**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH: 'D' : NEW DELHI**

**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER, AND**
**SHRI L.P. SAHU, ACCOUNTANT MEMBER,**

**ITA Nos. 3549/Del /2009 & 4847/Del/2009**
**Assessment Years: 2001-02 & 2003-04**

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| The D.C.I.T.<br>Circle – 4(1)<br>New Delhi | Vs. | M/s Landbase India Ltd<br>25, Basant Lok<br>Community Centre,<br>New Delhi<br>PAN : AAACL 0053F |

**CO No. 328/Del/2009 & 111/Del/2010**
**[A/o ITA No. 3549/Del /2009 & 4847/Del/2009]**
**Assessment Years: 2001-02 & 2003-04**

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| M/s Landbase India Ltd<br>25, Basant Lok<br>Community Centre<br>New Delhi<br>PAN : AAACL 0053 F<br>[Appellant] | Vs. | The D.C.I.T.<br>Circle – 4(1)<br>New Delhi<br><br>[Respondent] |

**Date of Final Hearing : 17.03.2016**
**Date of Pronouncement : 15.06.2016**

Revenue by : Smt. Sulekha Verma, CIT-DR
Assessee by : Shri Rohit Jain, Adv.
Shri Sambhav Jain, CA

**ORDER**

**PER CHANDRA MOHAN GARG, JUDICIAL MEMBER**

These appeals by the Revenue and cross objections by the assessee are directed against the order of the CIT(A, dated 22/05/2009 for A.Ys 2001-02 and 2003-04.

2. First we shall take up the cross objections raised by the assessee. The assessee has raised similarly worded following grounds of appeal:

*"1. That on the facts and circumstances of the case, the CIT(A) has erred in upholding the validity of the order of assessing officer passed under section 143(3) read with section 147 of the Income-tax Act, 1961 ('the Act'), without appreciating that the order of assessing officer was beyond jurisdiction, bad in law and void-ab-initio.*

*1.1 That on the facts and circumstances of the case, the CIT (A) has erred in holding that the issue regarding legality of proceedings under section 147 of the Act could not be raised since the validity thereof was not challenged before the assessing officer.*

*1.2 That on the facts and circumstances of the case, the CIT (A) failed to appreciate that initiation of proceedings was barred by limitation prescribed in the proviso to section 147 of the Act and consequently the assessment order was illegal and bad in law*

*1.3 That on the facts and circumstances of the case, the CIT(A) has erred in not appreciating that the reassessment proceedings were initiated by the assessing officer on a mere change of opinion and there was no failure on the part of appellant to disclose truly and fully all material facts necessary for assessment and consequently, the assessment order was illegal and bad in law.*

*1.4 That on the facts and circumstances of the case, the CIT(A) has erred in holding that the order passed by assessing officer was after independent application of mind, without appreciating that the re-assessment proceedings were initiated on the opinion of audit party, which is not permissible under law.*

*1.5 That on the facts and circumstances of the case, the CIT(A) has erred in not appreciating that reassessment proceedings were initiated by the assessing officer under section 147 of the Act without forming a reasonable belief that income of the appellant had escaped assessment, which a pre-requisite condition for validly initiating proceedings under that section."*

3. Briefly stated, the facts relating to these grounds are that the assessee has challenged the validity of the assessment order dated 24th December, 2007 on various grounds. The assessee originally filed return of income on 30th October, 2001, declaring loss of Rs. 20,72,84,983. Assessment was originally completed u/s 143(3) of the Income tax Act, 1961 [for short, 'the Act'] vide order dated 29th March, 2004 assessing the loss of the assessee at Rs.20,71,55,977 after making certain disallowances. Thereafter, reassessment proceedings were initiated u/s 147 of the Act vide notice dated 30th October, 2006 issued u/s 148 of the Act, on the basis of certain audit objections after obtaining approval of the appropriate authorities. In response to the said notice, the assessee filed return vide letter dated 27th November 2006, requesting the assessing officer to treat the return originally filed as return filed in response to notice under section 148 of the I.T. Act. In the aforesaid background facts, the assessee has challenged the validity of the reassessment order on the following four grounds:

(a) The reassessment proceedings were initiated on a mere change of opinion, which is not permissible in law;

(b) In terms of proviso to section 147 of the Act, proceedings under that section could be validly initiated beyond the period of four years from the end of the relevant year only if there was any failure on the part of the appellant to disclose fully and truly all material facts necessary for assessment. That being not so in the present case, the prerequisite condition for initiating reassessment proceedings, in terms of proviso to section 147 of the Act, were not fulfilled/satisfied;

(c) The impugned reassessment proceedings were initiated u/s 147 of the Act without forming a reasonable belief that income of the appellant had escaped assessment which is a pre requisite condition for validly initiating proceedings under that section.

(d) The impugned reassessment proceedings were initiated on the opinion of the audit party which is not permissible in law.

4. The ld. AR submitted that in the case of the assessee the original assessment was completed u/s 143(3) of the Act

after due application of mind on the claims made by the assessee in the return and/or during the assessment proceedings. It was further contended that the assessment proceedings were initiated on the basis of mere change of opinion which is not permissible in law.

5. Relying upon the following decisions, the Ld. Counsel for the appellant submitted that the assessment order is illegal and bad in law:

* Indian and Eastern Newspaper Society v. CIT: 119 ITR 997 (SC)
- CIT v. Lucas T.V.S. Ltd. 249 ITR 306 (SC)
- Adani Exports V. DCIT: 240 ITR 224 (Guj.)
- CIT V. Mettur Chemical & Inds. Corpn: 242 ITR 119 (Mad.)
- Waldies Limited V. ITO: 246 ITR 29 (Cal.)
- ITO V. Jiyajeerao Cotton Mills Ltd: 247 ITR 122 (Cal.)
- CIT V. Sambhar Salt Limited: 262 ITR 675 (Raj.)

The submissions filed by the appellant were forwarded to the assessing officer for comments' who submitted his remand report vide letter No. ACIT/Circle(4)/2009-10/279 dated 15th October, 2008. In the remand report, the assessing officer has not commented on the submissions filed by the appellant on the aforesaid issue for the assessment year being illegal and bad in law. However, during the course of personal hearing, the assessing

officer supported the assessment order and submitted that the reassessment proceedings were initiated by independent application of mind and after obtaining approval from the Ld. Addl. CIT and CIT on 5 October, 2006 and 27th October, 2006, respectively. The AO accordingly submitted that the objection of the appellant is without merit and should be dismissed.

6. In its reply to the remand report furnished by the appellant vide letter dated 17th November, 2008, the appellant, apart from the submissions made earlier also referred to the decision of the Delhi High Court in the case of Haryana Acrylic Manufacturing Co. vs. CIT in support of its contention that the reassessment proceedings are illegal and bad in law.

