IN THE INCOME TAX APPELLATE TRIBUNAL
'G' BENCH, MUMBAI.

BEFORE SHRI R.V.EASWAR, SR.V.P. AND SHRI J.SUDHAKAR REDDY, AM

I.T.A. No. 4512/Mum/2007
(Assessment Year :2004-05)

M/s. G.V. Corporation Plot No. 1, Hariom Nagar, Mulund (East), Mumbai-400 081. PAN: AAFFG 9658 C	Vs.	Income Tax Officer – 23(3)(2), C-10, 3rd floor, Pratyaksh Kar Bhavan, Bandra – Kurla Complex, Mumbai-400 051.
(Appellant)		(Respondent)

Appellant by : Mr. Hiro Rai
Respondent by : Mr. Pragati Kumar, (CIT) DR

O R D E R

Per R.V.Easwar, Senior Vice President: This is an appeal by the assessee and it is directed against the order passed by the CIT under section 263 of the Income Tax Act for the assessment year 2004-05. The assessee has been assessed as an association of persons and it is engaged in the business as builders and construction contractors.

2. In respect of the year under appeal, the assessee filed a return of income declaring total income of Rs.Nil. In the return deduction of Rs.1,89,18,106/- was claimed under section 80IB. The return was originally processed under section 143(1) but thereafter it was taken up for scrutiny by issue of notice under section 142(1). Ultimately, the assessment was completed under section 143(3) by order dated 29.12.2006 and in this order the Assessing Officer observed that after verification of the submissions and the details furnished the income declared is accepted and the assessed income was taken at Rs.Nil. In the assessment order, the Assessing Officer also observed that the

assessee had claimed deduction of Rs.1,89,18,106/- under section 80IB.

3. After completion of the assessment as above, the Assessing Officer himself sent a proposal to the CIT on 23.4.2007 requesting the latter to take action under section 263 of the Act on two grounds. The first ground was that the return was filed indicating the status of the assessee as "firm" and in the audit report filed with the return also the status was mentioned as "firm". However, in the course of the assessment proceedings the assessee claimed the status of an association of persons which was accepted. According to the Assessing Officer, the acceptance of the status as AOP was erroneous. The second ground was that the deduction under section 80IB was wrongly given, overlooking the provisions of sub-section (2) of the section. According to the Assessing Officer, the assessee AOP consisted of M/s. Gautam Enterprises and M/s. V.M.Corporation. Under sub-section (2) of section 80IB the benefit of deduction was not available to the cases of reconstruction of existing business. It was the Assessing Officer's view that the assessee AOP was reconstructed out of the businesses carried on by the aforesaid two entities and therefore the deduction was not available. The allowance of the deduction overlooking the provisions of sub-section (2) of section 80IB was prejudicial to the interests of the revenue. For these two grounds, the Assessing Officer suggested action under section 263 by the CIT.

4. On the basis of the Assessing Officer's suggestions, the CIT called for the assessment records and examined them and found that though the assessee had claimed the status of a firm in the return of income and the audit report, the Assessing Officer had completed the assessment in the status of an AOP

which was not permissible in law as held by the Allahabad High Court in CWT Vs. J.K. Srivastava, (1983) 142 ITR 183 and by the Rajasthan High Court in CIT Vs. Suresh Chandra Gupta (1988) 173 ITR 407. He therefore, took the view that completion of the assessment in the status of an AOP was erroneous. The CIT also examined the records to ascertain whether the deduction under section 80IB was properly allowed. He came to the conclusion that the Assessing Officer did not examine the question whether the requirements of sub-section (2) of section 80IB were complied with. According to the CIT, the assessee should be an industrial undertaking which fulfils the conditions mentioned in clause (i) to (iv) of sub-section (2) and clause (i) requires that the industrial undertaking should not have been formed by the splitting of or reconstruction of a business already in existence. According to the CIT the assessee had been formed by the reconstruction of the businesses carried on by M/s.Gautam Enterprises and M/s. V.M. Corporation and thus there was a violation of the conditions of sub-section (2). The CIT further held that under clause (ii) of sub-section (2), the industrial undertaking should not have been formed by the transfer of machinery or plant previously used for any purpose. He held that the Assessing Officer ought to have called for the balance sheet of M/s. Gautam Enterprises and M/s. V.M.Corporation in order to ascertain whether any machinery used by them was transferred to the assessee's business. The CIT also noticed that at no stage of the assessment proceedings did the assessee offer to produce evidence in support of the fact that each residential unit in the buildings constructed by the assessee was less than 1000 sq.ft. of built-up area as required by clause (c) of sub-section (10) of the section. The Assessing Officer did not get the measurements checked through the departmental valuers and only such an enquiry would have

enabled him to come to the right conclusion about the eligibility of the assessee to the deduction, according to the CIT.

