and the income can't be taxed under the head 'business income'. So, the income, as per the agreement with HPRIDC is "fee for technical services" covered under Article 12 of the DTAA between India and Austria, and the same is subject to tax on a gross basis @ 10% only.

22. We have addressed ourselves carefully to the rival submissions, both oral as well as written, relating to the first question (para 11) concerning determination of the status of the J.V.; being that of an 'association of persons'. Section 4 is the charging section under the Income Tax Act, 1961 and it imposes a tax on the income earned by a 'person' in the previous year. 'Person' has been defined in section 2(31) of the Act as under:-

Section 2: xx xx xx

Clause(31) 'Person' includes:-

- (i) an individual
- (ii) a Hindu Undivided Family
- (iii) a company
- (iv) a firm
- (v) an association of persons or a body of individuals, whether incorporated or not,
- (vi) a local authority; and
- (vii) every artificial juridical person, not falling within any of the preceding sub-clauses,

*[Explanation – For the purpose of this clause, an association of persons, or a body of individuals or a local authority, or an artificial juridical person, shall be deemed to be a person whether or not such person or body or authority or Juridical person was formed or established or incorporated with the object of deriving income, or profits, or gains]

* w.e.f. 1.4.2002 by Finance Act, 2002.

23. When the above section is paraphrased, it crystallizes that the word 'association of persons' has a wider connotation. As legislative history bears, there has been amendment in the section 2, clause 31; in as much as prior to 1939, the phrase used in the 1922 Act was 'association of individuals'. The amendment seems to have been made to remove any doubt as to the assessability as a unit of an association, of which the members might not, strictly speaking, be called 'Individuals'. The phrase 'association of persons' is of very comprehensive import. Under section 3(42) of the General Clauses Act, 'person' includes any company or association or body of individuals, whether incorporated or not. Therefore, an 'association of person' may have its members companies, firm, Joint families and associations (M.M Ipoh vs. C.I.T. 67 I.T.R.116 SC). Evidently, the companies entering into a J.V. can also be an assessable unit as an A.O.P.(67 I.T.R. 771, Cal.)

24. In various judicial pronouncements, the courts have enunciated the essential ingredients which go into constituting 'an association of persons'. In fact, the word 'association of persons' has not been used in any technical sense but has to be construed in their plain ordinary meaning (Ref. In re Elias 3 I.T.R. 408, 415, Md. Abdul vs. C.I.T. 16 I.T.R. 426). Analysing its plain, ordinary meaning, the Supreme Court observed in the case of C.I.T. vs. Indira Balakrishna, 39 I.T.R. 546, :-

"... the word 'associate' means according to Oxford Dictionary, 'to join in common purpose, or to join in an action' ... Therefore, an 'association of persons', must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains."

The Andhra Pradesh High court, after considering the previous decisions has, in the case of Deccan Wine and General Stores vs. C.I.T. 106 I.T.R. 111, laid down the principles governing an A.O.P. as under:-

"It is therefore clear that an association of persons does not mean any and every combination of persons. It is only when they associate themselves in income-producing activity that they become an association of persons. They must combine to engage in such an activity, the engagement must be pursuant to the combined will of the persons constituting the association: there must be a meeting of the minds, so to speak. In a nutshell, there must be a common design to produce income. If there is no common design, there is no association. Common interest is not enough. Production of income is not enough. This interpretation of the expression 'association of persons' flows from the meaning of the word 'association'."

25. The Explanation inserted in clause 31 to the Section 2 of the Act with effect from 1.4.2002 provides that an association of persons will be deemed to be a person whether or not it is formed with the object of deriving income. In other words, it is not essential that an A.O.P. should necessarily produce income. I, however, find that in the instant case, there does exist an object to 'produce income'.