7. After carefully considering the rival submissions, the ld. CIT(A) has held as under:

> ""*The submissions of the A.R. of the appellant and the arguments made by the Assessing Officer in the course of appellate proceedings have carefully been considered. After careful consideration of the rival submissions, I agree with the arguments of the Assessing Officer that the validity of the notice under sectionT48 cannot be challenged at this stage. The conduct of the appellant in submitting all the relevant information and complying with all the requirements, the*

*notices issued under section 148 / 143(2) and 142(1) have made it clear that he did not have any objection for re-opening the assessment proceedings at the initial stage. Subsequently also, no objection was taken in the course of assessment proceedings. However, the appellant had challenged the validity of the re-opening of the assessment proceedings only at the time of the filing of the appeal which is not only after thought and appeared to have been raised only for the sake of raising a ground of appeal. Even on the merit of the facts, I am of the view that AO has been justified in issuing the notice under section 148 of the Income Tax Act, 1961. Although the initial source of information was the audit objection but same has not been made the basis for re-opening the assessment proceedings. It was independent application of mind on the various facts as pointed out by the audit authority warranting the issuance of notice under section 148 as some of the issues involved in the appeal were altogether omitted in the course of original assessment proceedings of on some of the issues there was not full and true disclosure of the information. In totality of all these facts and circumstances, I dismiss appellant's appeal on ground nos. 1 and 2."*

8. Further, the ld. CIT(A) granted relief to the assessee on merits in both the years. Thus the Revenue filed appeals challenging the conclusion of the ld. CIT(A) on merits wherein the first appellate authority directed the AO to delete the addition made on account of

difference between budget cost of flats, prior period interest expenditure, excess depreciation on land and capital gain on agreement to sale dated 17.3.2003 in A.Y 2001-02. The Revenue has also filed appeal for A.Y 2003-04 wherein the ld. CIT(A) granted relief to the assessee on merits directing the AO to delete addition made by the AO on account of long term capital gain made by the AO u/s 32 of the Act, addition on account of excess depreciation claimed by the assessee on golf course. The assessee has also filed cross appeals challenging the validity of reopening u/s 147 of the Act and notice u/s 148 of the Act for both the years.

9. On the cross objections of the assessee for both the years, the allegations of the assessee to the reopening of assessment are similarly worded, which has been reproduced hereinabove. For the sake of clarity in our findings, we are considering the rival arguments of both the sides in view of the facts and circumstances of A.Y 2001-02.

10. We have heard the arguments of both the sides and perused the relevant material on record. The ld. AR reiterating submissions of the assessee placed before the ld. CIT(A), contended that the ld. CIT(A) has erred in upholding the validity of assessment order without

appreciating that the order of reassessment was beyond jurisdiction, bad in law and void ab initio. The ld. AR vehemently pointed out that the ld. CIT(A) has erred in holding that the issue regarding legality of proceedings u/s 147 of the Act could not be raised since the validity thereof was not challenged before the AO. The ld. AR also pointed out that in the present cases, the ld. CIT(A) failed to appreciate that the initiation of proceedings was barred by limitation prescribed in proviso to section 147 of the Act and consequently the assessment order was illegal and bad in law. The ld. AR reiterating his written submissions dated 28.10.2015 also contended that the reassessment proceedings were initiated by the AO on a mere change of opinion and there was no failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment and thus the assessment order was illegal and bad in law. The ld. AR also pointed out that the first appellate authority was not correct in holding that the order passed by the AO was after independent application of mind without appreciating that reassessment proceedings were initiated on the opinion of audit party which is not permissible under law. The ld. AR read out all three points mentioned in the reasons recorded by the AO. The ld. AR lastly pointed out that reassessment proceedings were initiated by the AO without forming a reasonable belief that income of the assessee has

escaped assessment which is a pre requisite condition for initiating proceedings validly.

11. Replying to the above, the ld. CIT-DR drew our attention towards relevant operative part of the impugned first appellate order and contended that from the reasons recorded it is amply clear that the AO was not guided by the observations of the audit party and he applied his mind independently while recording satisfaction for initiation of proceedings. The ld. DR also pointed out that the assessee did not raise any objection during the assessment proceedings challenging the validity of reassessment proceedings and issuance of notice u/s 147/148 of the Act. Therefore, this legal contention was not maintainable before the ld. CIT(A) at first appellate stage. The ld. DR also pointed out that the AO made independent application of mind on various facts as pointed out by the audit authority while issuing notice u/s 147 of the Act because some of the important issues involved in the appeal were altogether omitted during the course of assessment proceedings and there was not a full and true disclosure of information regarding depreciation claimed by the assessee, the assessee understated the sale proceeds resulting into escapement of proceedings and the assessee also claimed prior period expenditure which also shows that the assessee did not disclose full and true

particulars of its income for the relevant period. Therefore, reopening of assessment and issuance of notice was valid and the first appellate authority rightly rejected the legal objection of the assessee in this regard.

12. On careful consideration of above rival submissions, we are of the view that the AO initiated reassessment proceedings by recording following reasons:

> *"During the course of assessment proceedings it was seen that the Assessee claimed depreciation on golf cou*rse at the rate of 25% under cat*egory of plant and machinery. The golf course is a structure of building in which various sports facilities have been provided to the* members *of the assessee company. The depreciation is admissible on the* golf course *at the rate of 10% as in the case of building,* it is seen from depreciat*ion schedule that the depreciation was claimed on golf course at* Rs.2,42, *,64,813/- as against the admissible depreciation at Rs 1,04,93,770/- It* has been *held by Supreme Court in the case of CIT Vs Anand Theatre* (244 I*TR 192) that building is not a plant and even if it is to be construed as* plant *only that part of the building housing the auditorium and furniture* and *fittings found therein should be construed as plant and not the entire* bu*ilding. In this particular case, only sports facilities have been provided : he members. At most the equipment of sports may be considered for allowing depreciation as plant and machinery unless the* assessee has se*parately claimed the depreciation on these*

*equipments. Thus excess depreciation has been allowed at Rs 1,37,71,043/-. Thus the income to the extent of Rs 1,37,71,043/- has escaped assessment.*

*3. It is further seen from details filed during the course of assessment proceedings that the assessee sold apartments during the year. The total sale consideration has been shown at Rs 174,99,49,491/-, However in the computation of income and profit and loss account the assessee company has considered sale proceeds only at Rs 171,10,16,224/-.*

*3.1 The details in this regard filed during the course of assessment proceedings were examined. The assessee worked out the sale consideration on the basis of proportion of budgeted expenditure to the actual expenditure and applied the proportion to actual sales. However in this working the assessee reduced actual expenditure from proportioned sales proceeds which is not only incorrect but it is not based on any accounting or legal principles. It is also not sanctioned by the accounting standards prescribed by ICAI. There is no basis for this computation. This working is neither based on mercantile basis of accounting nor on any other provisions of law or accountancy. Thus the assessee company has under stated the sales proceeds by 3,89,33,267/- which has escaped assessment.*

