



# DTRTI NEWSLETTER

Issue No.61/Chennai

August 02, 2019

## TRAINING NETWORK RELATED NEWS



**Shri Rajiv Vijay Nabar, IRS, CCIT & Shri Amar Vir Singh, IRS, Pr.CIT graced the Valedictory function of the "Grievance Redressal" course held at MSTU, Madurai**



**Shri Anurag Sahay, IRS, CIT delivered the inaugural address during the Induction Course for Newly Recruited Inspectors**

## CONTENTS

**Training network related news**

**Topic for the week - Aggressive Tax Planning Schemes**

**From the Editor's Desk - How to handle OCM cases effectively**

**Section for the Week - Section 270AA**

**राजभाषा स्कंध**

**Solution to the last week's crossword- Section 35AD (Specified Business)**

## TOPIC FOR THE WEEK

### Aggressive Tax Planning Schemes

*Compiled and provided by Shri M.S. Nethrapal, IRS, Addl. CIT (continued from the last week)*

17. The Apex Court in the case of Ishikawajma-Harima Heavy Industries Ltd. vs. DIT (2007) 288 ITR 408 (SC) at para 60 had commented on interpretation of documents. It held:

*"In construing a contract, the terms and conditions thereof are to be read as a whole. A contract must be construed keeping in view the intention of the parties. No doubt, the applicability of the tax laws would depend upon the nature of the contract, but the same should not be construed keeping in view the taxing provisions."*

The divisibility of contracts can thus be inferred from the various documents/information, that indicate the EPC contracts. An indicative list is as under:

- Existence of separate agreements
- Separate consideration agreed for each components
- Invoicing
- Minutes of the meeting/ board resolution
- Customs duty documentation
- Pricing of the various components
- Bid/ offer documents
- Risk/ responsibility matrix of the arrangement
- General conditions of the contract including critical clauses

The above aspects were considered in few cases and the results of the factual analysis

in few cases found that the form of the split contracts was not present in reality and the substance was that it worked as one inextricably and organically linked contract. The splitting was done only to minimize Indian taxes. The skewed allocation of money to offshore component ensured that the Indian taxes were minimized and in many cases there were huge losses accumulated in the Indian books of the contractors. Some of the key aspects to be considered while looking in to aggressive tax planning structure of contract splitting are listed below:

a. One of the significant findings in few of the contracts was the finding of an umbrella agreement (*'Co-ordination Agreement' or 'Wrap Around Guarantee' (WAG)*), an contract which links the onshore and offshore components. The Umbrella agreement is usually a confidential document not disclosed to the department and in many forensic investigations as lead to the finding of an overarching agreement that makes the contract one organic whole. The contents of the umbrella agreement clearly bring out the timeliness, cost, risk of delivery cannot be bifurcated as two, but the contractor would be responsible for the entire project as a whole.

The umbrella agreement articulates the work scope of all the contractors involved; co-ordination of efforts; delivery time-lines; guarantee of successful accomplishment to the project owner (by the project leader/ contractor); etc. It also imposes a positive and direct obligation on the contractors (both onshore and off-shore)

to co-ordinate the execution of the works. The leader of the consortium usually also provides a warranty and representation that the separate scope of work in the split contracts when added together, constitutes the totality of the scope of the project. Under this, liquidated damages are payable by the leader irrespective of the contractor in default. Any caps in liability in the split contracts are made, subject to the overall cap in the wrap-around agreement. So it is clear that inspite of the contract splits, the risks are not spilt. In most of the cases it is found that the project contractors had the risk of delivery till commissioning and in many cases there also existed a defect liability period, where the project contractors were responsible even after the commissioning of the project.

The Apex Court's decision in *Ishikawajma-Harima Heavy Industries Ltd. vs. DIT* (2007) 288 ITR 408 (SC) reads as under:

*"The fact that it has been fashioned as a turnkey contract by itself may not be of much significance. The project is a turnkey project. The contract may also be a turnkey contract, but the same by itself would not mean that even for the purpose of taxability the entire contract must be considered to be an integrated one so as to make the appellant to pay tax in India. The taxable events in execution of a contract may arise at several stages in several years. The liability of the parties may also arise at several stages. Obligations under the contract are distinct ones. Supply obligation is distinct and separate from service obligation. Price for each of the*

*component of the contract is separate. Similarly, offshore supply and offshore services have separately been dealt with. Prices in each of the segment are also different.*

*18. The very fact that in the contract, the supply segment and service segment have been specified in different parts of the contract is a pointer to show that the liability of the appellant thereunder would also be different.....*