26. From the above, the crystallized Judicial view is that the essentials of an association of persons (AOP) are the following :

- i) Two or more persons
- ii) Voluntary combinations
- iii) A common purpose or common action with object to produce profit or gains¹. However, the object to produce profit or gain is no longer a sine qua non with the insertion of the Explanation as discussed above.
- iv) Combination in Joint Enterprise
- v) Some kind of scheme for common management

27. Based on the above touchstones and discussions, it seems imperative for us to refer to a few clauses in the 'contract Agreement' as well as in the 'service Agreement'. The parties (G.C-Rites-Secon) had agreed to 'collaborate' for all work associated with the consultancy services for feasibility design of Road Tunnels in Shimla and other parts of the State (Ref. Conditions and terms in the service agreement, pg.2). The contract is between J.V. partners and HPRIDC and any income earned by the J.V. would be income of the J.V. as per the contract Agreement, and not that of the individual partners. In this regard, it will be quite apt to extract the relevant clauses of the Contract Agreement as well as Joint Venture Agreement, which are as follows:-

Contract for Consultant's Services (lump sum) between HPRIDC and Joint Venture

Preamble to the Contract :

JV will be jointly and severally liable to the client for all the Consultant's obligations under the contract.

Clauses referred to by the respective Parties :

6) Payments to the Consultants :

6.1) Lump sum payment – The total payment due to the Consultant (JV) shall not exceed the contract price which is an all inclusive fixed lump sum covering all costs required to carry out the services described in Appendix 'A'. Except in so far as there is change in the taxes.

6.4) Payments will be made to the account of the Consultant and according to the payment schedule stated in the Spl. Conditions.

Joint Venture Agreement between GC, Rites and Secon.

Preamble : The three parties have agreed to collaborate for all work associated with the "consultancy services for feasibility & detailed design of road tunnels (project)". The Members have agreed to form a joint venture to provide the said professional engineering services. The contract for said services was awarded to the JV on 10.8.2006.

2.0 Joint Venture :

2.1 The Members hereby establish a joint venture for an unincorporated association under the name of GC – Rites Secon JV for entering into the Services Agreement with the client and performing all the services to be undertaken for the project by the JV under the Services Agreement.

2.2 & 3.2 The Members shall appoint the Leading Member and the representative of the joint venture for the purpose of correspondence and discussion with the client in regard to interpretation and alteration of terms and services to be performed.

4.2 Each Member shall be responsible for fulfilling the obligations prescribed in Schedule (3) in accordance with the terms of Services Agreement to the satisfaction of the client.

7.1 No Member shall have authority to bind or to make any commitment on behalf of joint venture or of any other Member unless such authority is expressed in writing.

8.2 All documents prepared by either of the Members in connection with the performance of work under the Services Agreement which are to be submitted to the

client or to third parties shall be signed by the team leader and be circulated to the Members.

8.3 Each Member shall have un-restricted access to any work carried out by the Members in connection with the project.

12.0 Member in default :

12.1 In the event of insolvency of a Member, the other Members are irrevocably appointed to act for the Member in all matters affecting performance of the Agreement, "being jointly and severally responsible on its behalf".

12.2 A Member that delays or fails to fulfill its obligations shall be deemed in default and shall indemnify the other Member in respect of the consequences.

12.7 Any sums received by JV in payment for the defaulting Members obligations already undertaken shall be used to compensate any loss or damage resulting from the default of that Member.

12.4 If the default of a Member is such that it is in substantial breach of obligations, the other Members shall be entitled to reassign the work.

18.0 Guarantees and Bonds

18.1 The Members severally shall provide guarantees and bonds in proportion to their respective shares in the services.

Schedule III : Allocation of Obligations (vide clause 4)

1. Distribution of duties between JV partners :

Notwithstanding the provisions of JV Agreement or any other internal arrangement amongst themselves, all the parties shall be jointly and severally liable for the satisfactory execution and completion of the work in all respects as per the terms and conditions set forth by the client.