*3.2 The assessee company has claimed interest at Rs **61,11,162**/- in respect of loan advanced by M/s Gilt Facilities Private Limited. There was a over delayed completion of projects and retention of money collected by the assessee*

*companion on behalf of M/s Gilt Facilities Private Ltd. After settlement the interest of 61.11,162/- was considered payable to the creditors. It was claimed during the course of assessment proceedings but this component of interest related to only assessment 2004-05 and not to any earlier assessment year.* ***However the details during the assessment proceedings clearly showed that there is meticulous working of year wise interest on the amount of loan need to the assessee company****. The interest of Rs 61,11,162/- is not admissible an the assessment year as it is prior period expenditure which is not admissible. Thus the income of Rs 61,11,162/- has escaped the assessment."*

13. In view of above, in the present case, admittedly and undisputedly, reopening of assessment and issuance of notice has been initiated beyond four years of prescribed period and hence, as per first proviso to section 147 of the Act, no action shall be taken under this section after expiry of four years from the end of relevant A.Y unless any income chargeable to tax has escaped assessment for such A.Y by reason of failure on the part of the assessee to make a return u/s 139 or in response to notice issued u/ss (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for the A.Y under consideration. In view of said provision, for initiation of reassessment proceedings it was the duty of the AO to record a satisfaction that any income chargeable to tax has escaped

assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts. In the reasons recorded it was alleged that the assessee had wrongly claimed deprecation on golf course. In this regard the ld. AR pointed out that the assessee has shown golf course under the head 'assets' in the audited financial statements and not as a 'part of building' and as per tax audit report, depreciation on golf course was shown at Sl. No. 3 and rate of depreciation was 25%. The ld. AR also pointed out that the assessee furnished detailed break up of addition to golf course and vide letter filed on15.3.2004, the assessee certified that no depreciation has been claimed on the value of land on which golf course has been constructed.

14. On issue of understatement of sale consideration, the ld. AR pointed out that on account of sale of apartments, the AO is referring to the income from Laburnum Project undertaken by the assessee and profit from the said project was consistently been accounted as per percentage completion method. The ld. AR pointed out that vide Note No. 7, Revenue recognition Schedule XXI significant accounting policies of the audited accounts for the year ended on 31.3.200, the assessee clearly mentioned that revenue on account of sale of land and constructed apartments is accounted for on the basis of percentage completion method and regarding Labunum Project, the assessee filed

detailed note in February 2004 with the details of profit on the project booked during the year under consideration. The ld. AR also pointed out that vide letter dated 15.3.2004 available at page 20 of the assessee's paper book, the assessee also furnished detailed working of the apartment amounting to Rs. 11.09 crores which was declared in the relevant profit and loss account. Therefore, on this count also, there was fully and truly all disclosure by the assessee. Therefore, reassessment beyond four years is not permissible.

15. Regarding third issue, the ld. AR pointed out that vide letter February 2004, the assessee furnished a detailed note on accrual on interest and justified its allowability after explaining the entire background of the sale alongwith detailed justification. The ld. AR also pointed out that the assessee also filed copy of the agreement dated 16.8.1995 entered into with Gilt Facilities P. Ltd. which is available at pages23 to 26 of assessee's paper book and again furnished detailed justification of interest and its allowability during A.Y 2001-02. Vide letter dated 15.3.2004 which is also available at pages 17 and 18 of the assessee's paper book. The ld. AR also pointed out that vide letter March 2004, available at pages 21, 22 and 27-45 of the assessee's paper book, the assessee furnished detailed background of

interest paid to M/s Gilt Facilities P. Ltd and legal justification for allowability of entire interest paid during A.Y 2001-02. Therefore, it cannot be alleged that the income of the assessee had escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessee.

16. The ld. AR also pointed out that it was a mere change of opinion on the similar material and reopening of assessment cannot be held as valid when without any tangible material, and without application of mind, the AO held that there is escapement of income. For this proposition, the ld. AR placed reliance on the ratio of the decision of Hon'ble Supreme Court in the case of CIT Vs. Kelvinator of India Ltd 320 ITR 561 [SC]. The ld. AR reiterating its submission again pointed out that as per first proviso to section 147 of the Act, reopening of assessment is not permissible after expiry of four years from the end of relevant A.Y unless any income chargeable to tax has escaped assessment by the reason of failure to disclose fully and truly all material facts necessary for assessment. The ld. AR lastly alleged that the AO initiated reassessment proceedings only on the report of audit party of the department and without applying his mind he proceeded to initiate reassessment proceedings which is not a legal and fair approach.

17. Replying to the above, the ld. DR fairly accepted that original order of assessment was passed u/s 143(3) of the Act and notice u/s 148 of the Act was issued beyond the period of four years. He also vehemently pointed out that the AO can take permissible view when two treatments are permissible and one view has been taken by the assessee but when the claim is not systematic, then two-views theory will not apply and allegation of change of opinion cannot be made against the AO. The ld. DR pointed out that as per audited financial results of the assessee, in the Schedule forming part of the balance sheet [APB page 297] golf course has been shown separately which is not as per provisions of the Act. The assessee should have specifically mentioned that the Golf course falls either in building or plant and machinery and this conduct of the assessee shows that the assessee did not file truly and fully all material facts for claiming depreciation on golf course and hence, the AO has validly reopened the assessment and issued notice u/s 147/148 of the Act.

18. The ld. DR further took us through assessment order for A.Y 2003-04 and submitted that assessee has not challenged this order dated 28.2.2006 and subsequent to that the AO issued notice u/s 148 of the Act on 30.10.2006 which clearly shows that reopening of

assessment for earlier year was consequent to the subsequent assessment order of A.Y 2003-04. The ld. DR pointed out that original assessment order for A.Y 2001-02 available at pages 49 and 50 of the paper book dated 29.3.2004 was

19. The ld. DR further took us through audit objection and submitted that as per order for A.Y 2003-04, the assessee accepted that the golf course is a building and depreciation was allowed thereon @ 10% whereas the assessee claimed depreciation @ of 25% which is not sustainable. The ld. CIT-DR also drew our attention towards Revenue PB pages 29 and 30 and read out audit objections raised in the case of assessee for A.Y 2001-02. The ld. DR on the second issue recorded in the reasons pointed out that as per pages 4 to 12 of APB, the profit position for the F.Y. commencing from 1989-99 to 2003-04 it is amply clear that entire sale was completed in F.Y. 2000-01. Therefore, calculation placed at page No. 6 is incorrect and wrong and note on Labunum property placed at APB page 9, the profit for the F.Y. 2000-01 has arrived on the basis of the matching of the Revenue for the number of apartments sold in the F.Y. 200-01 with the corresponding cost of the apartments. But this calculation was factually incorrect as the assessee only accounted 90% of the sale price and 98% of the cost

for calculation of profitability from Labunum Project for the year which is not a correct approach and thus the assessee should be held liable for not disclosing truly and fully all particulars of its income during the assessment proceedings and for this reason, reassessment beyond five years is permissible.

