JOINT VENTURE
- Concept &Tax Implications

The scope of this article is restricted to joint ventures with reference to real estate development activity. As such, by and large, the references hereinafter to joint ventures relate to those of builders and developers. Although this article also does not deal with joint ventures arising out of cross border alliances but most of the propositions brought out in this paper can be applied generally to all joint ventures and they may be read in the context of joint ventures of builders and developers.

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The concept of a joint venture as understood by the accounting world is best brought out by the Accounting Standard-27 'Financial Reporting of Interests in Joint Ventures' issued by the Institute of Chartered Accountants of India. AS-27 defines a joint venture as a contractual arrangement whereby two or more parties undertake an activity, which is subject to joint control i.e. an agreed sharing of control/ power to govern the financial and operating policies of an economic activity so as to obtain benefits from it. A Venturer is a party to a joint venture and has joint control over that joint venture. An investor in a joint venture is a party to a joint venture and does not have joint control over that joint venture.

All joint ventures are typically characterized by two or more ventures being bound by a **contractual arrangement** which establishes **joint control.** Activities, which have no contractual arrangements to establish joint control, are not joint ventures.

Contractual Arrangement

The contractual arrangements may be evidenced in a number of ways for e.g. by a contract between the venturers' or minutes of discussion between the venturers'. In some cases the arrangements is incorporated in the articles or other by-laws of the joint ventures. Whatever its forms, the contractual arrangement is normally in writing and deals with such matters as:

1. The activity, duration and reporting obligation of the joint venture;
2. The appointment of the board of directors or equivalent governing body of the joint venture and the voting rights of the venturers;
3. Capital contractual by the venturers; and
4. The sharing by the venturers of the output, income, expenses or results of the joint venture.

The arrangements identify those decisions in areas essential to the goals of all the venturers and those decisions, which may require the consent of a specified majority of the venturers.

The contractual arrangements establish joint control over the joint ventures. Such an arrangement ensures that no single venturer is in a position to unilaterally control the activity.

A joint venture may give protective or participating rights to the parties to the venture. Protective rights merely allow a co-venturer to protect its interests in the venture in situation where its interests are likely to be adversely affected. The participating rights enable the co-venturer to jointly control the financial and operating policies related to the ventures ordinary course of business. In evaluating whether an enterprise has joint control over a venture, it would need to be considered whether the contractual arrangement provides protective rights or participating rights to the venturers. The existence of participating rights would evidence joint control.

The contractual arrangements may identify one venturer as the operator who does not control the joint venture but acts within the

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financial and operating policies, which have been agreed to by the venturers in accordance with the contractual arrangements and delegated to operator.

Forms of Joint Ventures

Joint Venture takes many forms and structures. AS-27 identifies three broad types of joint ventures based on form of joint control: -

1. Jointly controlled operations,
2. Jointly controlled assets,
3. Jointly controlled entities.

Jointly Controlled Operations

The operation of some joint ventures involves the use of the assets and other resources of the venturers rather than the establishments of a corporation, partnership or other entity, or a financial structure that is separate from the venturers themselves. Each venturer uses its own fixed assets and carries its own an inventories. It also incurs its own expenses and liabilities and raises its own finance, which represent its own obligations. The joint venture's activity may be carried out by the venturer's employees alongside the venturer's similar activities. The joint venture agreements usually provide means by which the revenue from the jointly controlled operation and any expenses incurred in common are shared among the venturers.

An example of a jointly controlled operation is when two or more venturers combine their operations, resources and expertise in order to manufacture, market and distribute, jointly, a particular product, such as an aircraft. Different parts of the manufacturing process are carried out by each of the venturers. Each venturer bears its own costs and takes a share being determined in accordance with the contractual arrangements.

Jointly Controlled Assets

Some joint ventures involve the joint control, and often the joint ownership, by the venturers of one or more assets contributed to, or acquired for the purpose of, the joint venture and dedicated to the purposes of the joint venture. The assets are used to obtain economic benefits for the venturers. Each venturer may take a share of the output from the assets and each bears as agreed share of the expenses incurred.

These joint ventures do not involve the establishment of corporation, partnership or other entity, or a financial structure that is separate from the venturers themselves. Each venturer has control over its share of future economic benefit through its share in the jointly controlled assets.