Distribution of duties and responsibilities : Geo Consult :

(Phase I & II) – General Tasks and Particular tasks

A) GEOCONSULT ZT GmbH – AUSTRIA

i) Phase I (Project Preparation):

General Tasks: Project Management, Design Responsibility/ Support for particular tasks.

ii) Phase II (Project Preparation):

General Tasks: Project Management, Design Responsibility/ Support for particular tasks.

Particular Tasks, Phase I and Phase II :

1. As the lead firm, managing the day-to-day activities of the Joint Venture including project coordination, reporting, approvals from appropriate authorities etc.
2. General and contract administration functions.
3. To arrange Bank Guarantee for his share of Euro part of the contract amount for advance (mobilization) payment.
4. To raise invoices and coordinate for payments from the Client.
5. Provide the appropriate man-months of professional service and key personnel, as indicated in Annexure 3.
6. Within the framework of the manpower allocated, will perform all activities & technical work as necessary as per the Scope of Services stipulated in the Contract.
7. Detailed tasks as shown in Annexure I

Secon Pvt.Ltd and Rites Ltd.

Distribution of duties and responsibilities is on the same pattern as those of M/s.Geo Consult ZT.GmbH-Austria.

Schedule IV: Financial and Remuneration (vide clause 16)

(1) The distribution of fees between JV Members shall be as given in Annexure 2 (vide p.132). (Approx. ratio being 150%, 20% and 30%). Second and third party (Rites and Secon) shall be responsible for invoicing to the lead partner for their services in accordance with the provisions of the contract. The leading partner shall prepare a consolidated invoice and submit it to the client after check. Payment in the bank accounts of respective Members shall be made directly by client against the individual invoices raised by JV Members.

(2) Each Member shall bear its own costs and expenses for promotion and proposal preparation (tender stage)

(5) Each Member shall bear its own costs and expenses in regard to any Professional indemnity insurance, bank guarantee, insurance of man power.

(7) Each Member shall keep its own accounts in respect of payments due based on invoices for its own financial affairs.

(8) Investments required for the works shall be brought in by the Members as per mutual agreement.

Detailed tasks of JV Members (vide Schedule 3) :

The chart shows the prime responsibility for preparing detailed specifications for engineering analysis for feasibility study reports is with Geo Consult. It includes detailed survey, investigation and design (including detailed geo-tech and sub-services investigations for the proposed tunnels, access roads and bridges). Preparation of feasibility report and preliminary design report is also the primary responsibility of GC. Detailed engineering and geo-technical land material investigations as well as hydraulic investigations is also the main concern of GC.

28. A close look into the various clauses as extracted above reveals that all the essential ingredients of being an AOP, as enumerated in para 26 above, stand satisfied in this case (G.C – RITES-SECON combine). To be more eloquent, the J.V. partners have 'associated' themselves with a 'common design' to provide consultancy services to the client for the development of seven tunnels in Shimla and other areas of Himachal Pradesh and the common act / objective of the J.V. Partners is to earn income in the wake of consultancy. The Preamble of the J.V. agreement clearly shows the intention of the J.V. partners to collaborate for all the work associated with the project which is to be managed on a Joint basis by all the members (clause 2.1, 3.1 of the J.V. agreement). The detailed allocation of work in schedule III as reproduced in the preceding paras amply points out the fact that in most of the cases the members of the J.V. assist each other in the completion of the work. The J.V. Partners are jointly and severally liable to the client (HPRIDC) for the obligations and the total payments are also to be made to the J.V. and the said payment is also linked to the increase and decrease in the cost as per the mutual agreement with the client. Simplistically speaking, the performance of these services to the client generates the J.V.'s income. As such, the inescapable inference is that the object of the J.V. is also to produce income. Even if we go by the work distribution amongst the J.V. Partners, it crystallizes that their (GC-Rites-Secon) common goal/action or design is to prepare the feasibilities and detailed design of tunnels in Shimla and other parts of Himachal Pradesh. Thus, all the partners of J.V. have joined in for common purpose on their own volition to produce income which is shared in certain ratio. The applicant's plea that the payments from the client get credited in the respective Bank accounts of the J.V. members will not be of much help to the applicant, because it is the J.V. which earns the income in the wake of contract. Similarly, reliance on a few other clauses by the applicant's counsel goes in a tangent way.