*70. We would in the aforementioned context consider the question of division of taxable income of offshore services. Parties were ad idem that there existed a distinction between onshore supply and offshore supply. The intention of the parties, thus, must be judged from different types of services, different types of prices, as also different currencies in which the prices are to be paid."*

The Supreme Court in the aforesaid case relied on the 'obligations' of the parties involved. Mention of supply and service agreement in different parts of the contract was held as an 'indicator' of contracts being divisible. The question is whether such divisibility based on 'obligations' of the parties is appropriate? However from the above discussions it is clear that in case there is an Umbrella Agreement or Wrap Up Agreement on Top of the contracts, then the Apex Court Judgement is squarely applicable in these cases also and the same clearly shows that the contract is indivisible and hence it needs to be treated as one composite contract.

b. In all the contracts examined by the department, there should be a detailed analysis of facts right from the stage of

tendering, submission of bids, price negotiations, acceptance of tender, execution of project, organisational set up, project control in the form of milestones, project report etc, contract profitability analysis as maintained in the ERP system and detailed analysis of communication trails of various parties involved.

i. In many cases it was noticed that most of the companies at the stage of intent, tendering, submission of bids had prepared the bid as a consolidated project without any bifurcation of offshore-onshore components.

ii. The detailed price estimation for the bids were carried out by business analysts sitting in India and looking into various profitability factors like procurement of raw materials, setting of the fabrication plants/manufacturing plants, various steps in logistics, procurement, installation and commissioning. The detailed intent along with the price estimation clearly showed that the project was done as one single organic whole and there was spilt up of on shore and off shore components in the beginning.

iii. The contract was also awarded as one single turnkey contract by the customer to the foreign companies. However it was noticed that before finalization of the work order, the foreign companies resorted to aggressive tax planning schemes and used offshore entity

has a vehicle to shift bulk of the profits out of India. The spilt up was worked out so well, that there was no scope for any exchange rate manipulations and the rates actually matched pie to pie to the original contract.

iv. The Bid documents, the bid analysis carried out by the project owner was always for one single contract and there was no scope for splitting the contract into various parts.

v. Analysis of the specifications given in the contract clearly showed that the project was a turnkey project and there were interlinking provisions between the spilt contracts which made the contract one whole. The contractors introduced many more layers by splitting the contract into four as offshore supply, offshore services, onshore supply and onshore services. A simple plain turnkey contract was made complex artificially with a single point agenda of taking tax benefit and minimizing tax payments in the country. It was also noticed that many DTAA's also provide a concept of Installation PE where only if the installation PE exists for more than six months, the profits can be attributable to India. Using this, many contractors did not declare even on work that has been done India taking a claim either that it is less than six months or stating that the work is preparatory or auxiliary in nature and hence the income does not arise/accrue in India.

*(to be continued)*

**தகுதி எனவொன்று நன்றே பகுதியால்  
பாற்பட்டு ஒழுகப் பெறின் - குறள் 111**

தகுதி என்ற ஒன்று நல்லது அது பிரித்துப்  
பார்க்காமல் எல்லாரிடமும் ஒன்றாக  
பழுக்கும் தன்மை பெற்றதால்.

Neutrality is a great virtue when one practices  
impartiality, unfailingly, towards all sections.  
(Foes, friends, strangers)

**FROM THE EDITOR'S DESK**  
**HOW TO HANDLE OCM CASES EFFECTIVELY**

*(Compiled and provided by Shri Nagendra Kumar, IRS, JCIT, Coimbatore)*

**Genesis** – Demonetisation during the period from 08/11/2016 to 31/12/2016

**Fall Out** - Rampant manipulation of books of accounts and other official records.

**Action taken by the Department**

Data related to cash deposits during demonetisation period received from various sources viz., SFT-014, FIU Cash deposit data, SFT-003, SFT-004, details of cash deposit in ITR etc., along with information of cases marked as unacceptable by the AO and where response was not submitted by person under verification were utilised for risk assessment and cases were selected for scrutiny in CASS under various scenarios – Scrutiny assessments in majority of these cases are pending to be completed.

**Assessment**

- a. Valid service of notice is to be ensured.
- b. If the assessee is unable to substantiate deposits, then under which section it is to be taxed?
- c. **Analysis of S.68 and S.69A as given below:**

**1. Section 68: Cash Credits**

**68.** Where any sum is found credited in the books of an assessee maintained for any previous year.

If the assessee is having business income, bank account constitutes his books of accounts and addition should preferably be made u/s 68.

**2. Section 69A: Unexplained Money, etc.**

69A. Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article.

If the assessee is not having business income, bank account does not constitute his books of account and addition should not be made u/s 68. Addition should be made u/s 69A.

Also applicable where assessee is not maintaining the books of accounts.

d. Always analyse and compare returns of last 3 years [ Proviso (b) to S.142(1) prevents the Assessing Officer from going back more than 3 years prior to the previous year]

**VARIOUS SCENARIOS**

The CBDT has issued internal guidance note in F.No.225/145/209- ITA-II, dated 13/06/2019.

**UNDERSTANDING THE TAXPAYER'S PROFILE**

The compliance history of taxpayer viz., regular filing of returns, nature of income/activities etc., may be reviewed to classify the taxpayer as non-business case, business case, financial entity or other category. The associated risk factors and comparable variables for detection of evasion are likely to be different and hence a segmental approach is required to be undertaken while verifying the cash deposits made during demonetization.

## Examination of Non-Business cases

For non-business cases, foremost is to ascertain the source of income of the assessee. The assessee may provide following explanations as source of cash deposit during demonetization – Savings, Loans, Gifts, Exempt Income, Streedhan etc. Following needs to be kept in consideration during verification of such cases.

1. When the source of cash deposit is claimed as Savings.
2. When the source of cash deposit is claimed as Loan received.
3. When the source of cash deposit is claimed as repayment of Loan given.
4. When the source of cash deposit is claimed as Gift.
5. When the source of cash deposit is claimed as Exempt Income.
6. When the source of cash is from an agreement to sell land.
7. When the source of cash deposit is claimed as forfeit of advance for property.

8. When the source of cash deposit is claimed as services provided in cash.

### **1. When the source of cash deposit is claimed as Savings:**

The AO may verify the details of income, expenditure and investments made by the assessee in the past. The AO may also verify the cash-in-hand position as on 31/03/2015 and 31/03/2016. In case, any major cash withdrawals from the account were there, it needs to be ascertained whether any event such as marriage, foreign trip, etc., took place where this cash could have been utilized. If a large amount of cash is claimed as past savings, the veracity of the claim should be examined in the light of the fact that despite having bank account(s), why large amount of cash was kept in hand. The withdrawals/deposits vis-a-vis cash in hand may be carefully examined regarding the necessity of withdrawals for day to day expenditure although having huge cash in hand. *(to be continued)*



Shri R. Raghupathy, IRS, DCIT and Shri U.N. Dilip, IRS, DCIT delivered the inaugural & valedictory addresses respectively during the Special Course for TROs & TRIs

**செப்பம் உடையவன் ஆக்கஞ் சிதைவின்றி  
எச்சத்திற் கேமாப்பு உடைத்து.- குறள் 112**

சிறப்பு பொருந்தியவன் செயல்கள்  
வீணாகாமல் வளரும் சந்ததிக்கும்  
தனிச்சிறப்பு உடையதாய் இருக்கும்.

The wealth of one who has a balanced view,  
will remain intact  
and will last for the next generations.

## SECTION FOR THE WEEK- S.270AA – Immunity from imposition of penalty etc.

**270AA.** (1) An assessee may make an application to the Assessing Officer to grant immunity from imposition of penalty under section 270A and initiation of proceedings under section 276C or section 276CC, if he fulfils the following conditions, namely:—

- (a) the tax and interest payable as per the order of assessment or reassessment under sub-section (3) of section 143 or section 147, as the case may be, has been paid within the period specified in such notice of demand; and
- (b) no appeal against the order referred to in clause (a) has been filed.

(2) An application referred to in sub-section (1) shall be made within one month from the end of the month in which the order referred to in clause (a) of sub-section (1) has been received and shall be made in such form and verified in such manner as may be prescribed.

(3) The Assessing Officer shall, subject to fulfilment of the conditions specified in sub-section (1) and after the expiry of the period of filing the appeal as specified in clause (b) of sub-section (2) of section 249, grant immunity from imposition of penalty under section 270A and initiation of proceedings under section 276C or section 276CC, where the proceedings for penalty under section 270A has not been initiated under the circumstances referred to in sub-section (9) of the said section 270A.

(4) The Assessing Officer shall, within a period of one month from the end of the month in which the application under sub-section (1) is received, pass an order accepting or rejecting such application:

**Provided** that no order rejecting the application shall be passed unless the assessee has been given an opportunity of being heard.

(5) The order made under sub-section (4) shall be final.

(6) No appeal under section 246A or an application for revision under section 264 shall be admissible against the order of assessment or reassessment, referred to in clause (a) of sub-section (1), in a case where an order under sub-section (4) has been made accepting the application.

### राजभाषा स्कंध इस हफ्ते के शब्द

|                      |                     |
|----------------------|---------------------|
| Top priority         | सर्वोच्च प्राथमिकता |
| Pay bill             | वेतन बिल            |
| Until further orders | अगले आदेशों तक      |
| Circulate            | परिचालित करना       |
| In-principle         | सैद्धांतिक          |

### अंग्रेजी – हिन्दी वाक्य में प्रयोग

|   |  |
|---|--|
| Immediate action is required in this matter. Please give top priority to this.    | इस मामले में शीघ्र कार्रवाई की आवश्यकता है। कृपया इसे सर्वोच्च प्राथमिकता दें। |
| The pay bill has been sent to the Zonal Accounts Office.                          | वेतन बिल को क्षेत्रीय लेखा कार्यालय भेज दिया गया है।                           |
| This order will be applicable with immediate effect and until further orders.     | यह आदेश तत्काल प्रभाव से एवं अगले आदेशों तक लागू रहेगा।                        |
| Circulate this order among the staff members and then file.                       | इस आदेश को सभी कर्मचारियों में परिचालित करके फाइल करें।                        |
| In-principle decision has been taken after adequate consideration in this regard. | इस संबंध में समुचित विचार के बाद सैद्धांतिक निर्णय लिया गया है।                |

**SOLUTION TO THE LAST WEEK'S CROSSWORD**  
**SECTION 35AD (SPECIFIED BUSINESS)**

|                 |   |                 |                 |                 |                 |   |                |                 |   |                 |   |   |                |   |                |   |                 |   |   |
|-----------------|---|-----------------|-----------------|-----------------|-----------------|---|----------------|-----------------|---|-----------------|---|---|----------------|---|----------------|---|-----------------|---|---|
| C <sup>1</sup>  | A | P               | I               | T               | A               | L | I              | S <sup>2</sup>  | E | D               |   |   |                |   | W <sup>3</sup> |   |                 |   |   |
| O               |   |                 | B <sup>4</sup>  |                 |                 |   |                | P               |   | T <sup>5</sup>  | W | O | S              | T | A              | R | S <sup>6</sup>  |   |   |
| L               |   |                 | E               |                 |                 |   | S <sup>7</sup> | L               | U | R               | R | Y |                |   | R              |   | T               |   |   |
| D               |   | F <sup>8</sup>  | E               | R               | T               | I | L              | I               | S | E               | R |   |                |   | E              |   | O               |   |   |
| C               |   |                 | S               |                 |                 |   |                | T               |   |                 |   |   | E <sup>9</sup> | H |                |   | R               |   |   |
| H               |   |                 | W               |                 | D <sup>10</sup> | I | S              | T               | R | I               | B | U | T              | I | O              | N | A               |   |   |
| A               |   |                 | A               | A <sup>11</sup> |                 |   |                | I               |   |                 |   |   |                | G | U              |   | G               |   |   |
| I               |   |                 | X               | F               |                 |   |                | N               |   |                 |   |   |                | H | S              |   | I <sup>12</sup> | E |   |
| N               |   |                 |                 | F <sup>13</sup> | R               | E | I              | G               | H | T               | S | T | A              | T | I              | O | N               |   |   |
| F               |   |                 |                 | O <sup>14</sup> | N               | E | H              | U               | N | D               | R | E | D              |   | N              |   |                 | S |   |
| A               |   | W <sup>15</sup> |                 | R               |                 |   |                | P               |   |                 |   |   |                | G |                |   |                 | T |   |
| C               |   | A               |                 | D               |                 |   |                |                 |   |                 |   |   |                |   |                |   |                 | A |   |
| I <sup>16</sup> | N | F               | R               | A               | S               | T | R              | U               | C | T               | U | R | E              |   |                |   |                 | L |   |
| L               |   | E               |                 | B               |                 |   |                |                 |   |                 |   |   |                |   |                |   |                 | L |   |
| I               |   | R               |                 | L               |                 |   |                |                 |   | F <sup>17</sup> | I | N | A              | N | C              | I | A               | L |   |
| T               |   |                 | T <sup>18</sup> | E               | N               | T | H              | O               | U | S               | A | N | D              |   |                |   |                 | T |   |
| Y               |   |                 |                 |                 |                 |   |                |                 |   |                 |   |   |                |   |                |   |                 | I |   |
|                 |   |                 |                 |                 |                 |   |                | D <sup>19</sup> | E | P               | R | E | C              | I | A              | T | I               | O | N |
| S <sup>20</sup> | L | U               | M               | R               | E               | H | A              | B               | I | L               | I | T | A              | T | I              | O | N               |   |   |



**Shri Vijayakumar, DD(Systems) and Shri Govindarajan, DD(systems) conducted sessions during the Course on Grievance Redressal held at MSTU, Madurai**

**Published by: TEAM DTRTI**