An example of jointly controlled asset is an oil pipeline jointly controlled and operated by a number of oil production companies. Each venturer uses the pipeline to transport its own product in return for which it bears an agreed proportion of the expenses of operating the pipeline. Another example of a jointly controlled asset is when two enterprises jointly control a property, each taking a share of the rents received and bearing a share of the expenses.

Jointly Controlled Entities

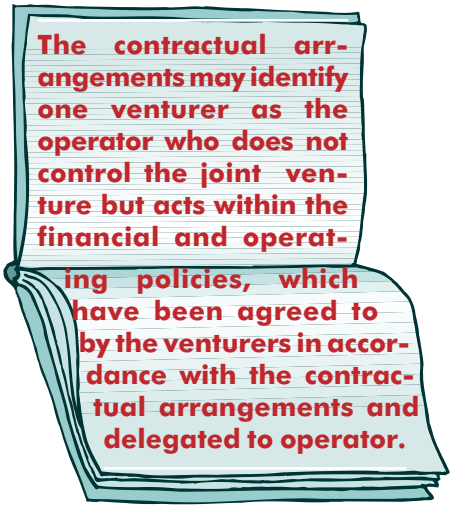
A jointly controlled entity is a joint venture, which involves the establishment of a corporation, partnership or other entity in which each venturer has an interest. The entity operates in the same way as other enterprises, except that a contractual arrangement between them establishes joint control over the economic activity of the entity.

A jointly controlled entity controls the assets of the joint ventures, incurs liabilities and expenses and earns income. It may enter into contracts in its own name and raise finance for the purposes of the joint venture activity. Each venturer is entitled to a share of the results of the jointly controlled entity, although some jointly controlled entities also involve a sharing of the output of the joint venture.

An example of jointly controlled entity is when two enterprises combine their activities in a particular line of business by transferring the relevant assets and liabilities into a jointly controlled entity. Another example is when an enterprise commences a business in a foreign country in conjunction with the government or other agency in that country, by establishing a separate entity, which is jointly controlled by the enterprise and the government or agency.

Joint Venture Distinguished From Partnership

A joint venture is an association of persons. A partnership is also an association of persons competent to contract who join together to share profits of a business carried on by all or any one of them acting for all. On a cursory appraisal, one may not notice the difference between an AOP and a partnership.



However, on deeper insight, some vital differences emerge.

An AOP can have a minor member whereas in a partnership a minor can only be admitted to the benefits of partnership. The principal of agency, which is an important feature of partnership, is absent in an AOP. A partnership is essentially for carrying on business whereas an AOP may be formed for earning any type of income.

An ordinary AOP does not have separate legal existence unlike a partnership, which is so recognised in law. An AOP cannot be sued independently; the suit has to be instituted against all individual members.

Joint Ventures and Developers

The joint venture agreements, typically executed by builders and developers could be a permutation of the following:

Sr. No.	Particulars	Sr. No.	Method of Sharing
1	Landlord & Developer	1	% Of Revenue
2	Developer & Another Developer with Development Rights	2	% Of Profits
3	Two Developers acquiring development rights	3	% Of Area Built-up
		4	% Of FAR

There is another dimension that can be added to these permutations based on the method of operations. One of the parties to the venture may be a sleeping member, or it may carry out purely the role of a contractor or the parties may decide to assign and allocate specific duties and responsibilities in relation to the venture. These permutations shall have to be kept in view while examining the implications under the stamp, registration and tax laws.

Stamp Duty and Registration

If the contractual arrangement is in writing, what is the stamp duty payable on such a document?

Section 3 of the Bombay Stamp Act is the charging section and provides that any instrument when executed in the state is liable to stamp duty at the rate provided in Schedule I. Accordingly, the charge of stamp duty is created only on execution of an instrument specified in Schedule I and not otherwise.

According to Section 2(1) of the said Act, instrument includes, save for certain exceptions, every document by which any right or liability is or is purported to be created, transferred, limited, extended, extinguished or recorded.

Article 5 of Schedule I, among other things, provides for the following:

- Agreement relating to give power to a promoter for development, sales, etc. of immovable property. — Rs. 5 for every Rs. 500 or part thereof
- General agreement — Rs. 20

Thus the only issue, which remains to be examined in the context of every joint venture agreement, is whether it is a general agreement attracting a stamp duty of Rs. 20. or is it otherwise.