5. On the above basis, the CIT issued notice under section 263 of the Act in response to which the assessee made detailed submissions which were considered by the CIT but rejected by him. It is necessary to summarise his findings and we do so in the following manner:

(a) The assessee failed to produce any evidence to show that all the three conditions mentioned in section 80IB (10) have been fulfilled.

(b) Some of the residential units, when coupled with the adjoining unit, resulted in the built-up area exceeding the maximum permissible limit of 1000 sq.ft.

(c) There was a reconstruction of two existing businesses – those of M/s. Gautam Enterprises and M/s. V.M. Corporation to form a new business namely that of the assessee and this is in violation of the conditions prescribed in section 80IB(2). In holding so, the CIT rejected the assessee's contention that section 80IB(10) is not controlled or governed by the conditions mentioned in section 80IB(2), but was an independent provision and therefore it was not necessary for the assessee to fulfil the conditions mentioned in sub-section (2) The CIT also rejected the assessee's contention that it was not necessary for the assessee to show that it is an industrial undertaking, in which case alone the provisions of sub-section (2) would apply. According to the CIT once the assessee admitted that it was not an industrial undertaking, it would automatically lead to rejection of its claim under section 80IB. It was the view of the CIT that the deduction

under section 80IB(10) was meant only for an industrial undertaking.

(d) The assessee did not put forth any plea that it is not a case of reconstruction of existing businesses.

(e) The assessee did not prove before the Assessing Officer that all the residential units in the buildings were not more than 1000 sq.ft each of built-up area. The assessee's contention that the Assessing Officer made a personal visit to the buildings to satisfy himself is not supported by any order sheet entry. The Assessing Officer ought to have carried out a verification of the actual measurements through departmental valuers. This was not done. Some of the occupants of the residential units have stated during the assessment proceedings that they have joined or merged to residential units with the result that the built-up area had exceeded 1000 sq.ft. There was a violation of clause (c) of section 80IB(10).

6. On the basis of the above findings, the CIT concluded that the assessment was erroneous and prejudicial to the interests of the revenue and accordingly set aside the same with a direction to the Assessing Officer to complete it afresh according to law and after giving an opportunity to the assessee of being heard and after taking into account his observations made in the order under section 263 and after referring the matter of measurement of the built-up area of all individual flats under section 131 (1)(d) through the departmental valuation officers and particularly those flats which have been joined by two purchasers whether they happened to be husband and wife or otherwise. It is against the aforesaid order of the CIT that the assessee has come in appeal before the Tribunal.

7. It is first contended on behalf of the assessee that the view taken by the CIT that section 80IB(2) also applies to assessee's claiming deduction under sub-section (10) of the section in respect of housing projects is erroneous and untenable as has been held by the Mumbai Bench of the Tribunal in (a) M/s. Parth Corporation vs. ITO in ITA Nos.3178 & 3179/Mum/2007 dated 12.5.2008 and (b) Shreejee Ratna Corporation Vs. ITO in ITA No.3106/Mum/2007 dated 10.02.2009. It is therefore contended that the CIT was not right in law in holding the assessment to be erroneous and prejudicial to the interests of the revenue on the ground that the Assessing Officer overlooked the provisions of sub-section (2) of section 80IB. Copies of the orders of the Tribunal in the above cases were filed. We find force in the contention. A perusal of the orders of the Tribunal shows that the Tribunal has taken the view, on identical matters while hearing an appeal from the order of the CIT passed under section 263 of the Act, that the CIT is not right in holding that an assessee engaged in developing housing projects and claiming exemption of its income under section 80IB(10) should be an industrial undertaking and should therefore fulfil all the conditions prescribed by sub-section (2). In paragraph 8 of its order in the case of Parth Corporation (supra) the Tribunal has discussed the issue and the conclusions can be summarized as below:-

(a) the provisions of section 80IB(2) have no application for claiming deduction under section 80IB(10) and therefore, the condition that the assessee should be an industrial undertaking is not applicable for claiming the deduction under sub-section (10).