29. The learned counsel for the applicant has placed heavy reliance on the earlier decision of the Authority in the case of Van Oord ACZ BV, 248 I.T.R. 399 and has submitted that the facts of the instant case are identical with those of Van Oord (Supra). On a careful perusal, it crystallizes that the facts are clearly distinguishable. In the case

of Van Oord (Supra), it was clearly written in the clauses of the agreement that "each of the parties expressly agrees that it is not their intention to carry on business in common with other parties with a view to profit ... Each party shall bear its own losses and retain all profits arising from the performance of its requisite work package". In the instant case, there is no such stipulation either in the contract Agreement or service agreement. On the other hand, the clauses, as reproduced above, clearly indicate that, there is 'a meeting of minds' coupled with 'common design' and common purpose' which, in its wake produces income also. The plea of the applicant's counsel relating to maintenance of separate Bank accounts/separate guarantees and separate billing by the members, in our opinion, pale into periphery, once main ingredients for an association of persons stand satisfied. Similarly, section 67A and section 86 against which the learned counsel has leaned against is not at all relevant for the determining the status that of an A.O.P. Section 67A was inserted by the Direct Taxes Law (Amendment) Act, 1989 w.e.f. 1.4.89 to provide the method of computation of a member's share in the income of an A.O.P, or B.O.I. Section 86 of the Act relates to non-taxability of the income of the members of the A.O.P. computed in the manner laid down in section 67A of the Act. Thus, section 86 it is also referable to section 67A of the Act. The relevance of this section (sec.67A) has been considered in leading textbooks. The following passage in Sampath Iyengar's commentary (10th Edition, revised by S.Rajaratnam) may be usefully quoted:-

"Assessment of an A.O.P. mandatory

Section 67A has lost its relevance after the decision of the Supreme Court in I.T.O. vs. Atchaih, 218, I.T.R. 239, which has held that there is no option either for the revenue or the assessee for assessing the members directly, as was possible under the Income Tax Act 1922. Such option is not available under the I.T.Act, 1961. Where the Association of person is assessed directly, it is entitled to special deduction under section 80M on its income from dividends (CIT vs. Puja Investments(P) Ltd. 272 I.T.R. 606, P&H). It is also entitled to carry forward and set off its losses (Ref. Birla Tyres Ltd. vs. C.I.T. 267 I.T.R.(A.T.) 1 Cal.)"

Thus, the reliance on section 67A and section 86 by the applicant's counsel seems to be misplaced.

30. Placed in the backdrop of the above discussion, I am of the opinion that the J.V. constitutes an 'association of persons' in consonance with section 2(31)(v) read with Explanation thereto. Further, the A.O.P. only is to be taxed in pursuance of the decision of the Apex Court in the case of I.T.O. vs. CH.ATCHAIH (Supra) wherein it has been held as under:-

"A comparison of the provisions of the Indian Income-tax Act, 1922, and the Income-tax Act, 1961, immediately brings out the difference between them. Section 3 of the 1922 Act provided that in respect of the total income of a firm or an association of persons, the income-tax shall be charged either on the firm or the association of persons or on

the partners of the firm or the members of the association of persons individually. It is evident that this option was to be exercised by the Income-tax Officer keeping in view the interests of the Revenue. In such a situation, it was generally held that once the Income-tax Officer opted for one course, the other course was barred to him. But no such option is provided to him under the present Act. Section 4 of the Act of 1961 says that income-tax shall be charged on the total income "of every person" and the expression "person" is defined in clause (31) of section 2. The definition merely says that the expression "person" includes, inter alia, a firm and an association of persons or a body of individuals whether incorporated or not. There are no words in the present Act which empower the Income-tax Officer or give him an option to tax either the association of persons or its members individually or for that matter to tax the firm or its partners individually. If it is the income of the association of persons in law, the association of persons alone has to be taxed; the members of the association of persons cannot be taxed individually in respect of the income of the association of persons. Consideration of the interests of the Revenue has no place in this scheme. Where Parliament wanted to provide an option, or a discretion, to the Income-tax Officer, it has provided so expressly."