20. The ld. DR vehemently pointed out that on the last issue recorded in the reasons, the assessee has to make claim as prior period interest expenditure and tax auditor should mention this glaring fact in the report and on this count also, the income of the assessee escaped assessment for the relevant A.Y by the reason of failure of the assessee for not disclosing truly and fully all relevant material facts for its assessment. The ld. DR pointed out that the reassessment proceedings were not initiated only on the basis of audit report of the Revenue, but it was consequent to the assessment order for A.Y 2003-04 dated 28.2.2006 and due application of mind, the AO held that reassessment proceedings has to be initiated.

21. The ld. AR also placed rejoinder to the above submissions of the Revenue and contended that reasons recorded by the AO for reopening of assessment has to be read without any support and no

supplementation or substitution or deletion therein or therefrom is permissible. He placed reliance on the decision of the Hon'ble Bombay High Court in the case of Hindustan Lever Ltd Vs. ACIT 268 ITR 332 [Bom] to support this contention. The ld. AR also pointed out that there is no reference of subsequent assessment order for 2003-04 in the reasons recorded and the issue of depreciation on golf course as decided by the AO has not been accepted by the assessee because the assessee is agitating this issue continuously and regularly. The ld. AR placing reliance on the decision of Hon'ble High Court of Delhi in the case of CIT Vs. Usha International, 348 ITR 485 [Del] contended that where an AO incorrectly or erroneously applies law or comes to a wrong conclusion, then initiation of reassessment proceedings will be invalid on the ground of change of opinion. The ld. AR further placing reliance on the decision of Hon'ble High Court of Delhi in the case of Haryana Acrylic Manufacturing Co.[supra] submitted that notice after four years u/s 148 of the Act and there is no indication in the reasons recorded about failure on the part of the assessee to disclose fully and truly all material facts for its assessment, then notice in such a situation is not a valid notice. The ld. AR of the assessee again took us through para 28 of the said decision of the Hon'ble High Court and contended that since there was no failure to make the return, the

escapement of income cannot be attributed to such failure and when the assessee had disclosed fully and truly all material facts necessary for assessment then no action u/s 148 of the Act could have been taken after four years period as per provisions of the Act.

22. The ld. AR further drew our attention towards the decision of Hon'ble High Court in the case of CIT Vs. Purolator India Ltd 343 ITR 155 para 10 to support this contention that there is no indication that the assessee has failed or omitted to disclose the material and primary facts, then reassessment proceedings beyond four years are not permissible. The ld. Counsel placing reliance on the plethora of decision including decision of Hon'ble Supreme Court in the case of Indian and Eastern Newspaper Society Vs. CIT 119 ITR 996 [SC] submitted that the opinion of internal audit party of the department on a point of law cannot be regarded as an information within the meaning of section 147(b) of the Act.

23. Replying to the above, the ld. DR also placed reliance on plethora of decisions including decision of Hon'ble Supreme Court in the case of P.V.S. Beedies Pvt. Ltd 237 ITR 13 [SC] & decision in the case of Ess Kay Engg. Com. (P) Ltd 247 ITR818 [sc] and Hon'ble High Court of Madras in the case of First Leasing Co. of India Ltd 241 ITR 248

[Madras] and vehemently contended that after considering the ratio of its own decision in the case of Indian and Eastern Newspaper Society [supra], it was held that the audit report has to be construed as if relevant provision of law had been brought to ITO's notice, then the said report constituted information within the meaning of section 147(b) of the Act. She also contended that when audit party had merely pointed out a fact which had been overlooked by the AO, and this was not a case of information on a question of law, then reopening of case u/s 147(b) of the Act on the basis of factual information given by the internal audit party was valid in law.

24. The ld. CIT-DR placing reliance on the decision of Hon'ble Supreme Court in the case of Maharaj Kumar Kamal Singh Vs. CIT 35 ITR 1 [SC] contended that the assessee has accepted assessment order for A.Y 2003-04 dated 28.2.2006 and contended that subsequent orders of Hon'ble Supreme Court, Hon'ble High Court, Tribunal and Revenue authorities in assessee's own case was information within the meaning of section 34(1)(b) of the I.T. Act, 1922 which is a corresponding section of section 147 of the Act and in the present case notice u/s 148 of the Act dated 30.10.2006 was issued after said assessment order passed in assessee's own case for AY 2003-04 which validly empower the AO for reopening of assessment beyond four years.

25. On a careful consideration of the above contentions, first of all, we may point out that all the decisions relied upon by both the parties are pertaining to old provision of section 147 of the Act which has been amended by the Finance Act, 1987 w.e.f 1.4.1989. In the present case, undisputedly and admittedly, the reopening and initiation of reassessment proceedings has been proceeded after internal audit report of the department and after assessment order passed u/s 143(3) of the Act for AY 2003-04. But, from the reasons recorded by the AO as reproduced hereinabove, there is no mention of audit report and subsequent assessment order and the AO has applied his own mind for stating reasons for reopening of assessment and initiation of proceedings u/s 147 of the Act and consequent to that notice u/s 148 of the Act has been issued to the assessee.

26. The important next question posed to us for adjudication to us is as to whether reopening of assessment and reopening of assessment proceedings beyond four years was validly initiated in the present case. The crux of the contention of the ld. Counsel for the assessee is that the assessee disclosed all material facts truly and fully during

the assessment proceedings by way of submitting audited financial statement, tax audit report vide letter dated February 2004, vide letter 15.3.2004 and copy of the opinion dated 22.4.2002 on the issue of deprecation claimed on golf course @ 25%. He further contended that on the issue of income from Labunum Project, the assessee besides above documents filed vide note No. VII in Schedule 21 of significant accounting policy and on third issue of interest expenditure, the assessee besides above documents, also filed another letter in March 2004 furnishing detailed background of interest paid and legal justification for allowability of entire interest paid during A.Y. 2001-02. After submitting above, the ld. AR vehemently pointed out that there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Therefore, reopening of assessment and initiation of re assessment proceedings and issuance of notice u/s 147/148 of the Act was not valid. Thus, the same should be quashed.

27. On the other hand, the ld. DR reiterated her contentions as noted above and vehemently submitted that while the assessee is not disclosing basis of depreciation charged and

claimed on golf course, not showing actual income from Labunum Project and not placing proper and true details about the interest charged, then it has to be held that the income of the assessee had escaped assessment by the reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment.