(b) Section 80IB(2) relates to "industrial undertaking" which manufactures or produces any article or thing whereas section 80IB(10) relates to deduction in the case of an "undertaking" which develops and builds

housing project. In CIT Vs N.C.Budharaja & Co.204 ITR 412, the Supreme Court has held that building of roads etc. does not amount to manufacture or production of articles or things. If that is so, it is impermissible to insist that an undertaking which is engaged in building housing projects should also fulfil the conditions of sub-section (2) which applies to an industrial undertaking which is engaged in the manufacture or production of articles or things.

(c) The CBDT has issued circular no.772 dated 23.12.1998 explaining the earlier provisions of section 80IA(4F) which correspond to section 80IB(10). It has been explained that the section has been introduced to promote investments in housing. The conditions are that the project should be approved by the local authorities, the size of the land should be a minimum of one acre, the residential unit should not exceed 1000 sq.f.t built up area and the undertaking should commence and complete the project within a specified period. If these conditions are fulfilled, the entire profit from the project would be deductible. There is no whisper in the circular that the assessee should also fulfil all the conditions necessary for being termed as an "industrial undertaking" as a prerequisite for claiming the benefit of the deduction.

8. The aforesaid reasoning of the Tribunal in M/s. Parth Corporation has been followed by the Tribunal in the case of Shreejee Ratna Corporation (supra) . In the light of the aforesaid orders of the co-ordinate Benches, it is not possible to accept the view taken by the CIT that an assessee claiming deduction under sub-section (10) of section 80IB is governed also by sub-section (2) of the section and it is necessary for him to fulfil the

conditions mentioned in that sub-section and prove that he is an industrial undertaking. In addition to the above reasoning of the Tribunal, which has been pressed into service before us on behalf of the assessee, it was further submitted that there is inherent evidence in section 80IB itself to show that the conditions mentioned in sub-section (2) are not required to be fulfilled by an assessee engaged in the development of housing projects and claiming deduction under sub-section (10). It is pointed out that there are several sub-sections, which specifically require the assessee claiming deduction thereunder that it should not be formed by reconstruction or splitting up of existing businesses and if, as claimed by the CIT, sub-section (2) and the conditions mentioned therein are to govern an assessee claiming deduction under the other sub-sections including sub-section (10), then there was really no need for the legislature to specifically provide in some of the sub-sections that the business should not have been formed by the splitting up or reconstruction of an existing business or by the transfer of any building or machinery previously used for any purpose. In this behalf our attention was drawn to sub-sections (7), (7A) and (7B). A perusal of these sub-sections shows that they apply respectively to the hotel, multiplex theatre and convention centre. Clause (c) (i) and (ii) of sub-section (7) provides that the deduction in respect of the profits of the hotel shall be available only if the business is not formed by the splitting up or reconstruction of a business already in existence or by the transfer to a new business of a building previously used as a hotel or any machinery or plant previously used for any purpose. Similarly, clause(b)(ii) of sub-section (7A) provides for such a condition in the case of profits of a multiplex theatre. Clause (b)(ii) of sub-section (7B) also prescribes an identical condition in the case of convention centre. There was no need, as rightly pointed out on behalf of the assessee, for prescribing

these conditions in the sub-sections noted above, if sub-section (2) and the conditions prescribed therein are to have overriding effect or to govern all the other sub-sections of section 80IB. Therefore, there is good reason to hold that the conditions prescribed in sub-section (2) are relevant only in the case of an industrial undertaking and wherever such conditions are required to be fulfilled by other types of businesses, such as a hotel or a multiplex theatre or a convention centre the legislature has expressly said so and sub-section (10) not having specifically provided for such conditions in the case of an undertaking engaged in the development of housing projects, it is not possible to telescope the conditions mentioned in sub-section (2) into the provisions of sub-section (10). Sub-section (10) has to be interpreted on its own terms.

9. Thus the first reason given by the CIT namely that the provisions of sub-section (10) are governed by the provisions of sub-section (2) of section 80IB is without merit.