31. In fine, the J.V. is to be taxed in the status of an association of persons @ 41% net basis. Accordingly, the question 1, as formulated in Para 11 above, is answered in favour of the revenue.

32. Ruling:

In view of the foregoing discussion, I answer the first question in favour of the revenue i.e. the J.V. is to be assessed to tax as an 'association of persons' only. Consequentially, the other three questions, as contained in para 4 above, do not merit rulings.

Per P.V.Reddi, J.

I have perused the well-considered ruling of learned Member. While I am in agreement with the conclusion reached by him, I felt that in view of the importance of the question, I should supplement to his opinion, may be at the risk of repetition here and there.

2. The term 'association of persons' is not a term of art (vide Murugesan vs. CIT). It has to be understood in its ordinary sense*. In CIT vs. Indira Balkrishna** which is an oft quoted decision, the Supreme Court approvingly referred to what Beaumont C.J. said in CIT vs. Laxmidas***: "an association of persons must be one in which two or more persons join in a common purpose or common action and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains".

3. The Supreme Court then referred to the apt observations of Costello J. in his separate but concurrent opinion in In re Elias****. The Supreme Court remarked that Costello J. "put the test in more forceful language". This is what Costello J. stated :

".....although these four persons did not constitute a body which was the same as partnership, it was in many respects similar to a partnership and was approximate to a partnership and it may well be that the intention of the legislature was to hit combinations of individuals who were engaged together in some joint enterprise but did not in law constitute partnerships.....".

The concluding words of Costello, J. are also important :

"When we find, as we do find in this case, that there is a combination of persons formed for the promotion of a joint enterprise banded together if I may so put it, co-adventurers to use an archaic expression, then I think no difficulty whatever arises in the way of saying that in this particular case these four persons did constitute an "association of individuals" within the meaning of both Section 3 and Section 55 of the Indian Income Tax Act, 1922".

4. The learned Judges of the Supreme Court, after quoting the above passages added a note of caution, i.e. "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".

5. The words of Costello J. together with the dicta in Laxmidas case (supra) bring out with admirable clarity the real meaning and connotation of the expression "association of persons". They furnish sufficient guidance to resolve the present controversy.

6. I may also refer to few other cases which throw some more light on the approach to be adopted. In Mohammed Noorullah vs. CIT[^], after adverting to the facts of the case, the fact that the business was carried on as a "single business" with "unitary control" was taken into account for reaching the conclusion that the joint heirs constituted AOP. It was observed that the term AOP applied to a combination of individuals engaged together in some joint enterprise but not constituting partnership.

7. The following passage from the decision of Supreme Court in Shanmugham & Co. vs. CIT^{^^} is also apposite :

"The control and management of business which was in the hands of the receivers was a unified one. The receivers had joined in a common purpose and they acted jointly. The profits were earned on behalf of the persons who had a common interest created by the order of the Court and 'were on that account an association of persons'. The existence of specific or defined interest in the profits did not make the earning any the less of an 'association of persons'. Liability to tax depends upon the earning of profits by a unit and not upon the ultimate division of the profits."