There is no gainsaying the fact that a joint venture agreement is a general agreement. By virtue of the agreement, a promoter, developer, etc. is given authority for constructing or developing a property or selling/transferring (in any manner whatsoever) any immovable property. Thus, joint venture agreements, viewed in this manner, shall take the colour of 'development rights agreements' and would therefore be covered by the earlier category of Article 5 i.e. Article 5(g-a) making it liable for stamp duty at the rate of 1% of the market value of the property. However, if stamp duty has already been paid in respect of the Power of Attorney in respect of the same property transaction under Article 48(g), then the stamp duty on the Joint venture agreement shall be Rs.100.

However there still could be joint venture agreements which do not purport to transfer or assign any rights in the immovable property either to the other party to the venture or the joint venture itself. In such a case, the joint venture could be a general agreement attracting a stamp duty of Rs. 20 only.

Tax Aspects

A joint venture is typically a limited partnership. However, as the principal of agency is lacking, it is not treated as partnership. The

question therefore arises whether such a joint venture shall be assessed as an AOP or the parties shall be assessed to their respective shares individually.

Are all arrangements of the type contemplated above joint ventures? This may well be the first question that may need to be answered. The Mumbai Bench of the ITAT in Standard Batteries Ltd. *vs.* ITO [11 ITD 309] observed that a joint venture implies sharing of profits of the venture.

The Delhi Bench of the ITAT in the case of Ashok Kapur (HUF) *vs.*ITO [12 ITD 520] has held that if the working in a joint venture is on a principal to principal basis, then there is no joint venture. This was a case of a landlord and a developer wherein the landlord was entitled to get 50% of the built up area.

Is a Joint Venture Taxable as AOP?

Section 4, which is the charging section, creates a charge in respect of total income of every person, such person being separately defined under the Act. Section 2(31) defines a person to include eight categories of assessees, one among them being "an association of persons or a body of individuals, whether incorporated or not." Thus AOP is a specified taxable entity under the Act.

Unfortunately, however, 'association of persons' is not defined under the Act. One shall, therefore, have to look either for a definition or for the meaning to the various case laws on the point.

The classic judgment on the issue is found in 39 ITR 586 in the case of CIT *vs.* Indira Balkrishna rendered by the Supreme Court.

The Supreme Court observed that there is no formula of universal application as to what facts, how many of them & of what nature, are necessary to come to a conclusion that there is an AOP and it depends on particular facts and circumstances of each case to determine whether the AOP exists or not. The Supreme Court held that two or more persons must 'associate' i.e. join in a common purpose or action with the object of producing income, profits or gains. The parameters thus provided by the apex court have been considered time and again by the various High Courts while sitting in judgment over the issue.

1. Whether a minor can be a person who can be a member ?
   - M.M.Ipoh *vs.*CIT 67 ITR 106 (SC)
   - G.Murugeson &Bros. *vs.* CIT 88 ITR 432 (SC)
   - CIT *vs.*Laxmidas Devidas 5 ITR 584.
2. Whether the association should be voluntary ?
   - Deccan Wine &Gen. Stores *vs.*CIT 106 ITR 111(AP)
   - CIT *vs.*Buldhana Dist main
   - Cloth Importers Group 42 ITR 728 (SC).
3. Whether object of production of income is necessary?
   - C.Ag. IT *vs.* Raja Ratan Gopal 59 ITR 728 (SC)
4. Whether association has to be a positive act?
   - Deccan Wine & Gen. . Stores *vs.* CIT (supra)
5. Whether 'business' is essential?
   - CIT *vs.*Friends enterprises 171 ITR 269 (AP)
6. Whether joint possession and management is essential?
   - CIT *vs.* P.G.Bhende 106 ITR 932 (Bom)
7. Whether 'common' purpose or action is essential?
   - N.V.Shanmugham & Co. *vs.* CIT 81 ITR 310 (SC)

In the face of the Supreme Court judgment in Indira Balkrishna and in the light of the decided cases, one shall have to note the ratio of the Supreme Court judgment in Mohammed Noorullah *vs.* CIT (42 ITR 115). In this case, the co-owners / heirs had consented for common management of business which was indivisible. The Supreme Court held that the consent for common management to carry on the business reflected an association to earn income and hence assessment of AOP was justified.