10. It is then contended on behalf of the assessee that the CIT was wrong in making an observation in paragraph 6 of his order that the assessee neither before him nor before the Assessing Officer had argued that their case is not a case of reconstruction of the businesses already in existence. In other words, the submission is that the assessee even factually had established that its business of developing housing projects in Mulund, Mumbai was not the result of reconstruction or splitting up of already existing businesses. In this connection, our attention was drawn to the assessee's reply dated 9th May, 2007 to the show cause notice issued by the CIT, a copy of which has been placed at pages 35 to 44 of the paper book. In sub-para (iii) of paragraph 2 of the reply (at page 40 of the paper book) the assessee has denied that it was found by way of reconstruction

or splitting up of business already in existence. A perusal of the paragraph shows that the assessee has supported its contention by reference to the following facts. Initially the land in Hari Om Nagar belonged to M/s. Gautam Enterprises who were not in a position to construct the housing project independently. M/s. V.M. Corporation, who apparently had the technical expertise, were approached for a joint venture proposal and thus both the entities came together in 1999 as G.V.Corporation and as an association of persons. Gautam Enterprises introduced a plot of land measuring 4275 sq.mtrs into the AOP. No construction activity had earlier been commenced on the said plot of land by either of the group entities and at the time of the formation of the AOP the land was barren and it was introduced by Gautam Enterprises into the AOP as its capital. Gautam Enterprises had other project partners forming AOPs with them in respect of different plots of land. However, as far as the present AOP is concerned, it was a fresh venture and it was not a reconstructed entity, nor was there any business already in existence which can be said to have been split up to form the business of the present AOP. The AOP is a separate legal entity formed to construct the housing project on the land contributed by Gautam Enterprises as a fresh project. These facts stated by the assessee in its reply to the show cause notice issued by the CIT have not been controverted either by the CIT or on behalf of the department before us. In such a situation, even assuming for the sake of argument that the CIT is right in law in saying that the conditions of sub-section (2) of section 80IB governed the claim for deduction under sub-section (10), it is factually not possible to hold that the assessee's business was formed by the reconstruction or splitting up of a business already in existence. It follows that the assessee cannot also be said to have used the plant or machinery earlier used for any purpose. In fact, there is no suggestion to that effect in the show cause notice or in the

order of the CIT. Thus, factually also the assessee has demonstrated that it was not formed by the reconstruction or splitting up of an existing business.

11. So far as the other condition namely that each residential unit in the housing project shall not exceed built up area of 1000 sq.ft. as defined in clause (a) of sub-section (10) of section 80IB, the stand taken by the CIT is that the assessee has not produced the relevant details and proved that the condition has been satisfied and further that the Assessing Officer has not verified the actual measurements of each flat. In this connection, it is necessary to refer to the assessee's letter dated 15.12.2006 written to the Assessing Officer, the copy of which is placed in the paper book. The assessee has furnished, inter-alia, the total lay out plan of Hari Om nagar and other details relating to the project and has stated therein that the residential units were of built up area of less than 1000 sq.ft. each. In support of the claim, the assessee had furnished annexure V to the aforesaid letter containing the details of the sales in building Nos. 1 to 4 in Millennium Park. This annexure contained the building no., flat no., carpet area of each flat, its built up area, the name of the purchaser, address and the sale value of the flat. No fault has been found in these details which show that each flat was of built up area less than 1000 sq.ft. Paragraph 9 of the order of the CIT also shows that before the completion of the assessment the Assessing Officer had made enquiries under section 131 of the Act with regard to the built up area of the residential units. It is better to reproduce the observations of the CIT himself in this connection:-

> *"No reference was made by the Assessing Officer at all to have an authentic measurement. The assessee's contention that the AO 'deputed' an independent architect is also not borne out from the records/ order sheet. The details were filed by the assessee during the assessment proceedings on*

27.12.2006 and the assessment completed on 29.12.2006. Earlier some enquiries were made u/s.131 of the I.T. Act. Mr.Girish S. Parwatkar vide his letter dated 04.12.2006 stated that at the time of possession, the adjacent self contained room (i.e. flat no. 404) is enclosed to the flat no.405 by the builder. One Shri Mukesh Mohanlal Mishra, deposed u/s.131 on 08.12.2006 before the AO in reply to the question "Have you joined the flat no.705/03 and 706/03" that 'for security reason we have made an extra window'. This resulted in coverage of some area of some passage. In reply to question no.6, Shri Bhagawat Wani in examination u/s.131 stated on 07.12.06 that the Builder had joined the flat no.702 & 701, by breaking the common wall of the hall."