8. The dicta in the case of Deccan Wine & General Stores v. C.I.T (A.P.)# is very instructive. Chinnappa Reddy, J. speaking for a Division Bench of the A.P. High Court, brought forth the distinction between AOP and body of individuals in the following words:

"It is, therefore, clear that an association of persons does not mean any and every combination of persons. It is only when they associate themselves in an income-producing activity that they become an association of persons. They must combine to engage in such an activity; the engagement must be pursuant to the combined will of the persons constituting the association; there must be a meeting of the minds, so to speak. In a nutshell, there must be a common design to produce income. If there is no common design, there is no association. Common interest is not enough. Production of income is not enough. This interpretation of the expression "association of persons" flows from the meaning of the word "association". When the word "association" is replaced by the word "body", it must follow that the feature of common design or combined will so peculiar or distinctive to an association of persons is not a characteristic of a body of individuals."

9. The legal concept of AOP in the specific context of income-tax law has thus been clarified by the Supreme Court as well as by the High Courts. The next step is to apply the law as expounded in the judgments cited above. For this purpose, let us take stock of the salient features of the arrangement between the parties constituting the "joint venture."

10. First, the contract for doing the work of "Consultancy Services for feasibility & detailed Design of Road Tunnels" was awarded to the 'Joint Venture' (hereafter referred to as JV) consisting of Geoconsult ZTGMBH (applicant), RITES LTD and SECON Pvt. Ltd. There was a MOU entered into by the three entities on 12-4-2006 according to which a Joint Venture has to be formed to undertake the contract. This was followed by execution of contract on 10th August 2006 which is known as "Services Agreement" between HPRIDC and the Joint Venture partners. In the Preamble to the contract, the applicant was described as "lead firm" in the Joint Venture. The Preamble further recites that each of the members of JV "will be jointly and severally liable" to HPRIDC – the 'client' "for all the Consultant's obligations". 'Consultant' is the Joint Venture and not the individual members. As per clause 6, a fixed lump sum amount will be paid to the Consultant (JV) for all the services rendered by it as per the payment schedule and such payments will be made "to the account of the Consultant". In Appendix A, the description of the services to be carried out by JV is set out. Phases I and II with which the JV is concerned relate to 'project preparation'. JV is not concerned with phase III, i.e., project implementation.

11. Thus, it is seen that the Client namely, HPRIDC has entered into the contract with a "consortium" of three Companies, and it looks to that joint enterprise for the due execution of work and the contract price is stipulated to be made to the JV as a unit. The contract between HPRIDC and JV gives sufficient indication of a combination of three entities into one with the common purpose of executing the work entrusted to the JV. That each member is made jointly and severally liable for performance of work is another important stipulation which points to the existence of AOP.

12. Now, we come to the "JV Agreement" between the three entities executed on 22-9-2006. Obviously, it is a sequel to the Agreement with HPRIDC. I shall refer to the relevant terms thereof which have bearing on the disputed question.

13. The JV Agreement is prefaced by a recital that "the three parties have agreed to collaborate for all work associated with the consultancy services.....". The Preamble discloses that under the terms of MOU dated 12/4/2006, the Members have agreed to form a Joint Venture to provide professional engineering services under the contract with HPRIDC. Cl. 2.1 expressly states : "The Members hereby establish a Joint Venture being an unincorporated association under the name of Geoconsult – Rites – Secon J.V. for the purpose of entering into the Services Agreement with the Client and performing all the services to be undertaken for the project by virtue of that Agreement." Cl. 2.2 read with 3.2 provides for the appointment of a 'Leading Member' and further states that the representative of the Leading Member shall be the representative of the Joint Venture for the purpose of correspondence and discussion with the Client in regard to the interpretation of and alteration to the terms of the Services Agreement and to the services to be performed. It is seen from Schedule I that the leading party of the JV is the applicant - Geoconsult and Dr. F.Prinzl of Geoconsult is the Team Leader. Thus, the

applicant who is the recipient of the major part of consideration manages the JV and coordinates with all concerned. The formation of association with a common object and unified management is thus evident.