Ordinarily, if two or more persons enter into an adventure in the nature of trade, they would be assessable in the status of AOP. The income would be income from business resulting from the joint efforts in carrying on of the business. However, income arising from mere joint ownership of assets shall not be liable to be assessed as an AOP. The Punjab & Haryana High Court in CIT *vs.*Har Prashad 178 ITR 591 have held that mere joint purchase and sale of land will not make the purchasers / sellers an AOP.

In case of income from property, section 26 specifically provides that where co-owners own property in definite and ascertainable shares then income from property shall be computed independently for each person in relation to his share. A common collecting agent also shall not make any difference. [Mohammed Aslam *vs.* CIT 4 ITR 12 (All)]

In case of capital gains arising to co-owners, the same cannot be assessed as AOP as has been held in the following cases:

- CIT *vs.*Smt. Vimla Lal 143 ITR 16 (All)
- Ramdev Agarwal *vs.*CIT 117 ITR 257 (Cal.)
- CIT *vs.*Memo Devi 113 ITR 335 (Delhi)
- CIT *vs.*Deghamwalla Estates 121 ITR 684 (Mad.)

However, contrary decisions on this issue are found in the following cases:

- M. K. Dar *vs.*CIT 138 ITR 801 (All)
- Smt. Parvatidevi *vs.*CIT 164 ITR 675 (AP).

Once it is established that there is an association for earning profits and the principal of agency is lacking, the association shall be liable to tax as an

AOP. Useful reference can be made to the following judgments :

- Shaikh Zainuddhin Ahmad *vs.* CIT 30 ITR 36 (Pat.)
- CIT *vs.* Friends Enterprises 66 CTR 143 (AP).
- Madhusudhan Goardhandas & Co. *vs* CIT 209 ITR 888 (Bom.)

A question likely to be posed is whether Explanation, to Section 2 (31) defining a person, which has been brought in by the Finance Act, 2002 w.e.f. 01.04.2002 makes any difference to the classic proposition that there has to be an *association for earning profits*.

Explanation to Section 2(31) reads as under:

"For the purposes 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, profits or gains;"

It appears that the Explanation is inserted to clarify that an association of persons, etc. shall be deemed to be a person, *whether or not,* such a person as body of individual, etc. was formed on established with the object of deriving income, profits or gains. As such, the Explanation may not negate the aforesaid classic proposition laid document by the Apex court in 39 ITR 586.

However, one may argue that the Explanation enlarges the scope of the word 'Person' in relation to AOPs, etc. Further the charge created in Section 4 is with reference to a person. As such, the classic requirement that on AOP, etc. would constitute an association of persons only when the association is formed with the intent of earning income / profits has been seem to given a go by.

The amendment by way of the insertion of Explanation to Section 2(31) has also to be appreciated in the context of the decision of the Authority for Advance Ruling (AAR) in the case of Van Oord ACZ (248 ITR 399). The AAR, in the aforesaid case, has ruled that in order to constitute an AOP there will have to be a common purpose or common action and the object of association must be to produce income jointly. It is not enough that the persons receive the income jointly. This case has been dealt with in a later part of this article. The issue may be debated until the dust is finally settled with a verdict from the Courts.

Option of Assessing AOP or Its Members

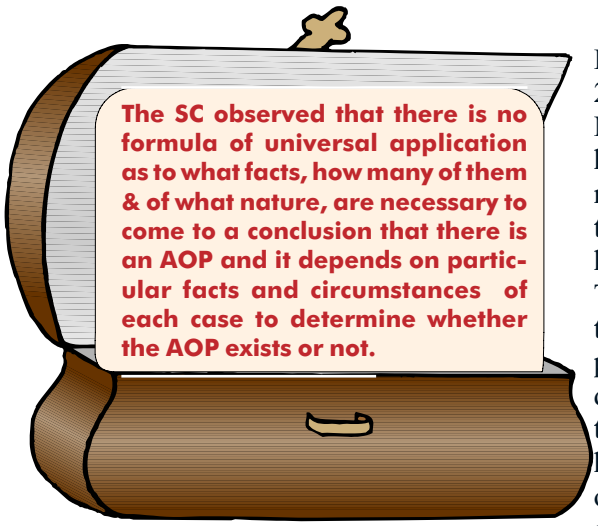
Section 3 of the 1922 Act provided an option to the Assessing Officer to select the option more beneficial to the Revenue. The Supreme Court in CIT *vs* Kanpur Coal Syndicate 53 ITR 225 has analysed section 3 and so confirmed the position. Section 4 of the 1961 Act does not provide an option and creates a charge on the income of every person.

Many courts carried the view expressed by the apex court in Kanpur Coal Syndicate even in deciding the cases under the 1961 Act. Prominent among these are cited herein below for a ready reference.

- CIT *vs.* R. Dhomdhayudham 113 ITR 602 (Mad.)
- Laxmichand Hirjibhai & Co. *vs.* CIT 128 ITR 747 (Guj.)
- CIT *vs.* V.N. Sheth 148 ITR 169 (Bom.)

The Supreme Court in ITO *vs.* C. H. Atchaiah 218 ITR 239 has set the controversy at rest by observing that the option is clearly not available to the Assessing Officer under the Section 4 of the 1961 Act. According to the Supreme Court, there is no option to make a direct assessment on the members of Aassociation of persons (AOP) and that 1961 Act, in contrast with 1922 Act, provides such assessment only on the AOP. The position shall be the same for the Body of Individuals (BOI). In CIT *vs.* v. Abdul Rasheed [240 ITR 402], the Madras High Court held that joint purchasers of lottery tickets have to be assessed together in a single assessment as BOI. Reliance was placed on the decision of the Supreme Court and its own decision in CIT *vs.* A. U. Chandrashekharan [229 ITR 406].

Thus where income is earned by a joint venture, it is only such a venture which could be taxed and that the fact that tax has been paid by any member will not dislodge the tax liability on the joint venture itself. An



erroneous offering of income of the venture by the individual venturer on its share of profits shall only lead to double payment of tax on the same income. Assessment of tax in the right hands cannot be avoided merely because tax has been paid on the same income by the wrong person as had been repeatedly pointed out by the courts. One may usefully refer to the Rajasthan High Court in CIT *vs.* Sriram Fagannath [250 ITR 689]. It is therefore imperative that the income is offered in the correct hands. There are certain decisions which have taken a different view. Two of these are considered below but with a note of caution that an assessee keeping these in view as precedents shall be so doing at his own peril.

In Gouranga Lal Chatterjee *vs.* ITO [247 ITR 737], the Calcutta High Court held that when two firms join together for a joint venture, a single assessment as an AOP or BOI is not possible especially where the individual partners had offered their share income of such joint venture in their individual hands and paid tax thereon. It observed that a joint venture is not unusual form of business or a distinct identity, so as to assessable as AOP/BOI in every case of joint venture.

In CIT *vs.* Nayan Engineering Works [248 ITR 596], the Madras High Court held that it was not necessary to disturb the assessments in the hands of the members. This was a case where the Department attempted to tax the AOP disregarding the fact that the share of profits had already been offered to tax by the members and the same had already been assessed long time ago. The High Court felt that the assessee has been led to believe that the matter is over. The High Court's decision may be in keeping with the doctrine of legitimate expectation. However, as stated earlier, these decisions may be taken as useful precedents only with a pinch of salt.

The Madras High Court in CIT *vs.* A. U. Chandrashekharan [229 ITR 406] held that where different persons came together and jointly purchase a lottery ticket and won the prize, they were to be assessed as an association of persons. Reliance was placed on the A.P High Court decision in CIT *vs.* Freinds Enterprises [171 ITR 269]. Interestingly, it may be noted that the same High Court had held otherwise in CIT *vs.* O. K. Arumugham Chettiar [224 ITR 391]. Distinction was drawn on facts, the difference being that in the later case two people had come together after the ticket was purchased.

The Himachal Pradesh High Court in Bhupindra Food and Malt Industries *vs.* CIT [229 ITR 496] negated the contention of the Department that there was an association of persons between an adult guardian and a minor. According to the Court, there was no evidence of the guardian having given consent to the association on behalf of the minor for business with the result that there was no association of persons, which implied an agreement two persons competent to contract. The contention that it could be assessed as a BOI was not raised.

As is the case of AOP, even BOI has not been defined in the Act. In fact, even Section 2(31) combines AOP and BOI into a single clause while giving an inclusive definition of 'Person'. It is obvious that two phrases having been used in one clause cannot have the same meaning. It is also equally true that as both the phrases are in a single clause, there must be a common thread or colour. However, the Bombay High Court in CIT *vs.* Modu Timblo 206 ITR 647 has held that such a restrictive interpretation is not justified.

The distinction is seen in the presence or absence of a common design, which is present in an AOP but absent in BOI. The distinction is also in the fact that AOP is of "person" and not only 'individuals' as in the case of BOI. Useful reference can be made to the following decisions in this regard:

- CIT *vs.* Harivadan Tribhovandas 106 ITR 494 (Guj.)
- Deccan Wine & General Stores *vs.* CIT 106 ITR 111 (AP)
- Meera & Co. *vs.* CIT 224 ITR 635 (S.C.)

The apex court in Meera & Co. *vs.* CIT (supra) has given a new line of thinking when it observed that an AOP is not something distinct from BOI. It has been added to obviate any controversy as to whether only combination of human beings is to be treated as a unit of assessment. *Suhas C. Sen, J. has observed thus in Meera & Co.*

"The intention of the Legislature is clearly to hit combinations

of individuals or other persons who were engaged together in some joint enterprise. The combinations may or may not be incorporated. A profit-yielding joint venture has to be taxed as a single unit. In the case before us, we have a widow and her minor sons who are engaged in the business activity which generates income. It does not make any difference that the widow and the minor sons did not start the business. The business was inherited. But the fact that the business has been continued by the widow on her own behalf as well as on behalf of the minor sons after buying the interest of the mother goes to show that there is an organized activity jointly carried on to produce income. It is a clear case of a joint business venture of a few individuals. The income of this business has been rightly assessed in the status of a 'body of individuals'."

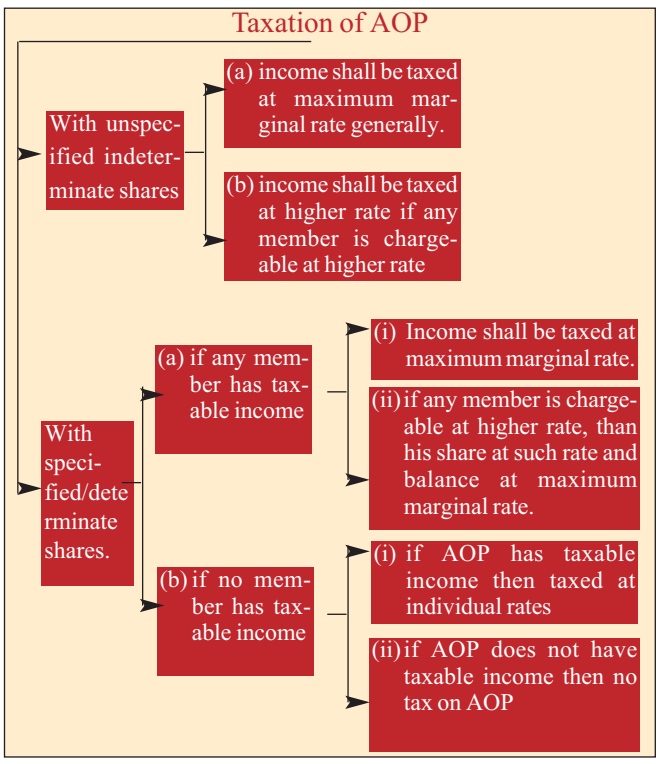
The concept of a BOI is much wider than that of an AOP. Almost every joint venture, which may be casual or confined to a particular activity is now vulnerable, though it is convenient and customary for each party to the joint venture to offer his share of income, while the concept as laid down by the Supreme Court would risk such joint ventures or those who are casually together to face a collective assessment, though separate assessments might have already been made. After the decision in Atchaiah's case, this law would have to be applied for BOIs as well. This interpretation makes almost every joint venture vulnerable in view of the possible inference by the Revenue that such joint venture constitutes the AOP/BOI, notwithstanding separate assessments, where the income is offered directly by the members, had already been made.