12. The aforesaid observations are indication of the fact that Assessing Officer did apply his mind to the question whether each residential unit exceeded built up area of 1000 sq.ft. and had also conducted enquiries in those cases where the flats were so joined as to exceed the aforesaid limit and had also enquired into the reason why they were joined. We are not able to think of any reason as to why the Assessing Officer should have conducted the above enquiries under section 131 except for the reason that he came to know that the two flats exceeded the prescribed built up area and wanted to know the reason for the same. Even in the proposal submitted by the Assessing Officer to the CIT inviting the letter to take action under section 263, which is reproduced in the first two pages of the order of the CIT, we find no mention of any case where the residential unit exceeded the built up area of 1000 sq.ft. Apparently the Assessing Officer by conducting the enquiries under section 131 of the Act was satisfied that it was due to compelling reasons of the purchasers of the units that the flats were so joined that they exceeded the aforesaid limit and that it did not constitute any violation of the basic conditions subject to which the deduction was granted to the assessee. In the course of the hearing before us, the learned counsel for the assessee stated

that out of 140 flats, only 9 flats or residential units were combined by the owners into four flats for reasons that are very valid. For example, he drew our attention to flat nos. 704 to 706 in annexure V filed by the assessee under cover of letter dated 15.12.2006 addressed to the Assessing Officer which showed that all the three purchasers of the three residential units were Sonawanes and belong to the same family and apparently they insisted that the three adjacent flats, each of less than 1000 sq.ft. built up area, purchased by them should be joined so that they will have a single flat of 1602 sq.ft. of built up area. It is common knowledge that members of the same family who purchase separate residential units adjacent or contiguous to each other often join them by breaking down a wall or by opening a door way or in many other ways so that the entire family lives together and gets more space to live. In many cases, a request is made by the purchasers to the builder or developer of the housing project to join the flats/residential units and the request is carried out by the builder. In such cases, it is not possible to hold that the builder built the residential flat of more than 1000 sq.ft. of built-up area. There is no evidence on record to suggest that the assessee itself advertised that the flats were of more than 1000 sq.ft. and that merely to get the benefit of sec.80-IB he drew the plans in such a manner that each residential unit was shown as not more than 1000 sq.ft. of built-up area. It is not also the case of the CIT that each flat in the housing projects undertaken by the assessee could not have been used as an independent or self-contained residential unit not exceeding 1000 sq.ft. of built-up area and that there would be a complete, habitable residential unit only if two or more flats are joined with each other, which would ultimately exceed 1000 sq.ft. of built-up area. In such a situation, merely because 9 out of 140 purchasers desired to join the flats purchased by them into one single unit, which

exceeded 1000 sq.ft. of built-up area, cannot disentitle the assessee to the deduction. In other words, taking the example of the flats purchased by the Sonawanes', there is no allegation that the flat no.704 measuring 244 sq.ft. purchased by Meera Sonawane, flat no.705 measuring 578 sq.ft. purchased by Supriya Sonawane and flat no.706 measuring 780 sq.ft. purchased by Ethin Sonawane were not independent residential units by themselves and could become independent residential units only when they were joined or combined together. If each residential unit does not exceed the built up area of 1000 sq.ft., the fact that they were joined together by the purchasers for better living or for more space or for any other reason does not disentitle the assessee to the claim for deduction under section 80IB.

13. Even assuming for the sake of argument that there was a violation of the condition (c) prescribed by section 80IB(10), the result thereof would not be denial of the claim for deduction as has been held by the Special Bench (Pune) in the case of Brahma Associates Vs. JCIT.OSD) Circle-4, Pune, (2009) 119 ITD 255(SB). In this case it was found that a small part of the building was built for commercial use. The condition that the entire building should have been built for residential use was thus not satisfied. However the portion used for commercial purposes was minimal and less than 10% of the total built up area. In such circumstances, the Tribunal held that the deduction under section 80IB(10) cannot be totally denied and if it is found that even if the commercial use exceeds 10%, but the residential segment of the project satisfies all the requirements of sub-section (10) on stand alone basis and the income from the construction of the residential units can be ascertained on a stand alone basis, the deduction would be available in respect of the residential segment of the project. Applying, with respect,