28. On careful consideration of above, first of all we may point out that in the case of Som Dutt Builders Pvt. Ltd Vs. DCIT, 98 ITD 78 [Kol] ITAT Kolkata Bench 'C' held that reopening of a case by the AO on the basis of substantial pointed out by the Revenue audit is permissible under law and change of opinion comes to rescue of assessee only where the AO has taken one of the permissible view at the time of original proceedings and a wrong appreciation of facts and law cannot be held as permissible view and that can always be changed for proper appreciation of law and in this situation, initiation of reassessment proceedings was within the mandate of law.

29. In the present case, the AO considered material placed on record by the assessee during original assessment proceedings and accepted the claim of the assessee regarding depreciation, interest paid during the relevant period and accepted the income shown by the assessee from Labunum Project relying on the details filed by the assessee.

30. On a vigilant perusal of documents and details referred by the counsels and reasons for reopening of assessment, it is amply clear that the assessee did not classify the golf course as per provisions of the Act as to whether it is part of 'building' or 'plant and machinery' and claimed depreciation @ 25% which was allowed @ 10% only in A.Y. 2003-04 and thus, in our considered opinion it can safely be presumed that the assessee did not disclose all material facts fully and truly for the claim of deprecation on golf course.

31. Further, we are also in agreement with the contention of the ld. CIT-DR that the assessee did not properly disclose income from Labunum Project as per percentage completion method because page No. 4 of the assessee's paper book reveals that entire sales was completed upto A.Y. 2001-02

and only there was a sale of Rs. 3,10,99,749/- in F.Y. 2001-02 which is less than 2% of the total sales which resulted into under statement of income from sale of apartments of Rs. 3.89 crores. From the assessee's paper book page 89, note on Labunum profitability it has been mentioned that profit for the F.Y. 2000-01 has been arrived on the basis of matching the revenue for the number of apartments sold in the F.Y. with the corresponding cost of the apartment and to support this factual contention, the assessee also enclosed a statement on profitability from Labunum Project which reveals that total sale value was of Rs. 174.99 crores whereas the Revenue recognised from sales was 171.10 crores resulting into understatement of sale receipts by Rs. 3.89 crores and this treat6metn given by the assessee was not in accordance with the well accepted principles of percentage of completion accounting method. Thus, these facts clearly establish the mistake apparently showing that there was failure on the part of the assessee to disclose all relevant facts necessary for assessment truly and fully for the period under assessment. Hence, the AO was well within his valid jurisdiction while issuing notice u/s 148 of the Act beyond

four years for initiation of proceedings of reassessment u/s 147 of the Act.

32. On the third issue, the ld. AR fairly submitted that after settlement of interest in respect of loan advanced by M/s Gilt Facilities P. Ltd, the amount of interest including Rs. 61,11,162/- was related to prior period and not for A.Y 2001-02. As per the details filed during the assessment proceedings available at pages 31 to 45 of assessee's paper book, it is amply clear that on 16.4.2001, Gilt Facilities confirmed the calculation forwarded by the assessee that an amount of Rs. 1,28,74,844/- was accepted as due from the assessee to M/s Gilt Facilities P. Ltd as interest on surplus money lying with the assessee. This calculation undisputedly includes impugned amount which clearly shows that the interest amount of Rs. 61.11 lakhs was not related to A.Y 2001-02. In our considered opinion, from the correspondence copy of the agreement dated 16.8.1995 between the assessee and M/s Gilt Facilities P. Ltd it is clear that an agreement was entered with the said company and because there was a delay on the part of the assessee company, therefore, as per agreement, M/s Gilt Facilities P. Ltd vide letter dated

16.2.2001 demanded interest on unutilised amount @ 25% per annum and the assessee vide reply dated 20.3.2001 informed M/s Gilt Facilities P. Ltd that interest @ 16% per annum is acceptable and finally vide letter date 31.3.2001, M/s Gilt Facilities P. Ltd accepted the proposal of the assessee and this liability stood crystallised during the period under consideration. In view of above facts, it cannot be said that the assessee did not disclose truly and fully all material facts on the issue of interest claim. Therefore, on the third count, action of the AO cannot be held as valid for assuming jurisdiction to reopen the assessment and to issue the notice u/s 147/148 of the Act. To sum up, as we have observed earlier that the income of the assessee escaped assessment due to the reason of failure on the part of the assessee in disclosing fully and truly all material facts pertaining to depreciation on golf course and on the issue of income from sale of Labunum Project. Therefore, on these two counts, action of the AO to initiate reassessment proceedings u/s 147 of the Act and issuing notice u/s 148 of the Act against the assessee for A.Y 2001-02 beyond four years cannot be held as invalid assumption of jurisdiction and finally part conclusion

of the ld. CIT(A) on legal contention and objection of the assessee are upheld. Since facts and circumstances of the A.Y 2003-04 on the issue of claim of depreciation on golf course are similar to the A.Y 2001-02 and this fact was fairly accepted by the ld. AR and thus our conclusion for A.Y 2001-02 as noted above, would apply mutatis mutandis for A.Y 2003-04 also. Consequently, cross objection of the assessee for both the years are jettisoned.

**Revenue appeal ITA No. 3549/Del/2009 for A.Y 2001-02 and 4847/Del/2009 for A.Y 2003-04**

33. Grounds Nos. 1 and 6 raised by the Revenue are of general in nature. Remaining grounds for A.Y 2001-02 read as under:

> *"2. On the facts and in the circumstances of ht case and in law, the ld. CIT(A) has erred in deleting the addition of Rs. 3,89 crores made by the AO on account of Rs. 3,89,33,267/- being the difference between the budget cost of the flats.*
>
> *2.1 The ld. CIT(A) has not appreciated the fact that the assessee has debited 98% of the budget cost and only 90% sales have been charged in P & L account.*

*3. On the facts and in the circumstances of ht case and in law, the ld. CIT(A) has erred in treating prior period interest as expenditure of the year under consideration.*

*4. On the facts and in the circumstances of ht case and in law, the ld. CIT(A) has erred in allowing depreciation @ 25% on Golf Course under the category of Plant and Machinery as against admissible @ 10% in case of building . Thus deleting the excess depreciation of Rs. 1,37,71,043/-.*

*4.1 The ld. CIT(A) has erred in treating golf course as plant.*

*5. On the facts and in the circumstances of ht case and in law, the ld. CIT(A) has erred in deleting the addition of Rs. 41.82 crores being the capital gain on agreement to sale dated 17.3.2003.*

*5.1 The CIT(A) erred in holding that neither sale nor transfer of possession was complete when the agreement to sale was executed on 17.3.2003."*

34. Grounds Nos. 1 and 4 of the Revenue are of general in nature which require no adjudication. Remaining effective grounds read as under:

> *"2. On the facts and in the circumstances of ht case and in law, the ld. CIT(A) has erred in deleting the addition of Rs. 8,12,14,136/- made by the AO on account of long term capital gain.*
>
> *2.1 The CIT(A) erred in ignoring the fact that the AO has made the addition in accordance with the provisions of section 32 of the I.T. Act.*
>
> *3. On the facts and in the circumstances of ht case and in law, the ld. CIT(A) has erred in deleting the addition of Rs. 60.54.840/- made by the AO on account of excess deprecation claimed by the assessee on golf course.*
>
> *3.1 The CIT(A) ignored the fact that depreciation on Golf Course is to be allowed @ 10% as applicable for buildings under the provisions of Income tax Act, 1961.*

<u>Ground Nos. 2 and 2.1 for A.Y 2001-02</u>

35. Apropos these grounds, we have heard the arguments of both the sides and carefully perused the relevant material on record. The ld. CIT-DR contended that the AO rightly made

addition of Rs. 3.89 crores by holding that the actual cost incurred by the assessee was reflected at Rs. 156.15 crores which was stated to be incurred to the extent of 98% of the budgeted total cost of the project and it was not known as to how and in what manner the assessee considered 98% of the total revenue at Rs. 171.10 crores as chargeable to the profit and loss account against the profit actually incurred till 31.3.2001. The ld. DR vehemently contended that neither any provision of balance amount of cost to be incurred nor any justification of recognition from sale existed. Therefore, the assessee suppressed in recognition of revenue from sale value of project to the extent of 3.89 crores which was rightly taxed in the hands of the assessee whereas the ld. CIT(A) granted relief to the assessee without any justified basis or reasons. Therefore, impugned order may be set aside by restoring that of the AO.

36. Replying to the above, the ld. AR strongly supported the conclusion of the ld. CIT(A) and submitted that the assessee had recognised total revenue of rs 174.16 crores from financial year 1998-99 to 2002-03 by following percentage completion method and assessee's accounting method is

consistent and regular. Therefore, first appellate authority rightly held that there was no suppression in recognition of revenue from Labunum project which has already been offered for taxation in the succeeding year.

37. The ld. CIT-DR contended that revenues and gross profit are recognised each period based on the construction progress. She further elaborated that in this situation construction cost and gross profit earned to date are accumulated in the asset account and progress billing are accumulated in a liability account. Therefore, the assessee did not properly follow the percentage completion method in letter and spirit. Therefore, there was suppression in recognition of revenue from sale in the Labunum Project. The ld. CIT-DR vehemently pointed out that the income offered to tax in subsequent year cannot demolish the allegation of suppression in recognition of revenue in the earlier year under consideration.

38. On careful consideration of above submissions, we are of the view that the ld. CIT-DR granted relief to the assessee only on this basis that the assessee is regularly following

percentage completion method consistently from F.Y 1998-99 to 2002-03 regularly but he has not deliberated or adjudicated contention of the AO that in what manner the assessee considered 98% of the total revenue as chargeable to profit and loss account against the cost actually incurred till 31.3.2001. It is also pertinent to note that the AO has clearly mentioned that no evidence of any further cost to be incurred in the said project was filed and how the vested cost was taken as bench mark for ascertained cost whereas the entire project was admitted to have been sold and consideration is to be received till 31.3.2001. From the statement submitted by the assessee during the assessment proceedings, available at page 5 and 6 we observe that the assessee has recorded total sales value of Rs. 174.99 crores whereas sales value has been recognised @ 98% of Rs. 171.10 crores and proportionate project cost of Rs. 156.15 crores has been debited to Profit and loss account and in our humble understanding, this calculation is not in accordance with percentage of completion method. If assessee has incurred some more cost in the subsequent A.Ys, but the total sales value was received during the year under

consideration, then the sales value has to be recognise accordingly. In view of the above, we are of the considered opinion that the issue requires examination and verification at the end of the AO according to the percentage of completion method consistently and regularly followed by the assessee and accepted by the department. Therefore, this issue is restored to the file of the AO for a fresh adjudication after affording due opportunity of being heard to the assessee.

Ground No. 3 of the Revenue for A.Y 2001-02.

39. The ld. CIT-DR supporting the action of the AO contended that the details filed by the assessee during the course of assessment proceedings clearly showed that there was meticulous working of year-wise interest and the interest of Rs. 61.11 crores was not admissible in the current year as it was prior period expenditure. Therefore, the AO rightly added the same to the income of the assessee. The ld. CIT-DR pointed out that the first appellate authority gave relief to the assessee without any basis. Therefore, the impugned order may be set aside by restoring that of the AO. The ld. AR strongly supported the impugned order and submitted that

the ld. CIT(A) after considering all relevant facts and remand report of the AO rightly held that the liability to pay the said interest accrued and crystallised during the year only therefore, the same was allowable in the year under consideration. The ld. Counsel pointed out that the ld. CIT(A) was right in granting relief to the assessee by placing on the decision of the Hon'ble High Court of Delhi in the case of Shri Ram Pistons Ltd reported at 220 CTR 404 [Del]. The ld. AR also pointed out that the ld. CIT(A) rightly considered this fact that the entire amount of 1.28 crore was paid to Gilt Facilities P. Ltd Facilities after deducting TDS which was also deposited on 17.5.2001 and the recipient Gilt Facilities P. Ltd offered this amount to in its return of income in A.Y 2001-02 only.

40. On careful consideration of above submissions, we are of the view that the ld. CIT(A) has elaborately discussed facts and circumstances of the case at page 16 last operative para wherein it was noted that the alleged interest amount relates to prior period however, it was accrued and crystallised during the financial period under consideration and entire

amount was paid to Gilt was parted after deduction of tax at source and same amount was offered to tax by the recipient Gilt Facilities P. Ltd. From the copies of the agreement dated 16.8.1995 and correspondence between the assessee and M/s Gilt Facilities P. Ltd, it is clear that the issue of interest was raised and settled during F.Y. 2000-01 and the assessee paid interest to M/s Gilt Facilities P. Ltd as per computation agreed between them. However, from the copy of the chart showing the calculation of total interest amount paid by the assessee to M/s Gilt Facilities P. Ltd reveals that the impugned amount was related to prior period but during the prior period there was no occasion for the assessee to claim the same as expenditure because this liability was accrued and crystallised after long conversation and correspondence with the Gilt Facilities P. Ltd as per agreement dated 16.8.1995 and the assessee paid amount after deduction of tax and the same was offered to tax by the recipient Gilt Facilities P. Ltd during A.Y 2001-01. We are unable to see any apparent mistake or ambiguity in the appellate order on this issue and thus we have no reason to

interfere with the same. Consequently, Ground No. 3 of the Revenue being devoid of merits stands dismissed.