An AOP can have a minor member whereas in a partnership a minor can only be admitted to the benefits of partnership. The principal of agency, which is an important feature of partnership, is absent in an AOP. A partnership is essentially for carrying on business whereas an AOP may be formed for earning any type of income.

It is in this context that the ruling from the AAR in Van Oord's case assumes significance. In this case, a non-resident opened a temporary project office in India and executed such project on its own but had made an agreement with an Indian company with the sole object of fulfilling the agreement, which the non-resident had with the Chennai Port Trust. It was provided that the agreement did not constitute a partnership and that there will be no sharing of profits or losses, each party being entitled to its own profits and bearing responsibility for its own losses in respect of division of work between them. On these facts, the Authority for Advance Rulings found that it was a case, where the non-resident was assessable on presumptive basis under section 44BBB and that such joint venture would not constitute an AOP, where each participant in such joint collaboration has designated an independent role as in the case of a building project. This decision is a useful precedent, since the Revenue is prone to make a collective assessment, wherever there is such joint venture often shifting the liability from one to the other by an incorrect collective assessment, deviating from the basic tenet of income-tax as a personal tax.

Taxation Scheme of AOP

Section 167B of the Income Tax Act, 1961 inserted by the Direct Tax Laws (Amendment) Act, 1989 w.e.f. 01.04.89 lays down the scheme of taxation of AOP. There are certain provisions contained in other sections. These are dealt with



separately as they deal with computation or chargeability of income.

For a proper appreciation of the taxation format, the following tabular presentation shall be useful:

It is important to note that the tax format is dependent on the AOP having members whose shares in the whole or part of the income of the AOP are determinate or known or otherwise. The Explanation to Section 167B is relevant as it provides the time factor for considering a member's share as indeterminate or unknown. Accordingly, such a position shall emanate if the share is indeterminate or unknown on the date of formation of the AOP or at anytime thereafter.

In case of computation of business income of AOP, section 40(ba) specifically provides that interest and remuneration paid to members shall not be allowed as deduction.

Taxation of Members of AOP

The discussion on taxation of AOPs cannot be complete without discussing the taxation of its members. Section 67A deals with the method of computing a member's share in income of an AOP. Similarly, Section, 86 deals with the inclusion and chargeability of share in the income and of tax thereon. Further Section 80A(3) provides for the restriction on deductions under Chapter VIA in computing the total income of a member of an AOP.

According to Section 67A, the income of a member of an AOP with definite and ascertainable shares shall be computed as under :

1. The income of the AOP shall be reduced by salary and interest paid to the member.
2. The balance income / loss shall be apportioned to the members. Such apportionment as aggregated by salary or interest as aforesaid shall be the member's share in the income of the AOP.
3. The member's share so ascertained shall be apportioned under various heads of income in a like manner as is done for the AOP.
4. Interest paid by member on borrowings for investment in AOP shall be deductible from the share of member in computing his income from business.

The format of taxation of member's share shall be better appreciated from the following tabular presentation.

Section 80A(3) provides that where a deduction is admissible under Chapter VI-A in computing the total income of AOP, then no deduction under the same section of Chapter VIA shall be made in computing total income of member in relation to the share from the AOP.

Member of AOP

Where AOP taxed at MMR or higher rate	→	No Tax as share not included in Member's total income.
Where income of AOP is below taxable	→	Share is fully taxed as part of Member's total income.
Where AOP if normally taxed	→	Share is added for rate purposes only (Sec. 66 & 110)

An issue that is being discussed is the taxation of joint ventures and the deduction is that section 80IB (10) seeks to provide a 100% deduction in respect of profits of an undertaking executing a housing project subject to compliance of certain conditions laid down therein. Assuming that the joint venture is executing such a project there could be two possibilities –

(i) that the joint venture is taxed independently, or

(ii) that the venture partners are taxed and not the joint venture as on AOP.

In case of situation (i), the AOP shall make a claim under section 80IB (10) and as such shall have no total income liable to tax. In such an event, could the provision to Section 86 be brought into play to tax the share of the member of such an AOP? The provision to Section 86 are reproduced hereunder:

"Provided further that where no income tax is chargeable on the total income of the association or body, the share of a member computed as aforesaid shall be chargeable to tax as part of his total income and nothing contained in this section shall apply to case."

It may be noted that the words used are "....no income tax is chargeable on the total income of the association...."

Section 86 falls under Chapter VII which is titled "Income forming part of total income on which no income tax is payable". Section 80IB(10) falls under Part C of Chapter VIA which is titled "Deductions in respect of certain incomes". These could be juxtaposed to the heading of Chapter III which reads "Incomes which do not form part of total income."

A combined reading of the aforesaid supported by the judgment of the Apex Court in Stump, Schuele & Somappa Pvt. Ltd (187 ITR 108) leads one to the inevitable conclusion that the share of the member in the aforesaid situation shall not be taxable in the hands of the member.

The next issue that arises for

consideration is the situation envisaged in (ii).

The deduction available under section 80IB(10) is with reference to the undertaking executing a housing project. 'Undertaking' has been defined for the limited purpose of demergers and slump sale in Section 291(AA) of the Income Tax Act, 1961. The Madras High Court in Madras Machine Tool Mfrs. Ltd. [98 ITR 119] had occasion to define the word "Undertaking". According to the High Court, it could be a concern started for a specific purpose or a concern engaged in a specific project. In the given situation, the undertaking is that of the joint venture and not of the members of the joint venture. The tax holiday contemplated u/s 80IB(10) is attached to the undertaking and the assessee who runs the undertaking gets the benefit. Impliedly, it shall be the assessee in whose total income the profits of the undertaking are included. If this be an accepted proposition, the members of the joint venture shall be the assesses in whose hands the profits of the undertaking are included and as such entitled to benefit. However, is sharing of the deduction permissible with reference to the individual profits derived by each member?

Chapter VIA has within its fold sections permitting a deduction being shared. Such sharing can be seen in 80HHD, 80HHB, 80HHC, etc. However, Section 80IB does not contain such a specific provision. This would mean that the deduction cannot be availed of by more than one entity. However, the matter is not free from doubt.

Losses and AOP

Sections 75, 76, 77 and 78 of the Income Tax Act specifically provide for the treatment of losses in the hands of the firm and partners. However, there are no such provisions in relation to AOP and its members.

The judgments of the A. P. High Court in Smt. Abida Khatoon *vs.* CIT 87 ITR 627 and in Hyderabad Deccan Cigarette Factory *vs.* CIT 127 ITR 460 provided an answer to the following issues that arise.

(i) Can the AOP carry forward the unabsorbed loss to succeeding assessment years?

(ii) Can the share of loss of the member be adjusted against the independent income of the member in the same year ?

(iii) Can the members carry forward any portion of their share of unabsorbed loss?

Useful references can also be made to the following decisions :

- CIT *vs.* SKS Rajamani Nadar 109 ITR 528 (Mad)
- Ganga Metal Refg. Co. Ltd. *vs.* CIT 67 ITR 771 (Cal)

However, as a sequel to the decision of the Supreme Court in CIT *vs.* Ch. Atchaiah, the loss suffered by the association could be carried forward and set off only against income of such association. The Bombay High Court had occasion to consider a similar situation when it held that it is not open to the members to claim such share of loss in their own assessment [CIT *vs.* Lalita M. Bhat 234 ITR 319].

A change in constitution of AOP does not bring in any restriction on carry forward of loss.

TDS and AOP

AOP's have been saddled with the responsibility of deducting tax at source unlike individuals and HUF's who have some exemption from so doing under various sections. Payments made by an AOP to its members in the form of salary and interest are liable for TDS under section 192 and 194A unlike the case of partners of a firm. This is regardless of the fact that the Section 40(ba) prohibits allowance of such salary and interest in computing the income of the AOP. It is to be noted that a partnership firm assessed as AOP shall not lead to a situation whereby interest and salary paid to partners becomes liable to the provisions of Sections 192 and 194A.

Conclusion

In the present endeavour with a limited scope, an attempt has been made to present the conceptual position, raise issues and provide possible guideposts in deciding the issues. Unanimity of opinion is a myth. However, we could live with the reality that we get comfort from those who agree with us and growth from those who don't. ■

The concept of a BOI is much wider than that of an AOP. Almost every joint venture, which may be casual or confined to a particular activity is now vulnerable, though it is convenient and customary for each party to the joint venture to offer his share of income, while the concept as laid down by the Supreme Court would risk such joint ventures or those who are casually together to face a collective assessment, though separate assessments might have already been made.