14. In accordance with clause 4.2, Schedule 3 lays down the distribution of duties and responsibilities between the JV Members. General tasks and particular tasks entrusted to each member of JV are set out therein. Such demarcation of duties does not in any way affect the integrity of the association. Obviously, keeping in view the expertise or experience of each of the members and for the convenient execution of the project, such distribution of work has been evolved by way of internal arrangement. In this context, clause 1 of Schedule 3 which deals with distribution of duties is important. It says that notwithstanding the provisions of JV agreement or any other internal agreement among themselves, all the parties shall be jointly and severally liable for the satisfactory execution and completion of the work as per the terms and conditions set forth by the client. Further, a perusal of Annexure I to Schedule 3 which contains details of allocation of work would show that although Geoconsult had the 'prime responsibility' in respect of certain items of work, another member also renders 'assistance' in relation to the same item of work. So also, where the prime responsibility is undertaken by Secon or Rites, Geoconsult is bound to render assistance, as per the Chart. Another clause which needs reference in this context is cl. 8.3 which says that each member shall have unrestricted access to any work carried out by the members in connection with the Project. One more provision that is relevant is cl. 12.4. It provides for reassignment of work by the other members in case a member committed substantial breach of its obligations. All these provisions reveal unity of action, common management and planned coordination among the JV partners. Cl. 7.1 to which attention has been drawn by the applicant's counsel, does not support his case. Cl. 7.1 says that no member shall have authority to bind or to make any commitment on behalf of the joint venture or any other member unless such authority is expressed in writing. It is a safeguard against the unauthorized acts of the individual member or members of the joint venture and does not in any way impinge on the functional unity of JV.

15. Coming to the financial aspects of the transaction, cl. 16.3 says that the payments to the Members shall be made in accordance with Schedule 4 and the financial policy of the joint venture as set out in that Schedule. Annexure 2 to Schedule 4 gives the details of distribution of fee between JV partners under two heads, 'remuneration' and 'reimbursable'. Approximately, the remuneration receivable by Geoconsult, Rites and Secon is in the proportion of 50%, 20% and 30% respectively. Para 2 of Schedule 4 states that each member shall bear its own costs and expenses incurred for promotion and 'proposal preparation' (i.e. at pre-contract stage). The manner of receiving payments from the client is set out in para (1) of Schedule 4. It is provided therein that Secon and Rites are responsible for invoicing to the Lead Partner for their services in accordance with the provisions of the contract. The Lead Partner shall prepare a consolidated invoice and submit it to the client after check. Payment in the bank accounts of respective Members shall be made directly by Client against the individual invoices raised by the JV Members. Though each Member receives payment directly, the bills are processed by the Lead Partner (applicant) which sends a consolidated invoice after checking the particulars. This again emphasizes the aspect of the joint venture partners acting in tandem through the lead Member even for receiving the payments. The payments must be deemed in law to have been made to and received by the Joint

Venture as a unit, though the members have authorized the Client to issue cheques to the individual accounts based on invoices.

16. The integral connection between the JV Members and their joint accountability to the client as well as their inter se accountability is further discernible from clause 12 which bears the caption 'Member in default'. Cl. 12.1 provides that in the event of insolvency of a member, the other members are irrevocably appointed to act for that member in the matter of performance of the agreement "being jointly and severally responsible on his behalf". The obligation of a member to indemnify the other member in case of delay or failure to fulfil its obligations (vide cl. 12.2) and the stipulation in cl. 12.7 to the effect that the sums received by JV towards payment for the work done by defaulting member shall be used to compensate any loss or damage resulting from the default of that Member are other indicators of the commonness and unity of the enterprise formed for the purpose of executing the works under the Services Agreement.

17. The applicant's counsel laid great stress on the fact that there is no sharing of profit or loss and each member of JV makes its own investment and maintains its own accounts. That is where, according to the learned counsel, the unity breaks down and the requisite ingredient of profit-making objective remains unfulfilled. It is difficult to uphold this contention. AOP is not the same as partnership, though it closely resembles partnership. It has been said so in many cases. The attributes of partnership ought not to be imported in toto for the purpose of ascertaining the existence of AOP. The agreement to make investments in a certain manner and to share the profits in definite proportions and the maintenance of accounts of receipts and expenditure which are all the special features of a partnership need not be present in AOP. It is enough if the overall common objective of the joint enterprise is to earn income through collective effort. The members of JV sharing the gross remuneration in the agreed proportion is equally consistent with the existence of AOP. The profits or losses may be the concern of individual members. But, the fact remains that all the members of AOP are pursuing the common object of making profit or deriving income, by organizing themselves into a Joint Venture to carry out the work for valuable consideration. The ultimate division of profits amongst the members of the joint enterprise is not a relevant criterion, as seen from the observations of Supreme Court in the case of Shanmugham & Co. (supra). It is also pertinent to notice para 8 of Schedule 4, according to which the investments required for the works shall be brought in by the Members as per mutual agreement. Thus, there is mutual understanding amongst the Members of the JV even in relation to investments in the venture.

18. Thus, the essential features and stipulations in the two agreements coupled with the background in which the joint venture was formed overwhelmingly point out the existence of 'association of persons' as it is understood in law and in ordinary parlance. Common purpose and common action pursued towards the ultimate end of earning income/profits is writ large on the face of the agreements.

19. The ruling of this Authority in Van Oord ACZ BV, IN RE (A.A.R.) does not in my view come to the aid of the applicant. True it was also a case of joint venture formed for the purpose of executing a construction contract. It is also true that the Authority relied on the fact that each of the two parties had agreed to bear its own loss or retain its own profit separately and the said feature is present in the instant case also. But then there are certain distinguishing points between that case and the present case. One of the stipulations in that agreement is : "each of the parties expressly agrees that it is not

their intention through the joint venture to carry on business in common with the other parties with a view to profit and that it is their intention to utilize the joint venture safely for the better cooperation with the employer and the division of the works and gross income arising under the contract". The Authority inter alia, relied on this clause. There was also a finding that each one had a designated and independent role to play in the building project, whereas in the present case, there is no such water-tight division of works. Above all, there is an important finding of the Authority that "there is no control or connection between the work done by the applicant and the HCC", HCC being the Joint Venture partner. There was also an observation that the intention was not to carry out any business in common. Moreover, the various clauses in the agreement

discussed supra were apparently not there in that contract. For all these reasons, we are not inclined to apply the ratio of that ruling to the present case. We do not understand the said decision as laying down a broad proposition that the absence of a stipulation to share profits and losses and the internal division of work amongst the members of the joint enterprise would negate the existence of AOP. It is however not necessary to dilate on the point whether the example of a building contractor associating with a plumber and electrician, as given in the Ruling, is appropriate or not.

20. Agreeing with the learned Member, I am therefore of the view that the applicant is a member of an 'association of persons' consisting of the applicant and two other entities. In view of this ruling, it is unnecessary to deal with the other questions, as agreed to by both the counsel in the course of hearing.

Per A.Sinha, Member

I have read the ruling of learned Member (Revenue), Mr. Rao Ranvijay Singh and also the additional reasons given by the Hon'ble Chairman and I agree with both.

Sd/-	Sd/-	Sd/-
(RAO RANVIJAY SINGH)	(P.V. REDDI)	(A. SINHA)
MEMBER	CHAIRMAN	MEMBER

F.No. AAR/745/2007/

Dated: 5.8.2008

This copy is certified to be a true copy of the advance ruling and is sent to:

1. The Applicant.
2. The DIT (International Taxation), Mumbai.
3. The Joint Secretary (FT &TR-I), M/o Finance, CBDT, Bhikaji Cama Place, New Delhi
4. The Joint Secretary (FT &TR-II), M/o Finance, CBDT, Bhikaji Cama Place, New Delhi
5. Guard File.

Sd/-

(Batsala Jha Yadav) Addl. Commissioner of Income-tax (AAR)