the ratio laid down in the Special Bench case, we find that in the present case the violation, if any, of condition (c) of sub-section (10) is much less than 10%, say around 6.5% to 7% only, and therefore the deduction for the profits arising from the housing project cannot be denied. The extent of violation, if at all there is a violation, is so less that it would be inappropriate to deny the deduction totally. The Special Bench has further held that even if the commercial user of the built up area of the building exceeds 10%, the assessee would still get the proportionate deduction, i.e. the deduction would be confined only to the profits of the residential segment of the overall profit. Therefore, even if the assessee cannot be given the entire deduction under section 80IB, it should be eligible for the proportionate deduction as envisaged by the Special Bench. It has been brought to our notice by the assessee that the Chennai Bench of the Tribunal in the case of Arun Excello Foundations (P) Ltd. Vs. ACIT., (2007) 108 TTJ 71 and the Bangalore Bench of the Tribunal in DCIT Vs. Brigade Enterprises (P) Ltd., (2008) 119 TTJ 269 have held that even where the violation exceeds the limit of 10%, the entire deduction cannot be denied but the same should be allowed proportionately. In this view of the matter also the grant of deduction by the Assessing Officer in the present case cannot be said to be erroneous and prejudicial to the interest of the revenue.

14. There is one more aspect of the matter which is that the Assessing Officer has considered the alleged violations of clause (c) of sub-section (10) as not material and affecting the merits of the assessee's claim and this is evident from the fact that he has himself not denied the deduction despite the fact that he conducted enquiries under section 131 of the Act in some cases to find out why the residential units were more than 1000 sq.ft.

of built up area. Apparently, the Assessing Officer has taken the same view which the Special Bench of the Tribunal (Pune) (supra) as well as the Chennai and Bangalore Benches took in the cases cited above. Even while proposing action under section 263 of the Act to the CIT, the Assessing Officer has not referred to any violation of the condition that the residential unit should not be more than 1000 sq.ft of built up area. Thus the Assessing Officer seems to have taken a plausible view of the provisions of law and the consequences of the violation, a view which has also appealed to the Special Bench of the Tribunal and two other Benches. It is now well settled that no action can be taken under section 263 on the footing that the assessment order is erroneous and prejudicial to the interest of the revenue merely because the Assessing Officer adopted one of the several plausible views that can be reasonably taken. Reference in this connection may be made to the judgements of the Supreme Court in the cases of Malabar Industrial Co. Ltd. (243 ITR 83) and CIT Vs. Max India Ltd. (2007) 295 ITR 282 where this aspect has been highlighted. In these circumstances, it is not possible to uphold the view taken by the CIT that the assessee having violated one of the conditions of sub-section (10), is not eligible for the deduction thereunder.

15. That takes us to the third contention of the assessee taken before us namely that the assessment having been completed after due enquiry, the same cannot be said to be erroneous and prejudicial to the interest of the revenue. Our attention was drawn to the letter dated 14.08.2006 issued by the Assessing Officer calling for several details one of which was to ask the assessee to justify the claim under section 80IB with respect to the statutory requirements. The assessee submitted two separate replies, one dated 13.09.2006 which contained an annexure (Annexure 5) furnishing full details of

the customers to whom the flats were sold. We have already referred to this annexure and to the details it contained. The assessee also filed another letter dated 27.12.2006 to the Assessing Officer explaining how it was formed and giving all other details regarding the housing project, the approval of the lay out plan etc. and also justifying the claim for deduction under section 80IB. A copy of this letter is at pages 29 to 32 of the paper book. This letter is actually in response to the Assessing Officer's query by letter dated 22.12.2006. We have also earlier referred to paragraph 9 of the order of the CIT and have also extracted some parts thereof which contained reference to the enquiries conducted by the Assessing Officer under section 131 of the Act in the course of the assessment proceedings. These enquiries appear to have been conducted, as we have already noted, to verify whether the flats exceeded the limit of the built up area of 1000 sq.ft. and if so, what was the reason for the same. In this background, we are unable to agree with the conclusion of the CIT that the Assessing Officer did not verify whether the assessee satisfied the condition mentioned in clause (c) of sub-section (10). We have already referred to a letter dated 15.12.2006 filed by the assessee before the Assessing Officer (copies separately handed over to us) in which the assessee asserted that the residential units were of built up area of less than 1000 sq.ft. each. Apparently, the enquiries made by the Assessing Officer under section 131 of the Act were a consequence to this assertion, as we can infer from the observation of the CIT in paragraph 7 of his order that the Assessing Officer conducted enquiries under section 131 of the Act before the assessee filed the details under cover of a letter dated 27.12.2006. Apparently the Assessing Officer conducted the enquiries into the extent of the area of the flats between 15.12.2006 and 27.12.2006. That he was satisfied that there was no violation of the condition mentioned in clause (c) of

sub-section 10 would be a reasonable inference because in his letter dated 22.12.2006, there is no further enquiry about the aforesaid condition having been fulfilled and the enquiry made in that letter was only about the approval of the building plans and whether they were approved before the prescribed time limit. Thus there is inherent evidence in the record itself to show that the Assessing Officer did make enquiries into all the conditions of sub-section (10) and was satisfied that there was no violation. What he proposed to the CIT by letter dated 23.4.2007 was (a) that the status of the assessee was wrongly declared and accepted & (b) that the conditions of sub-section (2) would govern the provisions of sub-section (10) also. The CIT, improving upon the proposal put up by the Assessing Officer, has taken the ground that the Assessing Officer did not conduct any enquiry into the conditions of sub-section (10). This, with respect, appears to us to be incorrect.

16. The last aspect which remains to be considered is whether the assessment could be termed as erroneous and prejudicial to the interest of the revenue because of the fact that the status of the assessee was wrongly taken as AOP, whereas it should have been taken as a firm. It is no doubt true that the assessee claimed the status of 'firm' in the return and even the audit report mentioned the status as that of a 'firm'. However the assessee itself claimed in the course of the assessment proceedings that the status was not that of a 'firm' but it was an 'AOP' and in support of the same filed an agreement dated 25.11.1999 between M/s. Gautam Enterprises and M/s. V.M.Corporation as constituting the basis for the claim of the changed status. There was also a supplementary agreement dated 19.04.2000 effecting some further terms and conditions between the aforesaid parties and both these agreements were undisputedly part of the record of the Assessing Officer. It is

open to the assessee to claim, in the course of the assessment proceedings that its correct status is something different from what was mentioned as its status in the return of income and there appears to be no statutory prohibition on doing so. It is for the Assessing Officer to look into the claim and decide the same in accordance with law and the facts. In case the assessee is to be assessed as a partnership firm, the basic condition is that it should be evidenced by a partnership deed and the individual shares of the partners should have been specified therein – see section 184(1) of the Act. If there is no partnership deed then there is no question of the assessee being assessed as a partnership firm. It is common ground between the parties that in the present case there was no partnership deed governing the relationship between M/s. Gautam Enterprises and M/s. V.M. Corporation. Therefore the question of assessing the assessee as a partnership firm does not arise. In the judgement of the Allahabad High Court (supra) cited in paragraph 2 of the impugned order, the assessee claimed the status of AOP but the Assessing Officer completed the assessment in the status of individual which was disapproved by the High Court and it was held that the Assessing Officer cannot do so without issuing a notice to file return in the status of individual. Similarly, the Rajasthan High Court (supra) held that the Assessing Officer cannot change the status of the assessee declared in the return without giving an opportunity of being heard. These two judgements do not deal with the case of an assessee itself claiming a status different from what was shown in the return of income and the acceptance thereof by the Assessing Officer. It is not a case of the Assessing Officer changing the status of the assessee without issuing notice or without hearing the assessee. In the case before us, the Assessing Officer has accepted the claim made by the assessee in the course of the assessment proceedings that its correct status was that of an AOP and not a

firm as mentioned in the return of income. There was also no partnership deed in existence. It is not the case of the CIT that the agreements between M/s. Gautam Enterprises and M/s. V.M.Corporation gave rise to a partnership agreement. In this situation, we are of the view that the Assessing Officer committed no error in accepting the status of the AOP claimed by the assessee during the assessment proceedings.

17. For the aforesaid reasons, we are of the view that the CIT was not right in law and on facts in his conclusion that the assessment made by the Assessing Officer was erroneous and prejudicial to the interest of the revenue. His order under section 263 of the Act is therefore set aside and the appeal is allowed with no orders as to costs.

Order pronounced on this 22nd day of December, 2009.

Sd/-	Sd/-
(J.SUDHAKAR REDDY)	**(R.V.EASWAR)**
Accountant Member	Senior Vice President

Mumbai, Dated 22nd December, 2009.
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Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The Mumbai.*
4. *The CIT-23, Mumbai*
5. *The DR 'G' Bench*

By Order

/True Copy/

Asstt. Registrar,
I.T.A.T, Mumbai