Ground No 4 and 4.1 for A.Y 2001-02 and Ground No. 3 & 3.1 for A.Y 2003-04 of the Revenue.

41. Apropos these grounds, the ld. CIT-DR submitted that the ld. CIT(A) has erred in allowing depreciation @ 25% on golf course under the category of plant machinery as against 10% as allowable in the case of building which includes golf course. The ld. CIT-DR pointed out that the ld. CIT(A) has erred in treating the golf course as plant and machinery whereas the same is includible as building for the purpose of deprecation. As per provisions of the Act, the ld. CIT-DR pointed out that as per decision of the of Hon'ble Supreme Court in the case of CIT Vs. Anand Theatre 2424 ITR 192 [SC] building in not a plant and machinery. Even if it is to be construed as plant only that part of the building can be put in the category of plant and machinery not the entire building. The ld. CIT-DR pointed out that golf course is a structure of building in which various sports facilities have been provided to the members of the assessee company and the assessee wrongly claimed depreciation on golf course as

plant and machinery @ 25%. The ld. CIT-DR pointed out that the ld. CIT(A) misunderstood the ratio of decision of the Hon'ble Supreme Court in the case of Anand Theatre [supra] as in that case, it was held that all the buildings cannot be considered as plant and machinery. However, some building using the auditorium and furniture and fitting found therein should be construed as a plant. The ld. DR vehemently pointed out that there was no basis for the ld. CIT(A) to treat the golf course as plant and machinery. Therefore, he was not justified in deleting the addition.

42. Replying to the above, the ld. AR pointed out that the ld. CIT(A) rightly held that benefit of ratio of decision of Anand Theatre [supra] rendered by Hon'ble Supreme Court is not available for the Revenue as present case is pertaining to golf course and not a theatre. The ld. AR supported the action of the ld. CIT(A).

43. On careful consideration of the above rival submissions we note that the ld. CIT(A) granted relief with following observations and conclusion:

*" Rival contentions have carefully been considered After considering the rival submissions I find a substantial support in the contention of the Id. A.R. of the appellant. It is a fact that the Assessing Officer has misconceived the facts of the case to some extent. In fact, the appellant has not claimed depreciation* ***(a)****. 25% on the concrete path, driveways, interconnecting roads constructing around play grounds in the Golf Court as recorded by the Assessing Officer in its assessment order. The Golf Course consist of the open land with so many levels which has been prepared as per technical requirement as required to play the game 'Golf. It includes expenses towards creating water tank, bunkers, fair ways, turf, rubs, grounds, installing proper erection system. landscaping etc.. Golf Course is a specialized superstructure on the land with various levels of undulation, holes, small ponds etc. as a specialized professional requirement for playing the Golf on the piece of land Therefore, cost of creating such technical requirement will certainly make the field of Golf Course as a 'plant' only. Although the various courts citations relied upon by the Id. A.R. of the appellant are not directly applicable to the facts of the case but there is an oblique reference for considering the Golf Course as a 'plant' only. As far as the reliance placed by the Assessing Officer in the decision of Hon'ble Supreme Court in the case of CIT vs. Anand Theater is concerned. I find that same is not applicable to the facts of the instant case at all. In that case it was clarified by the Hon'ble Supreme Court that all the buildings can not be considered as a 'plant'. However, some buildings using the auditorium and furniture & fittings found*

*therein should be construed in a plant. In the case of the appellant, none of the building or any asset in the nature of building has been considered as 'plant'. It is only a piece of land which has been prepared by putting several expenditures on various accounts to prepare it as per the technical requirements to play the game of Golf. In that context, it has also been noticed that the business of the appellant is to invite the players for playing the Golf and charging the fees for that. Therefore, the field so prepared was a business operated used by the appellant for carrying on its business of playing the Golf. In view of these facts and circumstances. I allow appellant's claim of depreciation* ***(a), 25%*** *and direct the Assessing Officer to delete the addition made by him on ant of disallowance of the depreciation on the Golf Course."*

44. In view of above, we observe that the ld. CIT(A) in the first part of the this para noted that golf course is a specialised superstructure on the land with various level undulation, holes, small points etc. as a specialised profession requirement for playing golf on the piece of land. Therefore cost of creating such technical requirement will certainly make the field of golf course as a plant.

45. In the second part of above operative para, the ld. CIT(A) held that the ratio of the decision of Hon'ble Supreme Court in the case of CIT Vs. Anand Theatre is not applicable and then jump to a conclusion that the business of the assessee is to invite players for playing the golf and charging the fee for that and thus the field so prepared was a business operated used by the assessee for carrying on its business of playing golf. In the last lines, without specifically pointing out as to whether the golf course that is a piece of land with many levels of undulation, holes, small ponds etc can be categorised as a plant and machinery and not as a building. The ld. CIT(A) jumped to a conclusion that the assessee's claim of depreciation @ 25% is allowed which is not a proper and justified approach for a quasi-judicial authority. We may point out that golf course has not been categorised in the schedule of depreciation and the main dispute between the assessee and the revenue is that the assessee is seeking to place the golf course in the category of plant and machinery whereas the Revenue wants to treat the same as building.

46. At this juncture, we may point out that we are not in agreement with the conclusion drawn by the ld. CIT(A) that a piece of land having some landscaping for playing golf such as various level undulation, holes, small ponds etc construed a super structure which can be categorised as a plant and machinery. If this view is accepted then every landscaping having some special features for the purpose of its intended use would become plant and machinery and every construction of building for the purpose of sports would be converted into plant and machinery. It is pertinent to note that for creation of golf course, landscaping is done for in various levels and some holes, ponds and walking path is created but in our humble understanding this kind of piece of land converted into a golf course by creating some specialised facilities for playing golf cannot be put in the category of plant and machinery.

47. In view of above, we have no hesitation to hold that the ld. CIT(A) granted relief to the assessee without any basis and without arriving to a conclusion as to whether golf course is a plant and machinery or building. Therefore, conclusion of the ld. CIT(A) is not sustainable as we are

unable to see any basis for the factual observations noted by the ld. CIT(A) for putting the golf course in the category of plant. Since the issue has not been adjudicated by the ld. CIT(A) in a proper manner, therefore, this issue is restored to the file of the AO for a fresh adjudication after affording due opportunity of being heard to the assessee and without being prejudiced from earlier orders and our observations in this order.

48. We may also point out that to support the case of the AO, the ld. CIT-DR has placed reliance on plethora of decisions including the decision of Hon'ble Supreme Court in the case of CIT Vs. Anand Theatre [supra], CIT Vs. Gwalior Rayon Silk Mfg. Mills 196 ITR 149 [SC] and decision of Hon'ble High Court of Delhi in the case of Moradabad Toll Road Co. Vs. ACIT [2014] 52 Taxmann.com 21 [Delhi] to establish that golf course is not a plant and machinery and it is to be categorised as a building and on the other hand, the ld. AR has placed reliance on the case of decision of Hon'ble Supreme Court in the case of CIT Vs. Karnataka Power Corpn. 247 ITR 268 [SC], Scientific Engineering House P. Ltd Vs. CIT 157 ITR 86 [SC] and decision in the case of Victory

Aqua Farm Ltd 61 Taxmann.com 166 [SC] and plethora of decision to support the case of the assessee that golf course is a plant and machinery and it is not a building. Interestingly, no cited decision relied by both the parties are related to golf course. Therefore, facts regarding this issue have to be dealt in respect to golf course of 300 acres land and how it became plant and machinery attracting 25% depreciation. The AO has to examine these details to ascertain the issue between the parties as stated above. We also note that the assessee in its written submissions before the authorities below as well as before the Tribunal has submitted the details of construction on the 300 acres of land converting it into a golf course, but these details have not been submitted before the AO and the AO could not get an opportunity to verify and examine the same. Therefore, in our considered opinion, this issue requires detailed verification and examination at the end of the AO after affording due opportunity of hearing to the assessee and without being prejudiced from the earlier assessment and first appellate order. Needless to say that the AO would examine all material facts on this issue and

after considering the mandate of the relevant provisions o of the Act as well as the ratio of decisions relied upon by both the parties shall decide the issue afresh in accordance with law. Consequently, Ground No 4 and 4.1 for A.Y 2001-02 and Ground No. 3 & 3.1 for A.Y 2003-04 of the Revenue are allowed for statistical purposes by restoring the same to the file of the AO.

Ground No 5 and 5.1 for A.Y 2001-02 and Ground No. 2 & 2.1 for A.Y 2003-04 of the Revenue.

49. Apropos these grounds, the ld. CIT-DR strongly supported the action of the AO and submitted that as per the agreement to sale executed between the company and ITC Ltd. in F.Y. 2000-01, 22.69 acres of land was sold to ITC Ltd. for a consideration of Rs. 45 crores and assessee company received entire consideration under this agreement during A.Y 2001-02. The ld. DR further contended that the assessee company had unconditionally and irrevocably transferred all its rights and interest of ownership in the subject property in favour of ITC Ltd. to the exclusion of others in the year of agreement to sale only. Therefore, the transaction was completed within A.Y 2001-02 and merely because for want

of some government approval if sale deed could not be executed in favour of ITC Ltd, then also income accrued therefrom was to be taxed as long term capital gain in the hands of the assessee. The ld. CIT-DR also pointed out that the ITC Ltd used the land as a possession and title holder and also obtained loan by mortgaging the land. Therefore, the AO was quite correct and justified in calculating long term capital gain and taxing the same in the hands of the assessee. The ld. DR vehemently contended that the ld. CIT(A) granted relief to the assessee without any basis. Therefore, impugned order may be set aside by restoring that of the AO.

50. Per contra, the ld. AR of the assessee strongly supported the first appellate order and also took us through the relevant operative part of the ld. CIT(A) from pages 25 to 51. The ld. AR pointed out that notional income cannot be charged to tax especially when the transaction of sale of land was not completed during the period under consideration and the same was cancelled in subsequent F.Y 2009-10. Since the agreement stands cancelled and entire amount stood refunded to the assessee in F.Y. 2009-10. The ld. AR also

contended that the AO misunderstood the facts and held that ITC Ltd obtained loan by mortgaging the land to various banks and this mistake was corrected by the AO by filing remand report to ld. CIT(A) wherein he fairly accepted that the documentary evidence in support of averment of the assessee that the assessee and the ITC Ltd, had actually mortgaged the land to various banks and financial institutions has been found to be correct. On this issue no other argument was placed by the parties.

51. On careful consideration of above rival submissions and perusal of the assessment order, first appellate order and all relevant material placed on record, we are of the considered view that in order to tax capital gain u/s 45 of the Act, there must be transfer of land or any other movable or immovable property as defined in section 2(47) of the Act. In the present case, the ld. CIT-DR could not controvert this fact that neither the sale deed was executed nor possession of the land was handed over to ITC Ltd and the land in question continues to be in complete control of the assessee. We are in agreement with the conclusion of the ld. CIT(A) that mere

receipt of entire sale consideration as an advance does not make the agreement as effective transfer as defined in section 2(47) of the Act. The ld. CIT-DR could not controvert this fact that the assessee is regularly showing advance amount as advance in its financial statements as the required permission from DTCP could not be obtained to execute sale deed in favour of the assessee to complete aforesaid transaction. So far as the allegation of the AO regarding mortgage by ITC Ltd is concerned, this fact was demolished by the AO himself in the remand report filed to the ld. CIT(A) during first appellate proceedings wherein it was stated that the funds, in fact, were raised by the assessee and not by ITC by mortgaging the land. From the record, it is apparent that the assessee continuous to possess the land physically and it could not be transferred to ITC Ltd till a valid permission is received from DTCP. From the documentary evidence filed by the assessee before the authorities below it is clear that the land in question owned by the assessee is situated within controlled area and same is governed by the provisions of Punjab Scheduled Road and Controlled Areas Restrictions of Unregulated Development Act, 1963 and Rules made

thereunder. In this situation, the assessee was prohibited from doing any commercial activity on the land without approval of DTCP and the assessee was legally prohibited from parting with the possession and title of the land to ITC or any other entity. In view of above noted facts, the ld. CIT(A) was right in drawing conclusion that there was neither sale of land nor transfer of possession as per clause (i) to (v) of section 2(47) of the Act pertaining to sale of immovable property and he rightly concluded that these provisions covers a situation where registration of sale deed has been completed. As per clause (v) of section 2(47), any transaction involving the allowing of possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882, but in the present case, the AO could not controvert this fact that the possession of the land in question was not transferred to the assessee and thus applicability of clause (v) of section 2(47) of the Act as part performance of contract cannot be inferred. On the basis of above discussion, we are unable to see any perversity, ambiguity or any other valid reason to

interfere with the impugned order on this issue and thus we uphold the same. Since facts and circumstances of A.Y 2003-04 on this issue are similar to A.Y 2001-02, therefore, our conclusion for A.Y 2001-02 would apply mutatis mutandis to A.Y 2003-04 also. Consequently Ground Nos 5 and 5.1 for A.Y 2001-02 and Ground Nos. 2 & 2.1 for A.Y 2003-04 of the Revenue are dismissed.

52. To sum up, in the result, cross objections of the assessee for both the years are dismissed and appeal of the Revenue on two issues are partly allowed for statistical purposes, for both the years, in the manner as indicated above.

**The order is pronounced in the open court on 15.06.2016.**

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(L.P. SAHU)** | **(C.M. GARG)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Dated: 15th June, 2016

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi