INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "D": NEW DELHI

BEFORE SMT BEENA A PILLAI, JUDICIAL MEMBER

AND

SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA Nos.	Assessment Year
4536/Del/2009	2005-06
4560/Del/2011	2005-06
653/Del/2011	2007-08
4098/Del/2011	2008-09
1516/Del/2014	2009-10
4998/Del/2015	2010-11
4999/Del/2015	2011-12

Landbase India Ltd, 25, Basant Lok, Community Centre, Vasant Vihar, New Delhi PAN: AAACI0053F	Vs.	The Deputy Commissioner of Income Tax, Circle-4(1), New Delhi
(Appellant)		(Respondent)

ITA No.	Assessment Year
5582/Del/2010	2004-05
4721/Del/2009	2005-06

The Deputy Commissioner of Income Tax, Circle-4(1), New Delhi	Vs.	Landbase India Ltd, 25, Basant Lok, Community Centre, Vasant Vihar, New Delhi PAN: AAACI0053F

(Appellant)		(Respondent)

ITA No.	Assessment Year
1030/Del/2019	2001-02
1031/Del/2019	2003-04
138/Del/2016	2012-13

Landbase India Ltd, 25, Basant Lok, Community Centre, Vasant Vihar, New Delhi PAN: AAACL0053F	Vs.	The Assistant Commissioner of Income Tax Circle-15(1), New Delhi
(Appellant)		(Respondent)

ITA No. 4849/Del/2011

(Assessment Year: 2005-06)

The Assistant Commissioner of Income Tax, Circle-15(1), New Delhi	Vs.	Landbase India Ltd, 25, Basant Lok, Community Centre, Vasant Vihar, New Delhi PAN: AAACL0053F
(Appellant)		(Respondent)

Assessee by :	Shri Rohit Jain, Adv Ms. Tejasvi Jain, CA Ms Somya Jain, CA
Revenue by:	Shri J. K. Mishra, CIT DR Smt Naina Soin Kapil, Sr. DR
Date of Hearing	28/05/2019
Date of pronouncement	26/08/2019

ORDER

PER BENCH.

1. These are the appeals in case of Landbase India Limited (Assessee) for AY 2001-02 to AY 2011-12 involving some common issues. These appeals were argued together and therefore they are disposed of by this common order.

2. The assessee has raised the following grounds of appeal in ITA No. 1030/Del/2019 for the Assessment Year 2001-02 against the order of The Commissioner Of Income Tax (Appeals) – 5, New Delhi [CIT (A)] dated 31/12/2018-

"1. That the CIT(A) erred on facts and circumstances of the case and in law in upholding the action of assessing officer in making addition of Rs. 1,37,71,043 on account of allowance of depreciation on golf-course as "building" as against the same being considered as "plant and machinery" by the appellant.

1.1 That the CIT (A)/assessing officer erred on facts and circumstances of the case and in law in not appreciating that classification of golf course could not be changed in subsequent year when claim of depreciation @ 25% on golf course as 'plant' stood allowed/ accepted in the past assessment years, i.e., 1998-99 to 2000-01 and succeeding assessment years, i.e., 2006-07 to 2009-10.

1.2 That the CIT (A)/assessing officer erred on facts and circumstances of the case and in law in not appreciating that the classification of block of asset which has been allowed/accepted and merely carried forward from earlier years cannot be modified in current year

1.3 That the CIT(A) erred on facts and circumstances of the case and in law in holding that golf course has not manufactured or produced anything so as to classify it as a 'plant and machinery'.

2. Without prejudice, if the golf course is treated as 'building', the assessing officer be directed to re-compute depreciation admissible under section 32(1) (ii) of the Act with reference to revised written down value of golf course in subsequent years."

3. The appellant is a company engaged, inter alia, in the business of running of golf course, construction of hotel and sale of merchandise. During the previous year relevant to the assessment year 2001-02, the appellant filed return of income on 30.10.2001 declaring loss of Rs. 20,72,84,983/-. The appellant derived substantial income from operating and running of the golf course. Assessment was originally completed under section 143(3) of the Income Tax Act, 1961 ("the Act") vide order dated 29.03.2004 assessing the loss of the appellant at Rs. 20,71,55,977/- after making certain disallowances. Thereafter, reassessment proceedings were initiated under section 147, vide notice dated 30.10.2006, issued under section 148, purportedly on the basis of certain audit objection, which was completed vide order dated 24.12.2007 passed under section 148 r.w.s 143(3) after making further disallowances. On further appeal, the Commissioner of Income-Tax(Appeals) ["CIT(A)"], vide order dated 22.05.2009, after rejecting the grounds challenging the validity of reassessment proceedings, was pleased to allow the appeal in favour of appellant on merits. Against the aforesaid order of LD CIT (A), the Department preferred further appeal before the Income Tax Appellate Tribunal, Delhi. The appellant also challenged the action of LD CIT (A) in upholding the validity of reassessment proceedings. ITAT , vide order dated 15.06.2016, inter-alia, restored the issue whether depreciation is admissible @25% as plant or @10% as building, to the file of the assessing officer for de-novo consideration and to examine the details of construction on the 300 acres of land converting it into a golf course, which were not filed before the assessing officer in the first round of proceedings
4. Pursuant to the aforesaid order, LD assessing officer passed order dated 29.12.2017 under section 254/148/143(3) of the Act giving effect to the said order of the Tribunal. In the said order, the assessing officer, after considering the entire material available on record, reiterated the findings given in original assessment and allowed depreciation on golf course @ 10% by treating the same as 'building'. On further appeal against the said order, the ld CIT(A), vide order dated 31.12.2018 upheld the order of the ld assessing officer restricting depreciation on golf course @ 10%. The CIT(A) held that no doubt the assessee is generating revenue from the players for

playing golf and allowing its golf course, but it cannot be said that the assessee has manufactured or produced anything. Thus, assessee is in appeal before us.

5. The ld AR submitted that aforesaid action of the assessing officer/CIT(A)in restricting the depreciation to 10% is bad in law and not sustainable for the reasons elaborated hereunder:

    a) Tribunal vide order dated 15.06.2016 merely remanded/remitted the matter to AO for fresh consideration

        i. As stated supra, in the first round of proceedings, the Hon'ble Tribunal restored the issue whether depreciation is admissible @25% as plant or @10% as building, to the file of the assessing officer for de-novo consideration and to examine the details of construction on the 300 acres of land converting it into a golf course, which were not filed before the assessing officer in the first round of proceedings. The relevant extract of the findings of the Tribunal are reproduced hereunder:

            "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 categorized 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 categorized 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 categorized 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 specialized 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 categorized 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 ITA No. 3549 & 4847/Del/2009 CO No. 328/Del/2009 & 111/2010 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 ITA No. 3549 & 4847/Del/2009 CO No. 328/Del/2009 & 111/2010 after considering the mandate of the relevant provisions 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. (Emphasis supplied)"

ii. He further submitted that on perusal of the aforesaid, it will kindly be appreciated that the Tribunal, vide para 47, merely restored the issue of depreciation on golf course as "plant" or "building" to the file of the assessing officer for fresh adjudication. The Tribunal categorically observed,

"....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".

iii. This was done considering the fact that details of construction of golf course were not considered by the assessing officer in the first round. He submitted that Tribunal simply set-aside/ remitted the issue to the file of the assessing officer to decide it afresh. In these circumstances, any prima-facie observation/finding recorded by the Tribunal in the earlier para, which was, in fact, based on limited examination of details of construction of golf-course, it is respectfully submitted, stood obliterated for all intents and purposes. He placed reliance in this regard is placed on the judgment of the Hon'ble Supreme Court in the case of Hukam Singh v. State of Haryana and Another: 2019 SCC Online SC 159, wherein the Apex Court clarified similar issue and held that once the matter is remanded for fresh consideration, any observation in the

judgment stands obliterated and the authorities are required to consider the issue afresh. In that case, review petition was filed before the Hon'ble Court called upon it to clarify the meaning and purport of the following passage from its earlier ruling in the case of Haryana State Industrial Development Corporation Ltd. vs. UDAL (2013) 14 SCC 506:

> "32. We also find merit in the argument of the learned counsel for the landowners that while fixing market value of the acquired land the learned Single Judge committed serious error by not considering an important piece of evidence i.e. Ext. PW 9/A dated 23-11-1999 vide which HSIIDC had allotted land to M/s. Honda Motorcycles and Scooters India (P) Ltd. At the rate of Rs. 1254.18 per square yard. Although, this document was produced before the Reference Court but the same was not taken into consideration while determining the amount of compensation. The same error has been repeated in the impugned judgment. If this document were taken into consideration, then market value of the acquired land would come to Rs. 60, 69,360 per acre. By making deduction of 50% towards development cost and granting annual increase of 12/15% (cumulative), market value of the land will be much higher than Rs. 37, 40,000 per acre.
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> 33. In view of the above conclusions, we do not consider it necessary to deal with the other points argued by the learned counsel for the parties/interveners and feel that the ends of justice will be served by setting aside the impugned judgment and remitting the matters to the High Court for fresh disposal of the appeals and cross-objections filed by the parties subject to the rider that the State Government/HSIIDC shall pay the balance of Rs.

37,40,000 to the landowners along with other statutory benefits.

34. In the result, the appeals are allowed, the impugned judgment is set aside and the matter is remitted to the High Court for fresh disposal of the appeals filed by the parties under Section 54 of the Act as also the cross-objections. The parties shall be free to urge all points in support of their respective cause and the High Court shall decide the matter uninfluenced by the observations contained in this judgment."(Emphasis supplied)

iv. He further submitted that Apex Court, while clarifying the afore-extracted observations made in its earlier judgment, negated the submission of the applicant that in line with the observations made at paragraph 32 of the judgment in the case of Haryana State Industrial Development Corpn (supra), 'the market value of land ought to be higher than Rs. 37,40,000 per acre'. The Court held that since the matter had been remitted to the High Court for fresh adjudication of appeals/ cross-objections with the specific direction that the High Court shall not be influenced by the observations made by the Supreme Court, such passing observation at paragraph 32 could not be held as binding. The Court observed that:

"8. As regards the last submission, paragraph 32 of the decision in Haryana State Industrial Development Corporation Ltd.[2] recorded the submission of the learned counsel that on the basis of sale deed Ext.PW 9/A, the value ought to be higher than Rs. 37,40,000/- per acre. The matter was not finally decided by this Court and was remitted in paragraph 34 for fresh consideration "uninfluenced by the observations contained in this

> judgment". We do not agree with the submission that the landowners were assured of minimum compensation at the level of Rs. 37,40,000/- per acre. In fact, in tune with the observation that fresh consideration is uninfluenced by any of the observations contained in the judgment, the matter was left open and the assessment had to be done de novo. We, therefore, reject the submission."
> (Emphasis supplied)

v. Similarly, the Hon'ble Supreme Court in the case of Kanaklata v. State (NCT of Delhi) and Others: 6 SCC 617, held that if an order passed by the court is set aside, the observations and findings recorded therein also get obliterated for all intents and purposes. The Court further held that in some cases, the Court makes the position clear by stating that any such observation shall not influence the court concerned while making a fresh order the same to put the matter beyond the pale of any controversy. The Court held as under:

> "5. We have heard the learned counsel for the parties at some length. It is true that the trial court had while discharging the accused persons under the Special Act mentioned above, made certain observations about the alleged misuse of the provisions of the said Act by unscrupulous elements and also certain suggestions for remedying that situation. It is also true that the trial court had come to the conclusion that there is no real basis for it to frame any charge against the accused persons under the said Act. But it is equally true that while setting aside that order and directing a fresh order on the question of charge, the High Court has clearly mentioned that the trial court shall remain uninfluenced by the observation made in its earlier order. That observation is, in the opinion of

the High Court, a sufficient safeguard against any possible prejudice to the complainant appellant herein making transfer of the case from the Court at Rohini to any other court unnecessary.

6. Now in the ordinary course if an order passed by the court is set aside, the observations and findings recorded therein also get obliterated for all intents and purposes. So also if the High Court makes the position clear that any such observation shall not influence the court concerned while making a fresh order the same should ordinarily put the matter beyond the pale of any controversy. Having said that, there may still be situations where the nature of the observations made by the court concerned create a reasonable apprehension in the mind of the litigant that the court has so committed itself to a given approach or thought process that it may not be possible for it to retrace its steps to take a fair and non-partisan view in the matter

7. The present appears to be one such case where despite the safeguards provided by the High Court's observations, the apprehension of the complainant continues to subsist. We do not think that such apprehension is wholly misconceived nor can it be dubbed as forum shopping in disguise. The earlier order passed by the trial court is so strongly worded that it could in all likelihood give rise to a reasonable apprehension in the mind of the complainant which cannot be lightly brushed aside. We must hasten to add that we are not in the least suggesting that the Presiding Officer of the trial court is totally incapable of adopting a fair approach while passing a fresh order but then the question is not whether the Judge is biased or incapable of rising above the earlier observations made by her. The question is whether the apprehension of the

complainant is reasonable for us to direct a transfer. Justice must not only be done but must seem to have been done. A lurking suspicion in the mind of the complainant will leave him with a brooding sense of having suffered injustice not because he had no case, but because the Presiding Officer had a preconceived notion about it. On that test we consider the present to be a case where the High Court ought to have directed a transfer. Inasmuch as it did not do so, we have no option but to interfere and direct transfer of the case to another court". (emphasis supplied)

vi. Similarly, in the present case, the Tribunal, he submitted, simply set-aside/ remitted the issue to the file of the assessing officer for fresh consideration and thus, any prima-facie observation/finding recorded by the Tribunal based on limited examination of details of construction of golf course, stood obliterated for all intents and purposes. The Tribunal, in para 47, in fact, clarified the position to put the matter beyond any doubt by observing, "……without being prejudiced from earlier orders and our observations in this order".

b) Classification as "plant" accepted in initial year(s) – AO had no jurisdiction to subsequently change classification

He submitted that next issue that arises in the present appeal is whether amount spent on construction of golf course is to be, for the purpose of depreciation, regarded as "plant", as contended by the appellant or as "building", as contended by the Revenue. It is, at the outset, the fundamental submission of the appellant that classification and acceptance of "golf course" as "plant" in the initial year(s) operates as res-judicata and binds both the assessee and the Revenue and consequently, the assessing officer had no jurisdiction, whatsoever, to change classification in subsequent year(s), including the year under

consideration. He furthered his arguments in terms of section 32(1) (ii) of the Act, depreciation is allowed on the "written down value" of any "block of assets". The expression "block of assets" is defined in section 2(11) of the Act to mean a group of assets falling within a class of assets in respect of which same percentage of depreciation is admissible. The expression "written down value" is defined in section 43(6) (c) of the Act to mean actual cost in year of acquisition. For every subsequent year(s), "written down value" at the beginning of the previous year, increased by actual cost of assets acquired during the year and reduced by consideration received on transfer of asset during the year. He submitted that under section 43(6)(c) of the Act, in all subsequent year(s), subsequent to the year of acquisition of asset, "written down value" necessarily means "written down value" of the block at the beginning of the previous year, i.e., at the closing of the immediately earlier year. Once an asset enters a particular block, neither the assessee nor the Revenue has any mandate/ authority to subsequently, remove the asset from a particular block and reclassify/ re-enter the same in some other block. To put it simply, once an asset is classified as block of "plant", then, in subsequent year, the same asset cannot be classified as "building" or vice versa. Pertinently, the block concept of depreciation was introduced by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 with effect from 1-4-1988. Circular No. 469 dated 23 September 1986: 162 ITR (St) 21 explained the scheme of depreciation on block of assets. It was clarified that in the block concept, individual identity of the asset is lost, and depreciation is allowed with reference to the entire block. In view of the above, he submitted that depreciation is to be allowed on the block of asset at specified percentage on the written down value of the block of asset. The written down value of the block of asset is the value of block of asset at the beginning of the previous year as increased or decreased by the addition or

deletion in the previous year. Hence, once an asset goes into the block of asset and the same is allowed by the assessing officer in the previous year, the asset loses its individual identity and become part of the block. In the succeeding years, the assessing officer has to allow depreciation on the block of asset as being brought forward.

c) Golf course accepted as "plant" in earlier years – not permissible to change block in current year

He submitted that the golf course, was constructed in previous year relevant to assessment year 1998-99, wherein total cost of Rs. 20,57,09,950 (excluding cost of land) was capitalized and depreciation was claimed thereon @25% under section 32(1) of the Act. Further, expenditure on its improvement was incurred in subsequent assessment years and the total cost of the golf course amounted to Rs. 22, 57, 78,036. He referred to paper book for year-wise details refer 62-70 of Paper Book-Vol I). The cost of golf course, it is submitted, comprised of various equipment and items of plant and machinery like irrigation system water tanks including water sprinklers, technical knowhow, bunkers, etc. The entire cost incurred on construction of golf course was capitalized as a separate block of plant and machinery and accordingly, depreciation at the applicable/prescribed rate of 25% was being claimed consistently since assessment year 1998-99 onwards. Following the aforesaid consistent method, the appellant had, during the relevant assessment year 2001-02, claimed depreciation @25% amounting to Rs. 2,42,64,813 on the opening WDV written down value ('WDV') of Rs. 8,91,80,816 and addition of Rs. 1,57,56,876 made during the relevant assessment year. He referred to page 39 of Paper book-Vol I. He submitted that claim of depreciation @25% has been allowed to the appellant in earlier as well subsequent assessment years, as per details tabulated hereunder:

Assessment year	Return filed	Assessment Particulars	Remarks
1998-99	28.11.1998	Order u/s 143(3) dated 19.3.2001	1st year, claim accepted by the assessing officer under section 143(3), as under: - Refer Tax Audit Report for A.Y. 98-99 - Assessment order accepting return
1999-00	30.12.1999	Return processed u/s 143(1) vide intimation dated 13.11.2000	2nd year, claim of depreciation stood accepted, as under: - Depreciation claimed in return - Tax Audit Report - Intimation u/s 143(1)
2000-01	28.11.2000	Order u/s 143(3) dated 28.3.2003	3rd year, claimed allowed by the assessing officer in regular assessment as under: - Depreciation claimed in return - Tax Audit Report

			- Assessment u/s 143(3) Reassessment proceedings subsequently initiated on a different issue, were quashed by ITAT vide order dated 21.05.2015.
2001-02	30.10.2001	Order u/s 143(3) dated 29.3.2004	4th year of claim, allowed originally by the assessing officer. Subsequently, the case was reopened and the issue was set aside by the Tribunal vide order dated 15.6.2016 for de-novo consideration.
2002-03	31.10.2002	Return processed u/s 143(1) vide intimation dated 27.2.2003	5th year, claim of depreciation stood accepted, as under: as under: - Depreciation claimed in return - Tax Audit Report - Intimation u/s

			143(1)
2003-04	27.11.2003	Order u/s 143(3) dated 28.2.2006	6th year of claim. The case was re-opened and the issue was set aside by the Tribunal vide order dated 15.6.2016 for denovo consideration.

He further submitted that , in regular assessment under section 143(3) vide order dated 29.03.2004 for assessment year 2001-02, the claim of depreciation was accepted after duly considering the replies dated February' 2004 and 15.3.2004 filed by the appellant. He submitted that vide letter filed in February 2004, the appellant furnished detailed break-up of additions to golf course (refer pages 112-118 of Paper book – Vol I). He referred that Vide letter dated 15th March' 2004, the appellant certified that no depreciation has been claimed on the value of land on which golf course has been constructed (refer page 119-122 of the Paper book – Vol I); he also referred to Opinion dated 22.4.2002 was filed during the assessment proceedings in support of claim of depreciation on golf course (refer pages 71-73 of paper book – Vol I). He therefore submitted that on n perusal of the aforesaid details/ documents, it will, be appreciated that the assessing officer, after due application of mind and after duly considering the exhaustive details/ documents furnished by the appellant, agreed with the claims and therefore, accepted the claim of depreciation on golf course @ 25% in the original assessment order. On perusal of the above, it may be noted that classification and claim of depreciation @ 25% on golf course as "plant" stood allowed/

accepted in the past assessment years. It was, thus, not open to the assessing officer to depart from the aforesaid classification and was bound to allow depreciation on golf course as plant, as claimed by the appellant.

d) Golf course – allowed as "plant" in subsequent years 2006-07 to 2009-10

He further submitted that the ld CIT(A) in assessment years 2006-07, 2007-08, 2008-09 and 2009-10, while allowing the appeal of the appellant on the issue of depreciation on golf course, directed the same to be treated as "plant". Most importantly, the Revenue's appeals against the aforesaid orders of the CIT(A) has been dismissed by the Hon'ble Tribunal vide separate orders dated 2.5.2016, 2.5.2016 and 1.8.2018 for assessment years 2006-07, 2008-09 and 2007-08 and 2009-10 respectively, though on the ground of low tax effect [refer pages 279-286 of Paper book-Vol-II]. Be that as it may, it will thus, kindly be appreciated that the order of the CIT(A) for assessment years 2006-07, 2007-08, 2008-09 and 2009-10, directing the golf course to be treated as "plant" attained finality. Thus according to him the claim of depreciation on golf course as "plant" stands accepted in assessment years 1998-99 to 2000-01, 2002-03 and 2006-07 to 2009-10. Therefore he submitted that it is totally absurd to take a different position in some of the middle assessment years, more so, when that would be totally contrary to the fundamental principle of depreciation being allowed on the WDV of the relevant block.

e) He further referred to several Judicial Precedents to support his contentions.

   i. He first referred to decision of Delhi Bench of the Tribunal in the case of DCIT v. Jaypee Greens Ltd. : ITA Nos. 3545 to 3547/Del/2009, wherein on exactly similar facts, the Tribunal considering golf course as a plant, was pleased to allow

depreciation @25% observing that the assessing officer has himself allowed depreciation at that rate in the past [refer pages 33-38 of case laws paper book]. He submitted that in that case, the assessee was engaged in the business of running and operating a golf course in Greater Noida on which the assessee claimed depreciation @ 25%. The assessing officer held that golf course and also hospitality services is not covered in the block of 'plant', but it is covered in the asset 'building' which is used by the hotels for hospitality services on which the depreciation @20% is allowable. Hence, the assessing officer rejected the assessee's claim of depreciation @25% for assessment year 2002-03 and 2003-04 and substituted it for 20%. For assessment year 2005-06, the AO allowed depreciation applicable for the cost of building @10% and rejected the claim of @25%. On further appeal, the CIT(A) decided the issue in favour of the assessee holding as under:

> "2.3................Rival contentions have carefully been considered. .... The second question arises is if the Golf Course in itself can be treated as a 'plant' or not. In this regard, I agree with the ld. AR of the appellant that the Golf course is a specialized superstructure constructed on the land with various levels of undulation, hotels, small ponds, etc., which have been created as per the rules of the game of the Golf. It is certainly 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 ld., ARs 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. It is also appreciated that the Golf Course in the

appellant's own case has been treated as a 'plant' in the assessment year 2001-02 also by the Assessing Officer himself. It has also come to my notice that the issue of treating the Golf course as a 'plant' has not been disputed in most of the cases which are doing the business of running the Golf Course. As far as the reliance on the various courts' citations made by the Assessing Officer is concerned, I find that they are not applicable because of messed up facts of the case. In totality of all the facts and circumstances, I am of the view that the claim of the appellant for providing the depreciation @25% on the Golf Course is in order. Appellant's succeed on this ground of appeal." (Emphasis supplied)

On further appeal by the Revenue, the Tribunal held as under:

"2.5 We have heard both the counsels and perused the records. The AO in this case has treated the Golf Course akin to hotel building and allowed 20% depreciation for A.Y. 2002-03 and 2003-04. For A.Y. 2005-06 he has allowed depreciation as applicable to building @10%. It is settled law that Tribunal cannot take away the relief that AO has given. Now further we find that on the same set of facts in assessee's own case, the impugned asset was treated as plant for A.Y. 2001-02 by the AO himself and depreciation @25% was allowed. The assessment was done u/s 143(3) of the IT Act.

In the present case, we do not find any change in the circumstances of the case facts or law. Under the circumstances, we refer to Hon'ble Jurisdictional High

Court decision in the case CIT vs. Dalmia Promoters Developers (P) Ltd. 281 ITR 346 wherein it was held that when there is absence of any material change in the facts and law, the view taken for earlier year cannot be disturbed. In the present case, we find that no such material change has been brought out before us. Since the depreciation @25% on the said asset has been allowed for A.Y. 2001-02, we do not see any reason to disturb the rate to 20% as applied by the AO. Accordingly, we uphold the order of the ld. CIT(A) to allow the depreciation @25%.

2.6 In the result, all the revenue's appeals are dismissed. (Emphasis supplied)

ii. He further placed reliance in this regard on the decision of the Delhi Bench of the Tribunal in the case of ACIT v. CLC Global Ltd. : ITA No. 2288/Del/2008, wherein it has been held that once the assessing officer has, on exactly similar facts, allowed depreciation on goodwill in the immediately preceding year, there is no reason to take a different stand for the succeeding year and to disallow the depreciation claimed [refer pages 39-46 of case laws paper book].

f) It is further respectfully submitted that though the principles of res judicata are not applicable to income tax proceedings, it does not mean that it is open for the assessing officer to come to a different conclusion on similar facts and circumstances. He relied up on Radhasoami Satsang vs. CIT: 193 ITR 321 CIT vs. Neo Polypack (P) Ltd: 245 ITR 492, CIT vs Excel Industries Ltd.: 358 ITR 295 (SC) , DIT (E) V. Apparel Export Promotion Council: 244 ITR 734 (Del), CIT V. Dalmial Promoters Developers (P) Ltd: 281 ITR 346 (Del.), DIT(E) v. Escorts Cardiac Diseases Hospital: 300 ITR 75 (Del.) CIT V. Girish.

Mohan Ganeriwala: 260 ITR 417 (P&H) CIT vs. Sewa Bharti Haryana Pradesh: 325 ITR 599 (P&H) CIT vs. P. Khrishna Warrier: 208 ITR 823 (Ker) CIT vs. Harishchandra Gupta 132 ITR 799 (Ori)

g) In view of the aforesaid, it is submitted that classification and acceptance of "golf course" as "plant" in the initial year(s) operates as res-judicata and binds both the assessee and the Revenue. In these circumstances, the assessing officer had no jurisdiction, whatsoever, to change classification in subsequent year(s), including the year under consideration.

h) On the aforesaid ground itself, without anything more, it is respectfully submitted that the action of the assessing officer/CIT(A) in treating the golf course as "building" and not as "plant" is not sustainable and calls for being deleted.

i) He also submitted that without prejudice to the aforesaid, the issue that arises in the present appeal is whether amount spent on construction of golf course is to be regarded as "plant" or as "building. Under section 32 of the Act, depreciation is, it is respectfully submitted, allowable, inter alia, on "plant". The term 'plant' is defined in section 43(3) of the Act, which reads as under:

> "43(3) "plant" includes ships, vehicles, books, scientific apparatus and surgical equipment used for the purposes of the business or profession but does not include tea bushes or livestock or buildings or furniture and fittings"

On perusal of the above definition, it is submitted that an inclusive definition of `plant' has been given in section 43(3) of the Act to include ships, vehicles, books, scientific apparatus and surgical instruments used for the purpose of business or profession. The definition specifically excludes from its ambit tea bushes, livestock,

buildings or furniture and fittings. He referred to decision of Supreme Court in the case of Scientific Engineering House Pvt Ltd v. CIT: 157 ITR 86, wherein the meaning of term 'plant' was explained. He submitted that legal principles that emerge from the aforesaid decision may be culled out as under:

(a) Plant in its ordinary sense includes any apparatus, article or object fixed or movable, live or dead, used by a businessman for carrying on his business;

(b) Plant include any article/ apparatus used by a businessman for carrying on business and it is not necessarily confined to an apparatus which is used for mechanical operations or processes or is employed in mechanical or industrial business;

(c) In order to qualify as plant, the article must have some degree of durability.

The Court, thus, summed up by holding that test is whether the article is a tool of trade with which assessee carries on his business and if the answer is in the affirmative, it will be a plant . He submitted that applying the aforesaid tests, the Golf course constructed by the appellant, it is submitted, qualifies as 'plant' and is eligible for depreciation @ 25% for the following reasons:

a) The Golf course constructed by the appellant, it is submitted, is a highly specialized structure built on land. Constructing/ developing/ maintaining golf course is a highly skilled and experience-oriented job wherein specific sophisticated machinery and wide range machinery is required to be employed. In order to construct/ develop Golf Course, the appellant had to engage highly reputed international designer Jack Nicklaus for designing the Golf course. It may be pertinent to mention here that following are important, essential and integral parts of any Golf course:

- Two varieties of grass ‘Bermuda Tiff Drawf’ and ‘Grass Selection 419” have to be maintained;
- Waterways, Bunkers, fairways, roughs, greens and many other things have to be created and maintained;
- Highly sophisticated turf care machinery is required for maintenance of the Golf course;
- Proper irrigation system is required so as to reach all corners of the course. Proper pump stations have to be installed for irrigating the golf course. In the case of the assessee, equipments have been installed for drawing water from 18 bore wells using 75 HP pumps. 907 sprinklers and 203 quick coupling have been installed for irrigating the whole course, which requires an average of 8,00,000 kilo liters of water every month.

b) In support of the aforesaid, year-wise details of expenditure on golf course aggregating to Rs. 22.57 crores is placed at pages 62-70 of the Paper book-Vol I. On perusal of the same, it will kindly be noticed that the expenditure on golf course includes the following:

(a) Expenditure on creation of Irrigation systems, which includes expenditure like pumps, motors, sprinklers, cutters, tanks, etc.;
(b) Expenditure on creation of bunkers, waterways, etc.;
(c) Expenditure on creation of lakes;
(d) Expenditure towards electrification;
(e) Expenditure towards creation of stores, medical centers, etc.
(f) Expenditure towards procuring technical know-how for development of golf course;
(g) Indirect day-to-day business expenses allocated to the cost of golf course;

(h) Other miscellaneous earthmoving, leveling expenses, etc.

c) On perusal of the aforesaid, it will be kindly appreciated that the Golf course is a highly specialized and complex plant constructed on the land requiring levels of undulation and other technical requirements as per the rules of the game of golf. The construction of golf course involves various plants and equipment referred above. Further, the fact that the appellant spent an aggregate sum of Rs. 22.57 crores for construction of Golf course during the financial years 1997-98 to 2000-01 speaks volume of the specialized nature and the advanced technology/ expertise that goes into constructing the Golf course (Refer pictorial representation of the specialized nature of Golf course placed at pages 74-111 of the Paper book – Vol 1).

d) In light of the aforesaid, it is respectfully submitted that Golf course has to be treated as 'plant' and is, therefore, entitled to deprecation @ 25% as applicable to 'plant', more particularly in the light of the legal position discussed herein.

e) Similarly, in the present case, in the business of Golf course, developing a golf course, for running the business of operating a golf course is, it is submitted, an essential/ indispensable part of/ and is used as a tool of business. Therefore, applying the functional test laid down in various decisions, Golf Course expense has to be, and it is submitted, regarded as `plant

f) Attention is also invited to the decision of the Supreme Court in the case of ACIT v. Victory Aqua Farm Ltd: 379 ITR 335, wherein the assessee was engaged in business of

‘Aqua Culture’ and growing prawns in specially designed ponds. In the income tax return, the assessee claimed depreciation in respect of the ponds by treating the same to be ‘plant’ within the meaning of section 32 of the Act. The assessing officer disallowed the claim of the assessee. The apex court held that since the ponds were specially designed for rearing/ breeding of the prawns, thus, they have to be treated as tools of the business of the assessee and therefore, such ponds would be treated as ‘plant’ for the purpose of allowing depreciation thereon. The relevant extracts of the observation of the Court are as under:

> “4. It is not in dispute that if these ponds are 'plants', then they are eligible for depreciation at the rates applicable to plant and machinery and case would be covered by the provisions of Section 32 of the Act. It is not even necessary to deal with this aspect in detail with reference to the various judgments, inasmuch as judgment of this Court in Commissioner of Income Tax, Karnataka v. Karnataka Power Corporation [2002(9) SCC 571] clinches the issue. Therein the Court has taken into consideration the earlier judgments on which some reliance was placed by the learned counsel for the Revenue and is suitably dealt with. The relevant portion of the said judgment reads as under:
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> …………… …………………
>
> 5. An attempt was made by the learned counsel for the Revenue to the effect that the pond in question was natural and not constructed/specially designed by the assessee. We do not find it be so. In the judgment dated 14.10.2004 of the High Court,

which is decided in favour of the assessee, the High Court has specifically mentioned that the prawns are grown in specially designed ponds. Further, this very contention that these are natural ponds has been specifically rejected as not correct. Moreover, from the order passed by the Assessing Officer we find that this was not the reason given by the Assessing Officer to reject the claim. Therefore, finding of fact on this aspect cannot be gone into at this stage.

6. We find that the judgment dated 14.10.2004 rightly rests this case on 'functional test' and since the ponds were specially designed for rearing/breeding of the prawns, they have to be treated as tools of the business of the assessee and the depreciation was admissible on these ponds. We, thus, decide the question in favour of the assessee and as a consequence, appeals of the Revenue are dismissed and that of the assessee are allowed." (Emphasis supplied)

g) Kind attention, in this regard, is also invited to the decision of the Bombay High Court in the case of CIT V. Hydro Electric Power Supply Co. Ltd: 122 ITR 288 wherein the Court held dam constructed by the assessee engaged in the business of generation of electric power to be 'plant'. Similarly, wet dock of a dockyard in the case of CIT V. Mazagon Dock Limited: 191 ITR 460 (Bom.) and swimming pool of a caravan park operator in the case of Cooke V. Beach Station Caravans Limited: (1974) 3 All ER 159 have been held to be 'plant'. In the case of Shyam Enterprises v CIT: 349 ITR 418 (All), the High Court,

applying the functional test, had held that the building of special cooling chambers in a cold storage plant, being constructed in a specific process and manner, is eligible for depreciation as applicable on a 'plant'. definition of plant, The High Court further held that section 43(3) of the Act, providing the excludes general buildings but not buildings of a special nature. In the case of Niko Resources Ltd. vs. ACIT: 395 ITR 301 (Guj), the High Court treated mineral oil wells as plant for the purpose of applying depreciation under section 32 of the Act In the case of Airports Authority of India v. CIT: 134 ITD 34 (Delhi), the Delhi Bench of the Tribunal had held that, terminal building of the assessee used as a tool of business for regulation of air traffic and communicational and navigational control was to be treated as 'plant' for the purposes of claiming depreciation under the relevant provisions of the Act. In the case of Serum Institute of India Ltd. vs. Addl. CIT: 147 TTJ 594 (Pune), the Pune Bench of Tribunal had held that various stools, tables, stainless steel racks, trolley, etc., used by the assessee in a laboratory for manufacturing chemicals and vaccines were to be treated as 'plant' and not as 'furniture'. The Tribunal, in this regard, relying on the Bombay High Court decision in the case of CIT v. Park Devis (India) Ltd.: 214 ITR 587, held that the 'functional test' has to be applied in deciding if a particular tool constitutes plant and machinery or the furniture. The Tribunal further held that as various tools, tables, etc., were being used for the purpose of production or processing of the chemical tests in the laboratory premises leading to the production of the stocks, the same must be categorized as plant and machinery.

h) Further, reliance is placed on the following decisions:

- Cooke v. Beach Station Caravans Limited (1974) 3 All ER 159 (All.)
- SK Tulsi and Sons vs. CIT: 187 ITR 685 (All)
- Moidu's Medicare (P) Ltd v. CIT : ITA Nos. 1261, 1262, 1310 of 2009 (Ker.)
- Maharashtra State Road Development Corpn. Ltd. v. ACIT: 128 TTJ 32 (Mum. Trib)

i) Similarly, in the present case, in the business of Golf course, developing a golf course, for running the business of operating a golf course is, it is submitted, an essential/ indispensable part of/ and is used as a tool of business. Therefore, applying the functional test laid down in various decisions, Golf Course expense has to be, it is submitted, regarded as `plant ‘and is eligible for depreciation @ 25%. Accordingly, the addition made by the assessing officer and upheld by the CIT(A) calls for being deleted in toto. The LD AO reiterated the findings given in original assessment and allowed depreciation on golf course @ 10% by treating the same as ‘building’. On further appeal against the said order, the CIT(A), vide order dated 31.12.2018 upheld the order of the assessing officer restricting depreciation on golf course @ 10%. The CIT(A) held that no doubt the assessee is generating revenue from the players for playing golf and allowing its golf course, but it cannot be said that the assessee has manufactured or produced anything. The aforesaid conclusion of the CIT(A) is, it is submitted, contrary to the functional test laid down by the Courts. The CIT(A) failed to appreciate that manufacture/ production is not necessary to treat an asset as “plant”. So long as functional test of a plant is satisfied, the asset would qualify as plant. Further, reliance placed by the CIT(A) on the decision in the case of CIT v. Anand Theatres: 244 ITR

192 (SC) is, it is submitted, totally misplaced since the Supreme Court in the later case in CIT V. Karnataka Power Corporation: 247 ITR 268 (SC) clarified that the decision and observation in Anand Theatres (supra) was limited to buildings used for purposes of hotels or cinema theatres and will not apply otherwise. Moreover, the Supreme Court in the latest case of Victory Aqua Farm (supra), re-emphasized the concept of functional test to determine whether a particular asset is to be treated as 'plant' under section 32 of the Act.

6. Based on the above stated submission he prayed that for the aforesaid cumulative reasons, it is respectfully submitted that the assessee has rightly claimed depreciation on golf course as "plant".

7. The LD DR vehemently supported the orders of the lower authorities. The main contention of the learned departmental representative was that AO has correctly allowed the depreciation considering the golf course as a building. It was stated that golf course is nothing but a piece of land having some landscaping with level undulation, grass on the land etc , Small ponds etc. Essentially, according to him golf course is a piece of land. Depreciation is not allowed on land. However since certain activities have been carried out on the piece of land to make it usable for playing the golf the learned assessing officer has allowed the depreciation considering the golf course as building. In fact were golf course may be considered akin to a road. The road was not covered under depreciation as it was essentially on land. However, after insertion of appendix – 1 under rule 5 of the income tax rules 1962 the building includes roads bridges and converts well, tube wells. The learned departmental representative vehemently relied upon the decision of the honourable Supreme Court in case of CIT vs. Anand Theatres 244 ITR 192. The learned CIT DR further relied upon the decision of the Delhi High Court in case of 52 taxmann.com 21 in brother but the toll road Co Ltd vs. the assistant Commissioner of income tax. He further relied upon the decision of CIT vs. that my local 82 ITR 44 of the honourable Supreme Court and 243 ITR 81. He further submitted that in Anand the theatre the honourable Supreme Court held that the building used for

running a hotel or carrying on cinema theatre and not be held to be a plant. In case of Raj Malhotra, the honourable Supreme Court held that the building in which water was run was not the plant. In the case of Dr P Venkata of the Supreme Court held that if it was found that the building or structure constituted an apparatus or a tool of the taxpayer by means of which business activities were carried on amounted to a plant but where the structure played no part in carrying on these activities but merely constituted a place where they were carried on, then it is a building and it is not a plant. He therefore submitted that in the present case the players play golf on the golf course but the golf course as such does not play any part in carrying on the playing activity of the assessee. He further countered the argument of the learned authorised representative that the issue squarely covered in favour of the assessee in case of GP greens Ltd in ITA number 3545/del/2009, wherein the coordinate bench vide order dated 9/3/2010 has not due to adjudicate the issue as to whether the depreciation is allowable on golf course treating the same as plant or not. He therefore submitted that the ratio of said decision does not apply to the facts of the case. He further submitted that in case of the assessee itself the coordinate bench restore the issue of depreciation of golf course to the AO to examine the facts which were not produced before the AO including details of construction on 300 acres of land et cetera. He therefore submitted that the learned assessing officer has correctly granted the depreciation on golf course considering it as a building and not plant.

8. We have carefully considered the rival contention and perused orders of the lower authorities. The only issue involved in this appeal is whether the golf course constructed by the assessee is a plant or building. According to the revenue authorities, it is a building and not a plant whereas the assessee contends that it is a plant. The learned CIT (A) has dealt with the whole issue considering the direction of ITAT and view of the AO thereon as under :-

> "6.1 I have carefully considered the assessment order under appeal and earlier orders, submissions by the appellant, other materials on record and the case laws relied upon.

6.2 The issue revolves around the allowable rate of depreciation on the golf course held by the appellant. As stated earlier, the AO while completing the assessment u/s 148 / 143(3) dated 24.12.2017 allowed the depreciation on golf course @ 10% considering it as building against the claim of appellant of 25% as plant and machinery. The addition amounting to Rs. 1,37,71,043/- as made for this difference. The CIT(A) allowed the appeal of the appellant, thereby determining the depreciation @ 25%. The department preferred further appeal before the ITAT, Delhi. The Hon'ble ITAT vide their orders in ITA No. 3549/Del/2009 and 4847/Del/2009 for the AYs 2001-02 and 2003-04 have set aside the matter to the file of AO with the following direction/remarks:-

> "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 categorized as a plant and machinery and not as a building. The Id. 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 categorized 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 id. 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 categorized 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 specialized 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 Id. 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 Id. CIT(A) is not sustainable as we are unable to see any basis for the factual observations noted by the Id. CIT(A) for putting the golf course in the category of plant. Since the issue has not been adjudicated by the Id. 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 Id. 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. I/s. ACIT [2014] 52 Taxmann.com 21 [Delhi] to establish that golf course is not a plant and machinery and it is to be categorized as a building and on the other hand, the Id. 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 of 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 of the Act as well as the ration of decisions relied upon by both the parties shall decide the issue afresh in accordance with law."

6.3 Accordingly, the AO, after considering the issue, has taken the depreciation on Golf course @ 10% as applicable to building only, rejecting the claim of AO in the assessment order under appeal with the following remarks:-

"5.4 From the details of the expenses, the assessee was not able to justify as to how these expenses make Golf Course a Plant. These are simple expenses related to landscaping and

construction. If the argument of the assessee is accepted, then every land with some kind of landscaping or every building used for some king of sports activity would be converted into Plant & Machinery. Further, simply because some special controlling equipment are attached, it will not take out of the category of building. The golden rule of interpretation is that if some structure / entity are more near to one category than by stretching it should not be considered to fall in a category, which is far off.

5.5 Assessee in its responses have submitted that Golf Course, which includes various plants and equipment, falls under the definition of term 'Plant' as per the provisions of the Act and is eligible for depreciation @ 25%. However, during set-aside proceedings, the assessee could not justify as to what are these plants and equipment used in Golf Course, which fall under the head of 'Plant and Machinery'. Moreover, assessee is already separately claiming depreciation on sporting items like Golf Carts, Pull Carts etc.

5.6 The Hon'ble Supreme Court in the case of CIT V Anand Theatre 244 ITR 92 has stated that building is not plant and machinery. Even if it is to be construed as plant, only that part of the building can be put in the category as plant and machinery not the entire building. On occasions a building may be designed and constructed to the specific requirement of a particular industry, trade or business, but that would not make such building a plant.

5.7 In an Industry, no production can be normally carried on without a building where the plant and machinery is installed but for that reason, the building cannot be considered as plant when there is separate entry for building for the purpose of Depreciation.

5.8 The concrete pathways, drive ways, inter connecting roads constructed in the Golf course which links and provide

approach to the playground cannot be referred as Plant but would be covered in "Building" within the meaning of Section 32 as the worked "building" specifically includes roads, bridges etc.

5.9 Moreover, when we come to the basic question as why depreciation is allowed, because every tangible asset depreciates. It is off. passage of time causes physical assets to wear, tear and otherwise lose value; depreciation & designed to capture that loss of value over a tangible asset's useful life. Through depreciation, a company is able to capture and spread out costs over the long-term. In the context of the above definition also, the Golf Course cannot be considered as Plant but Building only.

5.10 Furthermore, the assessee is already taking depreciation separately on sporting items like Golf Carts, Pull Carts etc.

In view of the above discussion depreciation on the Golf Course is limited to 10%"

6.4 I have examined the contention of the appellant, the assessment order and direction by the Hon'ble ITAT.

6.5 It is evident that no depreciation has been claimed on land but only the add-ons on the land has been taken to consider as plant and "machinery by the appellant, which was taken as building by the AO. It is also observed that in the depreciation chart as per the IT Act and Rules, no such category has been mentioned related to depreciation on golf course. No direct ruling or any case laws has been brought to the notice by appellant, to say that golf course is plant and machinery. The case laws relied upon are on different issues all together. The issue in this case is decided looking to the fact and circumstances of this case only. Accordingly, this has to be examined with reference to the activities of the appellant company.

6.6 The golf course is a playground with various equipments such as sprinklers, holes, ponds and other add-ons incorporated therein to facilitate the sports of golf. It is stated to be highly sophisticated and

value added equipments have been installed. No doubt that appellant is generating the revenue from the players for playing golf and allowing its golf course but it cannot be said that it has manufactured or produced anything as a creation of asset akin to plant and machinery. In common parlance the plant or machinery is such to become a tool for production of the commercial goods, generally tangible in nature. This also finds support from the various judgments wherein it is held that the functional test is required to understand and consider whether it is a plant or an asset specially for the case of appellant. In the case of appellant, the golf course has been created as sports facility to facilitate and provide entertainment to its clients who are either residents of the hotel run by appellant or members. There is no production per se is substantiated.

6.7 Further the conversion of land with inserting certain playing equipments, creating landscaping, holes, ponds and others is being done ii the regular course to facilitate the game of golf and not aimed to any production of goods and services. It may be a facility to provide for better and smooth play of golf, thereby better commercial prospects for company but cannot be termed as plant and machinery within the meaning of the Act.

6.8 The definition of plant and machinery as mentioned in the section 43(3) of the Act is as follows:-

> "43(3) "plant" includes ships, vehicles, books, scientific apparatus and surgical equipment used for the purposes of the business or profession but does not include tea bushes or livestock or buildings or furniture and fittings"

6.9 In the present case, the landscaping etc. are neither surgical equipments nor any scientific apparatus. The add-ons on the land for running of smooth play of golf such as landscaping, sprinklers, waterways, holes etc. are required for any such activity in the normal circumstance as the same is required for the maintenance of any building also. Therefore, putting up of various sophisticated or

specialized item cannot be the basis for treating any golf course as plant and machinery. Therefore, the argument of the appellant that it has put up various value addition is not tenable.

6.10 Further, it is not directly related to the production or creation of any output but work as a support system and therefore, appropriately considered by AO as building and not the plant. It is also to be mentioned that the assessee is running a hotel and therefore, the residents of the hotel are also provided the facility to play golf. In such circumstance, the main objective is to increase the business of hotel by providing additional benefit / facility of golf.

6.11 The issue discussed in the case of CIT vs. Anand Theatre (supra) is clearly in the favour of revenue with respect to the facts relates to the appellant. Therefore, the same is accordingly followed where it is clearly mentioned that in such circumstance it has to be treated as building and not plant.

6.12 Therefore, looking to the facts and circumstances of the case and in law, where no specific rate of depreciation has been provided in the Act / Rules nor categorized golf course as plant and machinery, the landscaping and some structuring and fixtures done over land for the purpose of the sports to lure the client where no_ product is also demonstrated to have been manufactured but only facility is provided, this cannot be considered as plant and machinery. Accordingly, the appellant is not entitled for depreciation @ 25% but only treated as building as this is a super structure on the land, which is being used for the purpose of business.

6.13 Therefore, I have no reason to differ with the findings of AO and thus the addition is confirmed in the case of appellant."

9. It is an admitted fact that assessee is a company engaged in the business of inviting membership and then allowing those members to play golf on the golf course constructed by it. It is also apparent that the assessee is engaged in the business of running of the golf course and also earning revenue from apartments. It has constructed golf course at the total cost of

Rs. 225728037 as on 31st of March 2001. Its main source of income is membership fees. The golf course constructed comprised of various equipments and items of plant and machinery like irrigation system, water tanks including water sprinklers, technical know-how, bunkers et cetera. The assessee has submitted that the entire cost incurred on construction of golf course was capitalized as a separate block of plant and machinery and depreciation thereon is allowable at the rate of 25%. Admittedly, the above cost on which depreciation is claimed does not include the cost of land. The honourable Supreme Court in 243 ITR 81 CIT vs. Dr B Venkata Rao while holding that the nursing room is a plant has laid down the guiding principles for considering which building constitutes plant. It was held there in that :-

> "The assessee is a medical practitioner. He runs a nursing home. In respect of the building in which the nursing home is run, the assessee claimed, for the assessment year 1983-84, that it was a "plant". His contention was rejected by the Income-tax Officer and by the Commissioner (Appeals). The Income-tax Appellate Tribunal found to the contrary. Applying the functional test, it held that the nursing home was a plant. The High Court affirmed that view. It said that a building used as a nursing home is not comparable with an ordinary building having regard to the number of persons using it, the manner of its use and the purpose for which it is used. The building was used to not only house patients and nurse them, but also to treat them, for which various kinds of equipment and instruments were installed.
>
> The most apposite decision in this context is that delivered by the Allahabad High Court in S. K. Tulsi and Sons v. CIT [1991] 187 ITR 685. Reference was made to an earlier judgment, where also the functional test approved by this court in several decisions was applied. It was held that if it was found that the building or structure constituted an apparatus or a tool of the taxpayer by means of which business activities were carried on, it amounted to a "plant" ; but where the structure played no part in the carrying on of those activities but merely constituted a place wherein they were carried on, the building could not be regarded as a plant.

The Tribunal and the High Court in the instant case proceeded upon assumptions of what a nursing home should contain. This may not be altogether appropriate. What is to be determined is whether the particular nursing home building was equipped as to enable the assessee to carry on the business of a nursing home therein or whether it is just any premises utilized for that object.

We find from the order of the Tribunal as also the assessment order that the assessee's nursing home is equipped to enable the sterilization of surgical instruments and bandages to be carried on. It is reasonable to assume in the circumstances, particularly having regard to the Tribunal's order, which states that the sterilization room covers about 250 sq. ft. that the nursing home is also equipped with an operation theatre. In the circumstance, we think that the finding of the High Court should be accepted.

We would, however, add that in a case such as this, the Tribunal should proceed upon material placed by the assessee which establishes that the building is specially equipped as a plant for the assessee's business."

10. In SCIENTIFIC ENGINEERING HOUSE (PVT.) LTD. v. COMMISSIONER OF INCOME TAX, ANDHRA PRADESH [1986] 157 ITR 86X (SC) Honorable Supreme court has held that that "plant" was not necessarily confined to an apparatus, which was used for mechanical operations or process or was employed in mechanical or industrial business. But in order to qualify as "plant", the particular article had to have some degree of durability. The test to be applied was: <u>Did the article fulfill the function of a plant in the assessee's trading activity? Was it a tool of his trade with which he carried on his business? If the answer was in the affirmative, it would be a "plant".</u>

11. Honourable supreme court in ASSISTANT COMMISSIONER OF INCOME TAX v. VICTORY AQUA FARM LTD. [2015] 379 ITR 335 (SC) has held that when assessee carried on the business of aquaculture. It grew prawns in specially designed ponds. It claimed depreciation in respect of these ponds treating them as tools of its business and, therefore, constituting "plant" within the meaning of section 32 of the Income-tax Act, 1961. The Assessing

Officer disallowed the claim but the Tribunal held in favour of the assessee. Two Benches of the High Court took opposing views. On appeal to the Supreme Court , affirming the view of the Tribunal, that the High Court had specifically mentioned that the prawns were grown in specially designed ponds and the contention that these were natural ponds had been specifically rejected as not correct. Moreover, this was not the reason given by the Assessing Officer to reject the claim. Therefore, the finding of fact on this aspect could not be gone into at this stage. The functional test was applicable and since the ponds were specially designed for rearing or breeding of the prawns, they had to be treated as tools of the business of the assessee and the depreciation was admissible on these ponds as plant.

12. Further honourable Gujarat High Court in NIKO RESOURCES LTD. v. ASSISTANT COMMISSIONER OF INCOME-TAX (2017) 395 ITR 301 while deciding the issue whether the mineral oil well constitute plant as claimed by the assessee or building as claimed by the revenue, has held that Under section 32 of the Income-tax Act, 1961, depreciation allowance is, subject to the provisions of section 34 , permissible only in respect of certain assets specified therein, namely, buildings, machinery, plant and furniture owned by the assessee and used for the purpose of business. Section 43(3) defines ”plant” in very wide terms. In order to qualify as plant the article must have some degree of durability. The test would be: does the article fulfill the function of a plant in the assessee's trading activity? Is it a tool of his trade with which he carries on his business ? If the answer is in the affirmative, it will be a plant. Thus, it was held that Tribunal was not right in law in treating the mineral oil wells as buildings for applying rate of depreciation under section 32 of the Act. The mineral oil wells constituted “plant” for purposes of section 32.

13. In the present case also before us, the golf course owned and used by the assessee for the purpose of the business as a tool of the business of the assessee. It is functioning like a plant in case of the assessee. Further, it is not the case of the revenue that assessee has claimed any depreciation on the land. It is similar to the depreciation on pond allowed in the case of an

aquaculture company by the honourable Supreme Court in 379 ITR 335 and honourable Gujarat High Court holding that mineral oil well also constitute a plant. The learned CIT – A is not correct in saying that playing equipments, creating landscaping, holes, ponds and others are being done in the regular course to facilitate the game of golf and not into any production of goods and services. In fact, by creating these facilities, the assessee has created a service facility for its members and it produces revenue for the assessee. It is not always necessary that each plant should produce certain other tangible goods. Further, in case of the assessee in certain assessment years under section 143 (3) of the income tax act the claim of the depreciation holding the golf course as plant has been accepted by revenue and in subsequent years in assessment year 2006 – 07 to 2009 – 10 also the claim of the assessee is accepted. In fact the claim of depreciation on golf course as a plant stands accepted in assessment year 98 – 99 to assessment year 2000 – 01, 2002 – 03 and 2006 – 07 to 2009 – 10. Even otherwise, coordinate bench in case of Deputy Commissioner of Income Tax vs. JP greens Ltd in ITA number 3545-3547/Del/2009 , on identical facts and circumstances considered golf course as plant and depreciation at the rate of 25% was allowed holding that assessing officer himself has allowed depreciation at that rate in past in that particular case. The decision relied upon by the learned CIT DR that Toll Road does not qualify as a plant for higher rate of depreciation as held by the honourable Delhi High Court in 52 taxmann.com 21 (Delhi) in the Moradabad Toll Road Co Ltd vs. Asst Commissioner of income tax was decided as 'road' was specifically considered as part of building in the part A of appendix 1 of The Income tax Rules 1962. Thus, the fact of that case is distinguishable. Further, it was not stated before us that revenue has not accepted the decision of the coordinate bench in DCIT vs. JP greens Ltd where golf course was held to be plant. Therefore, it stands concluded that golf course is a plant looking to the nature of business of the assessee. Further, the judicial precedents relied upon by the parties also only lays down the proposition established by the higher judicial forum supports the above view. In view of this, ground number 1 of the appeal of the assessee is allowed reversing the views of the lower authorities, holding that golf course is a plant on which

assessee is entitled to the depreciation at the rate of 25% under the income tax act.

14. In view of our decision in ground number 1 of the appeal, the second ground raised by the assessee, which was an alternative claim, does not survive, hence it is dismissed.

15. Accordingly, ITA number 1030/del/2019 for assessment year 2001 – 02, filed by the assessee is allowed.

Assessment year 2003 – 04

16. The assessee has raised the following grounds of appeal in ITA No. 1031/Del/2019 for the Assessment Year 2003-04 against the order of the Commissioner of income tax (appeals) – 5, New Delhi dated 31/12/2018:-

"1. That the CIT(A) erred on facts and circumstances of the case and in law in upholding the action of assessing officer in making addition of Rs. 60,54,840 on account of allowance of depreciation on golf-course as "building" as against the same being considered as "plant and machinery" by the appellant.

1.1 That the CIT(A)/assessing officer erred on facts and circumstances of the case and in law in not appreciating that classification of golf course could not be changed in subsequent year when claim of depreciation @ 25% on golf course as 'plant' stood allowed/ accepted in the past assessment years, i.e., 1998-99 to 2000-01 and succeeding assessment years, i.e., 2006-07 to 2009-10.

1.2 That the CIT (A)/assessing officer erred on facts and circumstances of the case and in law in not appreciating that the classification of block of asset, which has been allowed/accepted and merely carried forward from earlier years, cannot be modified in current year

1.3 That the CIT(A) erred on facts and circumstances of the case and in law in holding that golf course has not manufactured or produced anything so as to classify it as a 'plant and machinery'.

2. Without prejudice, that the assessing officer erred on facts and circumstances of the case and in law in not re-computing depreciation

admissible under section 32(1)(ii) of the Act with reference to revised written down value of golf course, consistent with the finding of treating the golf course as 'building' in earlier year(s)."

17. The only issue involved in this appeal is whether golf course is a plant or building. We have already decided this in appeal of the assessee for assessment year 2001 – 02 holding that golf course is a plant. In view of this ground number 1 of the appeal is allowed for the similar reasons given by us in appeal for assessment year 2001 – 02. Ground number 2 being an alternative claim by the assessee is not required to be adjudicated in view of our decision in ground number 1 of above appeal.

18. Accordingly ITA number 1031/del/2019 filed by the assessee is allowed.

Assessment year 2004-05

19. The learned Deputy Commissioner Of Income Tax, circle 4 (1), New Delhi has raised the following grounds of appeal in ITA No. 5582/Del/2010 for the Assessment Year 2004-05 against the order of the learned Commissioner Of Income Tax (Appeals) – VII, New Delhi dated 13/10/2010:-

"1. The order of the learned CIT (APPEALS) is erroneous & contrary to facts & law..

2. On the facts and in the circumstances of the case and in law, the Ld. CIT (Appeals) has erred in deleting the addition of Rs. 68,11,697/- made by the AO by disallowing the excess depreciation claimed by the assessee i.e. by directing the AO to allow depreciation on Golf Course @ 15% as against the 10% allowed by the AO.

2.1. The ld CIT (A) ignored the fact the Golf Course is building and not machinery and is not entitled for depreciation @ 15% applicable for machinery.

3. On the facts and circumstances of the case and in law, the Ld. CIT (Appeals) has erred in deleting the addition of Rs. 55,00,000/- made by the AO by disallowing the expenses on account of golf course and repair & maintenance expenses.

3.1. The Ld CIT(A) ignored the fact that there is abnormal increase in the expenses and decline in the income of the assessee.

4. The appellant craves leave to add, to alter, or amend any grounds of the appeal raised above at the time of hearing."

20. Ground number 1 and 4 of the appeal are general in nature, no arguments were advanced by the parties, and hence they are dismissed.

21. Ground number 2 of the appeal along with ground number 2.1 is with respect to the direction of the learned CIT – A to the learned assessing officer to allow depreciation on golf course at the rate of 15% considering it is planned against the depreciation at the rate of 10% allowed by the learned assessing officer considering it as a building. This issue has already been decided by us in appeal for assessment year 2001 – 02 in case of the assessee wherein we have held that the golf course is a plant, for the similar reasons, we hold that there is no infirmity in the order of the learned CIT – A for this year. Accordingly, ground number 2 of the appeal of the revenue is dismissed.

22. Ground number 3 of the appeal is against the order of the learned CIT – A in deleting the addition of INR 5,500,000 made by the AO disallowing the expenses on account of golf course on repairs and maintenance. The learned assessing officer found that assessee has debited a sum of INR 5 002703/– on golf course maintenance and further INR 8 280468/– on repairs and maintenance stop the learned assessing officer disallowed INR 3,000,000 out of general repairs and maintenance and INR 2,500,000 out of thus Rs. 55,00,000 were disallowed on account of repairs. The assessee preferred an appeal before the learned CIT – A who deleted the above disallowance vide para number 5.1 of his order. The learned CIT – A noted that the learned assessing officer should make an intelligent and well-grounded estimate in the appropriate cases where estimation is actually required but he does not possess absolute arbitrary authority to assess any figure he likes. He held that such estimate must be based on adequate and relevant material. He further held that in the instant case he do not find any adequate all relevant material based on which the expenses incurred by the assessee could be disallowed. Accordingly, he deleted the disallowance.

The revenue challenged the above disallowance deletion as per ground number 3.

23. The learned CIT DR vehemently supported the order of the learned assessing officer and stated that the learned CIT – A has not given any finding that why he is disallowing the above expenditure when the assessee has failed to show the genuineness of the expenditure incurred.

24. Learned authorised representative submitted that the learned assessing officer has made an adopted disallowance is despite the assessee maintaining the complete details of the expenditure merely for the reason that there is an increase in the above expenditure vis-a-vis golf course income. He further submitted that assessee maintains the regular books of accounts, which are duly audited and certified by the tax audit. He further stated that the learned assessing officer has further failed to point out any specific defect in those details and merely because of the reason that there is an increase in the expenditure compared to the golf course income the disallowance has been made. He further referred to the order of the learned CIT – A and submitted that there is no infirmity in the order of the learned CIT – A deleting the above disallowance.

25. We have carefully considered the rival contention and perused the orders of the lower authorities on this issue. It is a fact that assessee has submitted the details of such expenses which are placed at page number 132 – 139 of the paper book. The books of the accounts of the assessee are duly audited and the learned assessing officer has also not pointed out any specific debate the defect in the details of such expenses. The merely because there is an increase in the expenditure compared to the golf course income the disallowance cannot be made. Further the assessing officer has also not established that those expenditure have not been incurred wholly and exclusively for the purposes of the business. In view of this we do not find any infirmity in the order of the learned CIT – A in deleting the above disallowance. Accordingly, ground number 3 of the appeal of the learned assessing officer is dismissed.

26. Accordingly, ITA number 5582/del/2010 filed by the learned assessing officer for assessment year 2004 – 05 is dismissed.

Assessment year 2005-06

27. For assessment year 2005 – 06, assessee as well as the learned assessing officer has preferred appeals against the order of the Commissioner of income tax (appeals) – VII, New Delhi dated 27/10/2009.

28. The assessee has raised the following grounds of appeal in ITA No. 4536/Del/2009 for the Assessment Year 2005-06:-

"1. That the CIT(Appeals) erred on facts and in law in confirming addition to the extent of Rs. 20,41,449 out of total addition of Rs. 84,16,051 made by the assessing officer under section 41(1) of the Income Tax Act, 1961 (The Act').

2. That the CIT(Appeals) erred on facts and in law in confirming addition of Security deposits received by the appellant over the years aggregating to Rs. 34,05,42,851.

2.1 Without prejudice, that the CIT (Appeals) failed to appreciate that out of total security deposit of Rs. 34.05,42,851 security deposit of Rs. 31,14,60.578 was on account of refundable deposit owed by the appellant to its members and the same could not, therefore, be regarded as taxable income of the appellant.

2.2 Further without prejudice that the CIT(Appeals) erred on facts and in law in not holding that the addition, if any, had to be restricted to security deposits received during the year amounting to Rs. 78.87.656 only. ~

2.3 Further without prejudice that the CIT(Appeals) failed to appreciate that out of total deposit of Rs. 34,05,42,851, Rs. 3,52.88,416 was in the nature of advance membership fee, which had already been offered for tax by the appellant in the subsequent year(s).

3. Without prejudice, having held advance membership fee of Rs. 3,52,88,416 to be taxable in the year under appeal, the CIT(Appeals) erred on facts and in law in not directing the assessing officer to exclude advance membership fee of Rs. 3,52,88,416 from the taxable

income of the appellant of the subsequent year(s) in which the said income had already been offered and subjected to tax.

4. That the CIT(Appeals) erred on facts and in law in confirming disallowance of Rs. 72,29,915 on account of bad debts/ advances written off in the normal course of business."

29. The revenue has raised the following grounds of appeal in ITA No. 4721/Del/2009 for the Assessment Year 2005-06:-

"1. The order of the learned CIT (APPEALS) is erroneous & contrary to facts & law.

2. On the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in restricting the additions made by AO disallowing the expenses claimed on account of provisions no longer written back to Rs. 20,41,449/- as against the disallowance of Rs. 84,16,051/- made in the assessment order.

2.1. The Ld. CIT (A) ignored the fact that the disallowance of Rs. 84,16,051/- was made by AO in accordance of the provisions of section 41 (1) (a) of the I. T. Act.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 19,59,50,000/- made by the AO on account of undisclosed income on sale of land.

3.1. The Ld. CIT (A) ignored the fact that the AO has made addition on basis of sale consideration received by the assessee in earlier years on similar property.

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.49,71,84,511/- made by the AO being the Long Term Capital Gain on transfer of ownership to M/s. ITC Ltd.

4.1. The Ld. CIT (A) ignored the fact that the LTG has arrived at by AO on the basis of the agreement to sell in favour of ITC Ltd.

5. On the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the addition of Rs.20,31,305/- made by

AO on account of interest disallowed as having been paid for non-business activities.

5.1 The Ld. CIT (A) ignored the fact that the assessee utilized 64% of the borrowed sum during the year for repayment of term loans.

6. On the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the addition of Rs.51,08,772/- made by AO on account of excess depreciation claimed.

6.1. The Ld. CIT (A) ignored the fact that Golf Course is entitled for depreciation of 10% i.e. for building and not 25% meant for plant and machinery."

30. Briefly stated the facts shows that the assessee has filed its return of income on 31/10/2005 declaring loss of Rs 28641836/–. The assessment u/s 143 (3) of the income tax act was passed on 18/12/2007 determining the total taxable income of Rs 497184511/–. Assessee preferred an appeal before the learned CIT – A who partly allowed the appeal of the assessee. Therefore, both the parties are in appeal before us.

31. We 1st take up the appeal filed by the assessee. The first ground of appeal is against the confirmation of the addition of INR 2 041449/– out of the total addition of INR 8 416051/– made by the AO under the provisions of section 41 (1) of the income tax act. The brief facts of the issue shows that in the computation of the total income the sum of INR 8 416051/– was claimed as provisions no longer required and written back. The allowances for which resulted in increased of the existing declared losses. On being confronted regarding that visibility of such claim, it was stated that such written back amount primarily consisted of various provisions, which were not allowed in the earlier years as per the income tax act. Therefore, it are written back and claimed as admission deduction during the previous year. The learned assessing officer verified the details in support of such claim and found that the said) was a emission on account of net balances of trading assets and liabilities which primarily consisted of business advances, debtors, creditors and other provisions. Therefore according to him such) is clearly in the nature of remission of trading liabilities and have to be treated as profits

chargeable to tax under the provisions of section 41 (1) of the income tax act. In view of this, the above addition was made. The assessee preferred the appeal before the learned CIT – A who considered the whole issue and found that the learned assessing officer nowhere brought on record anything to show that any allowance or deduction regarding any particular amount written back had been allowed in the earlier years. He further noted that the provision for bad and doubtful debts were already added back to the total income and offered by the assessee for taxation. After that on examination of the reconciliation of the provisions no longer required written back during the year under consideration with the copies of the computation of income for assessment year 2000 – 1, 2001 – 02 and 2003 – 04 he noted that INR 6 374602/– was already added back by the assessee of to its total income in earlier years. Therefore he deleted the above amount from the deduction and sustained the balance addition of INR 2 041449/–. Therefore, against the order of the learned CIT – A assessee is in appeal as per ground number 1 of the appeal and the revenue is in appeal as per ground number 2. Both these grounds of appeal being interconnected are taken together.

32. The learned authorised representative supported the order of the learned CIT – A the deletion of the disallowance is concerned and with respect to the addition sustained is submitted that the same logic which has been given by the learned CIT – A for deleting the addition applies to the extent of the additions sustained by him as the learned assessing officer has failed to bring on record any material that these expenditure have been allowed to the assessee in earlier years. He submitted that in absence of this the learned CIT – A should have deleted the whole disallowance.

33. The learned CIT DR vehemently supported the order of the learned assessing officer and submitted that the learned CIT – A has wrongly deleted the above disallowance.

34. We have carefully considered the rival contention and perused the orders of the lower authorities. We have carefully perused the paragraph number 5 of the order of the learned CIT – A where in the assessee has submitted a detailed chart assessment year -wise showing the provisions created, provisions debited, and additional provisions made an amount disallowed in

the return of income. On the basis of the above analysis the learned CIT – A noted that a sum of INR 1 54606/– was disallowed by the assessee in assessment year 2000 – 01, Rs. 2886114 in assessment year 2001 – 02 and Rs 3333882/– in assessment year 2003 – 04 and therefore he held that the assessee itself has disallowed the above sum amounting in all INR 2 6374602/– in the earlier years and therefore out of the sum of INR 80 416051/– a sum of INR 6 374602 is not following under the provisions of section 41 (1). He therefore held that the addition made by the learned assessing officer to that extent of INR 6 374602/– is not sustainable. We do not find any infirmity in the order of the learned CIT – A to that extent. Further with respect to the disallowance of INR 2 041449/– of the balance sum sustained by the learned CIT – A, the assessee could not show that whether these expenditure have already been disallowed by the assessee in the earlier years or not and therefore in absence of such details, the additions cannot be deleted. In view of this we find no infirmity in the order of the learned CIT – A in upholding the disallowance of INR 2 041449/–. Accordingly, ground number 1 of the appeal of the assessee and ground number 2 of the appeal of the revenue are dismissed.

35. Ground number 2 of the appeal of the assessee is with respect to confirmation of the addition of security deposit received by the appellant over the years amounting to INR 3 40542851/–. The appellant, in the course of carrying on the business of running and maintenance of golf course, popularly known as 'Classic Golf Course', receives membership fee from its members for use of golf course and the club facility. Broadly stated, there are two types of members, viz., individual member and corporate member. Every member admitted to membership signs the membership plan and is bound by the rules and regulations. In terms of the membership plan, every individual member is required to pay security deposit, membership entrance fee, advance membership fee, subscription fee, etc. A corporate member is, however, not required to pay any security deposit. In the audited financial statements for the year ended 31.03.2005 (the year under consideration), the appellant had, in `Schedule 12' thereto under the heading 'Current Liabilities', disclosed/ shown `Other liabilities' of Rs.34,05,42,851 as under:-

Payment received against Golf course membership	Rs. 3,52,88,416
Security Deposit against Golf Course membership	Rs.31,14,60,578
Total	Rs.34,67,48,994
Less: Membership subscription receivable	Rs. 62,06,143
Net Amount	Rs.34,05,42,851

In the assessment order, the assessing officer held the aforesaid amount of Rs.34,05,42,851 to be in the nature of trading receipt taxable under the provisions of the Act. On appeal, the said addition made by the assessing officer was upheld by the CIT(A). Therefore, assessee is in appeal before us.

36. The learned authorised representative vehemently contested the orders of the lower authorities. He submitted a detailed note as under :-

" Rs. 34,05,42,851 includes `Payment received against Golf course membership' of Rs. 3,52,88,416, which is in the nature of advance membership fees offered for taxation as income on pro-rata basis. The same amount of Rs. 3,52,88,416 has already been offered for tax in subsequent year(s). The assessing officer also regarded the said amount as part of security deposit to make addition of the same, which is patently erroneous and has resulted in double taxation of the same amount. Further, the CIT(A), while approving the action of the assessing officer observed that since membership fees has been utilized for creation of fixed assets which in turn have been used by the members, deferment of income is therefore, not relevant in facts and circumstances of the case. In this regard, it is respectfully submitted that the aforesaid allegation of the CIT(A) is not tenable inasmuch as the CIT(A) failed to appreciate that:

(a) membership fees is taxable on accrual basis and not on receipt basis; and

(b) Since the appellant had already offered to tax the said amount in subsequent year(s), the same income cannot be taxed twice.

As regards (a) above, it is submitted that it is quite elementary that in mercantile system of accounting, amount is taxed as income in the year in which the same accrues. The concept of "income" and its accrual is judiciously well settled and reference, in this regard, may be made to the following decisions. In the landmark decision rendered by the Supreme Court in the case of E. D. Sassoon and Co. Ltd. v. CIT: 26 ITR 27, the question was raised as to when the commission for managing agency linked with annual net profits of the managed company accrues or arises. After deliberating on the concept of "accrual of income" as a whole, the Supreme Court laid down that income must be held to accrue at the point of time when the assessee contributed to its accruing or arising and a debt becomes due. The Supreme Court held as under:

> "...... It is clear therefore that income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may received later on its being ascertained. The basis conception so that he must have acquired a right to receive the income. There must be a debt owned to him by somebody...... Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him...... But in order that the income can be said to have accrued to or earned by the assessee it is not only necessary that the assessee must have contributed to its accruing or arising by rendering services or otherwise but he must have created a debt in his favour. A debt must have come into existence and he must have acquired a right to receive the payment... The mere expression "earned" in the sense of rendering the service etc. by itself is of no avail." (Emphasis supplied)

In view of the above observation, it is clear that for the accrual of income two conditions are cumulatively required to be satisfied, i.e. (a) the assessee must have contributed to accruing or arising of income by rendering services or otherwise; and (b) a debt must be created in the favour of the assessee. One of the necessary conditions of accrual, thus, is that a debt must have come into existence and the assessee must have acquired a right to receive the payment. Unless and until his contribution or parenthood is effective in bringing into existence a debt or a right to receive the payment or in other words, debitum in praesenti, solvendum in futuro, it cannot be said that any income has accrued to the assessee. It will kindly be appreciated that advance membership fees is received for rendering services to the members in subsequent years and hence the appellant has not contributed to its earning in the year under consideration. Therefore, advance membership fees could not be regarded as income accrued in favour of the appellant in the year under consideration. Applying the aforesaid principle, advance membership fees has been held to be taxable on pro-rata basis in the following decisions:

- CIT vs. T. N. K. Govindarajulu Chetty : 165 ITR 231 (SC) - Held that interest received for 2 years is to be spread over according to the mercantile system of accounting
- Rama Bai &Ors. V. CIT : 181 ITR 400 (SC)
- CIT v. Dinesh Kumar Goel : 331 ITR 10 (Del.)
- CIT v. Punjab Tractor Co-operative Muli-purpose Society Ltd. : 234 ITR 105 (P&H)- Amount received in advance under post warranty service charges, Held that amount pertaining to the year under consideration could only be taxed not the entire amount received
- CIT v. Coral Electronics (P) Ltd. : 274 ITR 336 (Mad)
- CIT v. Hindustan Computers Ltd. : 233 ITR 366 (All)
- ACIT and DCIT vs. Mahindra Holidays and Resorts India Ltd: 131 TTJ 1 (ITAT (SB) - Chennai))
- Treasure Island Resorts (P) Ltd. vs. DCIT : 90 ITD 814 (Hyd)

- Akash Lavlesh Leisure (P) Ltd v. ITO: 78 taxmann.com 338 (Hyd.)
- T.K. International Ltd. v. ACIT : 91 ITD 481 (Cuttack) - Consideration received towards sale of time share for 99 years – held taxable over the years in which assessee was to provide services and facilities

<u>As regards (b) above</u>, it is emphatically reiterated that since the appellant had already offered to tax the said amount in subsequent year(s), the same amount cannot be taxed twice in the year under consideration merely because the amount received has been utilized for creation of fixed assets. For the aforesaid reasons, addition to the extent of Rs.3,52,88,416, being advance membership fees offered to tax on pro-rata basis, is liable to be deleted."

37. The learned Commissioner of income tax Department representative vehemently relied upon the order of the learned CIT – A and the learned assessing officer. He extensively referred to the paragraph number 7 of the learned CIT – A and submitted that both these receipts are revenue in nature and therefore chargeable to tax in the end of the assessee in the year in which they received. He therefore submitted that there is no infirmity in the order of the lower authorities.

38. We have carefully considered the rival contention and perused the orders of the lower authorities on the issue. The learned CIT – A has decided the whole issue as per paragraph number 7.1 – 7.7 of his order. Undisputedly the assessee is running a golf course and making the revenue collection by way of refundable security deposit and membership fees from the members. This indicates that the assets are fully operation and the members are deriving a benefit from the use of the assets. As such, it is not in dispute that appellant is carrying on the business of running of golf course. Facts shows that the assessee has received certain security deposits and membership fees collected by the appellant from the members along with the borrowed funds were utilized for the creation of the fixed assets by the assessee. The learned CIT – A following the decision of the honourable

Supreme Court income Calcutta stock exchange Association Ltd and Delhi stock exchange Association Ltd held that the security deposit received from the members are not capital receipt but are revenue receipts and are taxable as income of the appellant. He further held that nature of such security deposit is whether refundable or non-refundable is immaterial. He further noted that though the assessee has offered the golf course membership fees of INR 3 5288416/– as income in subsequent years such deferment of income is not relevant on the facts and circumstances of the case of the appellant as the membership fees received by the assessee is also assessable as income for the assessment year in which it is received. He further noted that it is a fact that unless the security deposits and membership fees were paid by the members, the appellant would not have granted the membership of the golf club to those members. He therefore held that both this sum of the security deposit as well as the membership fee has correctly been charged by the learned assessing officer as income of the assessee. The learned CIT – A with respect to the entrance fees and membership fees has followed the decision of the honourable Supreme Court in case of Calcutta stock exchange Association Ltd 36 ITR 222 and Delhi stock exchange Association Ltd 41 ITR 495 wherein it has been held that entrance fee/membership fees received from the members is an income.

39. On careful analysis of the order of the learned CIT – A, according to us he has wrongly applied the decision of the Calcutta stock exchange Ltd and Delhi stock exchange Ltd. In Calcutta stock exchange Ltd the issue of the monthly fees received by the assessee. Therefore, it cannot be said that if the fees received which is pertaining to the year itself it cannot be said not to be the income of the assessee. In the case of the assessee, assessee has received advance membership fees for which the services were to be rendered in subsequent years and assessee has already offered such income in the subsequent years on accrual basis. It is not the case of the revenue that assessee has not offered golf course membership fees income in the year to which it pertains to. It is also not the case of the revenue that assessee provides all the services to the members in the year in which the membership fee is received, and in subsequent years, no services were

rendered. The membership fees are chargeable to tax under the provisions of the business income. The assessee follows undisputedly, mercantile/accrual system of accounting. Therefore, income/expenses of the assessee are also required to be recorded as income only based on accrual system. Thus, whenever the Income accrues to the assessee irrespective of the time of receipt of such income is taxable as business income. Under the mercantile system of accounting, the assessee has an option to account for any income either on accrual or after accrual, on the basis of method of accounting regularly followed by it . So far as the issue of the entrance fee and membership fees received by the assessee, we are of the opinion that it should be accounted for as income only when it accrues to the assessee. Merely because the income, which is pertaining to subsequent years, is received by the assessee in earlier years does not become the income of the earlier years under section 5 of the income tax act in case of either business income or u/s 28. Hence, according to us, the membership fee income of the assessee should be chargeable to tax in the year to which it pertains. Therefore, we reverse the finding of the learned CIT – A in holding that that a sum of INR 3 5288416 received as golf course membership fee is chargeable to tax as income. As such, it is the claim of the assessee that subsequently such income has already been offered for taxation therefore for the year to which it pertains. Therefore, we direct the learned assessing officer to tax the above income of INR 3 5288416 as Income for the impugned assessment year to which it pertains to. Therefore, if the assessee has offered the income, to the year to which it pertains to, the addition is required to be deleted. However, it is not known that how much income is pertaining to which year, therefore, we direct the assessee to show before the assessing officer about the taxability of this income in the subsequent years on accrual basis. The learned assessing officer may verify the same and if the income has been offered in subsequent years on accrual basis, the addition deserves to be deleted in this year.

40. With respect to the issue of taxability of the security deposit against the golf course membership fee of INR 3 11460578/–, the claim of the assessee is that such security deposit is refundable in nature. It is required to be

refunded to the members at the end of the specified years or as per the terms of the membership. If the membership is refundable to the members, it becomes a liability of the assessee, which is required to be repaid. It is not the case of the revenue that assessee do not refund or under no obligation to refund the above sum at the end of the specified period or on happening of certain events. The identical issue arose before the honourable Gujarat High Court in principal Commissioner of income tax vs. Gulmohar Green Golf and country club Ltd 392 ITR 601 (2017) (Gujarat) wherein it was been held that the security deposit recovered from the members at the time of their enrolment as a member is refundable on occurrence of the contingency mentioned in the rules and regulation and bylaws, therefore it is required to be treated as a deposit, thus, a capital receipt. Therefore, it was held that it is not an income of the assessee. As in the case of the assessee also the security deposit is refundable hence respectfully following the decision of the honourable Gujarat High Court in 392 ITR 601, we also hold that the sum of refundable security deposit received from the members of the assessee is a capital receipt and cannot be charged to tax as income. Accordingly, we direct the learned assessing officer to delete the addition to the extent of refundable deposit received from the members. Accordingly, ground number 2 and 3 of the appeal of the assessee is partly allowed.

41. Now we come to ground number 4 of the appeal of the assessee wherein the learned CIT – A has upheld the disallowance of INR 7 229915/– on account of bad debt/advances written off in the normal course of the business. During the relevant assessment year under consideration, the appellant claimed deduction of bad debts/advances written off aggregating to Rs. 72,29,903, since there was no possibility of any recovery against the said debts/advances. Details of the bad debts/advances written off are placed at pages 98-103 of the paper book**.** The assessing officer, in the assessment order, proceeded to disallow the claim of bad debts written off by the appellant by holding that the appellant had not been able to furnish the details of exact nature of debt, the year of its approval, the reasons of dispute, etc., to establish the genuineness of the debt. On appeal, the aforesaid disallowance was affirmed in appeal by the CIT(A) on the ground

that the same comprises of bad debts written off amounting to Rs. 12,86,282 and advances written off amounting to Rs. 59,43,633. Insofar as bad debts written off is concerned, since evidence of fulfillment of conditions of section 36(1)(vii) of the Act was not furnished, the same was upheld. As regards, advances written off, the same was held to be towards capital expenditure and hence held to be not allowable as deduction.

42. The learned authorised representative submitted that The aforesaid action of the assessing officer in making disallowance of deduction claimed for bad debts/advances written off is not sustainable for the reasons elaborated in the note submitted as hereunder:

> "It is, at the outset, respectfully submitted that bad debts/advances written off by the appellant related to debts arising/advances made in earlier years. On perusal of the details placed at pages 98-103 of paper book, it will be noticed that the debts/ advances written off arose in the normal course of business and, therefore, write off of such debts based upon the commercial decision taken by the management of the appellant having regard to there being no chance of recovery out of the said debts/advances, were allowable as bad debt and/or loss incidental to the business.
>
> It is respectfully submitted that advances/ deposits were given by the appellant in the ordinary course of carrying on the business, and, thus, if any such amount become irrecoverable, the same would be, it is submitted, allowable as trading loss under section 28 of the Act.
>
> Attention in this regard is invited to the decision of the Delhi Bench of the Tribunal in the case of Minda HUF v. JCT: 101 ITD 191. In that case the Tribunal was pleased to hold that the CIT (A) erred in not allowing the claim of the assessee in respect of the advances written off which had become irrecoverable. The relevant observations of the Tribunal are reproduced herein-below for ready reference:
>
> > "We have carefully considered the entire material on record and the rival submissions. From the details furnished by

the assessee in the paper book it is found that the assessee had given full details of each item. The amounts represented advances given to the parties. The advances were given during the course of business for supply of raw material etc. Either the material was not supplied or defective material was supplied. The amount became irrecoverable from the parties to whom the advances were made. Thus, the advances were totally connected with the business activities of the assessee. The learned CIT(Appeals) was not justified in observing that the amount of advance was not a trading loss. After seeing the details of amounts, it is observed that the assessee was not required to take a lengthy litigation for recovering the small amounts. In our opinion, therefore, the approach of the learned CIT(A) is not justified." (Emphasis supplied)

Reliance in this regard is also placed on the following decisions:

- CIT v. Mysore Sugar Co. Ltd.: 46 ITR 549 (SC)
- CIT v. Triveni Engg. & Industries Ltd.: 343 ITR 245 (Del)
- Mohan Meakin Ltd. v. CIT: 348 ITR 109 (Del)
- Kwality Fun Foods and Restaurants (P.) Ltd. v. DCIT: 356 ITR 170 (Mad)
- Devi Films Private Ltd. vs. CIT: 75 ITR 301 (Mad.)
- CIT v. Inden Biselers: 181 ITR 69 (Mad.)
- P. Satyanarayana v. CIT: 116 ITR 803 (AP)
- CIT v. H. P. Lohia: 77 Taxman 476 (Cal)
- CIT v. Gillanders Arbuthnot & Co. Ltd.: 9 Taxman 76 (Cal.)
- CIT v. Sethu Film Distributors: 212 ITR 620(Mad)
- CIT v. Abdul Razak & Co.: 136 ITR 825(Guj)
- Salora International Ltd. v. JCIT: 129 Taxman 68 (Del.)
- CIT V. Shreyans Industries Limited: 207 CTR 281 (P&H)
- DCIT vs. M/s Edelweiss Capital Ltd.: ITA No: 3971/Mum/2009 (Mum ITAT)

- CIT v. Claridges Investment & Finance Pvt. Ltd.: 18 SOT 390 (Mum ITAT)
- ITO v. Gokaldas Pragji: 24 ITD 25 (Ahd. ITAT)
- Gujarat Fluoro Chemicals Ltd. v. JCIT: 76 TTJ 313 (Ahd.)
- Asst. CIT v. Shantilal Balabhai: 74 TTJ 506 (Ahd.)
- ITO vs. Ashok Kumar Lalitkumar: 53 ITD 326 (Ahd.)

It is further submitted that advances primarily related to tour expenses, advances for organizing party, advance for laundry services, advances to employees, advance for vehicle repair, advance for painting, etc., (refer details of expenses placed at pages 98-103 of the paper book). Therefore, it is not correct to hold that such advances were for procuring capital expenditure.

That apart, even insofar as advances for procuring capital assets was considered, in the following decisions it has been held that where the asset does not come into existence, then the expenditure incurred is allowable as revenue expenditure:

- CIT v. Priya Village Roadshows : 332 ITR 594 (Del.)
- Indorama Synthetics Ltd v. CIT: 333 ITR 18 (Del.). Expenses relating to setting up of new unit for expansion of its business operations, which was later abandoned was held to be revenue expenditure
- CIT v. Vardhman Spinning &General Mills: 176 Taxman 157 (P&H)
- Asiatic oxygen Ltd. v. CIT :190 ITR 328 (Cal.)
- Hindustan Aluminium Corporation ltd. v. CIT: 159 ITR 673 (Cal.)
- CIT v. Graphite India Ltd. : 221 ITR 420 (Cal)
- CIT v. Coromandal fertilizers: 247 ITR 417 (AP)
- Enpro India Ltd. v. DCIT:113 Taxman 132 (Del. Trib.)

- CIT v. Honda Siel Power Products Ltd. : ITA No. 758/2008
- Sutlej Industries Ltd. v. ACIT : 94 TTJ 108 (Del)

It is thus submitted that merely because part of the advances related to acquisition of a capital asset could not have been the basis for disallowing the write off since no asset came into existence. In view of the aforesaid, it is respectfully submitted that the action of the assessing officer in not allowing deduction of the aforesaid sum of Rs. 72,29,915 is not tenable and, hence, calls for being reversed."

43. The learned departmental representative vehemently supported the order of the learned CIT – A and submitted that when the expenditure incurred by the assessee is for the purpose of advances paid for capital expenditure, they are not allowable as there u/s 37 (1) or u/s 28 of the income tax act. He further submitted that even as such, these expenditure are not incurred during the year but are advances. Unless the assessee proves that the assessee has incurred the loss by writing of these advances during the year, it cannot be allowed. Further, the writing of advance is a loss, which has to be on revenue account. Even under section 28, the loss, which is of capital nature, is not at all allowable. He therefore submitted that the advances written off by the assessee for purchase of capital asset is not an allowable loss or expenditure under the income tax act.

44. We have carefully considered the rival contentions and perused the orders of the lower authorities. The assessee has placed the details of bad debts, loans etc written off during the year under consideration at page number 98 – 103 of the paper book. On careful verification of these details, it is found that the expenses incurred by the assessee in the form of advances to various parties are for various expenditure of revenue nature. Certain advances were also given for material which if would have purchased would have been fallen in the category of repairs and maintenance. Certain amount of advances and security deposit is given to various parties are also for the purposes of pity services. However a sum of INR 3 47700 was also provided for the purchases of the computer. Further sum of INR 6 72119/– is also paid for purchase of computers. However, it is stated that no such

computer is purchased but the amount is written off. It is not in dispute that assessee has purchased the computers but has not adjusted the advances. Therefore, undoubtedly, such advances were for purchase of capital assets, which have never been acquired by the assessee. To justify the claim of the allowability assessee has relied upon the decision of the honourable Delhi High Court in case of Indo Rama synthetics Ltd vs. Commissioner of income tax 333 ITR 18 (Del). We found that in that particular decision the claim was with respect to allowability of certain expenditure in the nature of salary, wages, repairs, maintenance, design and engineering fees along with other expenditure of revenue administrative nature. It was not the case of advances given for purchase of a capital asset. It is also not the case of the assessee that advances given by it for the golf course of business, never came into existence. Thus, reliance on these decisions is misplaced. Reliance placed on another decision of the honourable Delhi High Court in CIT v. Priya Village Roadshows : 332 ITR 594 (Del.) is also misplaced because the issue before the honourable court was with respect to the claim of allowability of a feasibility study report expenditure for the existing business which even otherwise would have been allowed as revenue expenditure. In the present case, advances for the capital goods such as computers et cetera would as such could not have been allowed to the assessee as revenue expenditure. We have also perused other judicial precedents also raised before us, however, we are not impressed to allow the claim of the assessee, as none of the decision cited before us relates to advances written off for purchase of a capital asset given in earlier years was involved. Further, for the claim of allowability u/s 28, loss should be of revenue nature. For the claim of allowability u/s 37 (1) of the act, the expenditure should be of revenue nature. Therefore, the prime condition that is required to be satisfied by the assessee is that that expenditure is revenue in nature. According to us the advances given for purchase of capital goods, cannot be considered to be revenue in nature, when they are written off. In view of this, we do not find any infirmity in the order of the learned CIT – A, in principle, that the advances given for the purchase of capital goods he further written off in this year is a capital expenditure. With respect to the allowability of bad debts, there is no

infirmity in the order of the learned CIT – A mentioned in para number 10.2 of his order that such advances should have been shown as income in the earlier years. In view of this, we dismiss ground number 4 of the appeal of the assessee.

45. In the result ITA number 4536/Del/2009 for assessment year 2005 – 06 filed by the assessee is partly allowed.

46. Now we come to the appeal filed by the learned assessing officer in ITA number 4721/Del/2009 for assessment year 2005 – 06.

47. The first ground of appeal is general in nature and therefore it is dismissed.

48. The second ground of appeal is related to ground number 1 of the appeal of the assessee. This ground has already been decided while deciding the ground number 1 of the appeal of the assessee wherein we have held that there is no infirmity in the order of the learned CIT – A in deleting the disallowance of INR 6 374602/–. Hence, this ground of appeal is dismissed.

49. The ground number 3 is with respect to the deletion of addition of INR 1 95950000/– because of undisclosed income on sale of land. The learned assessing officer noted that profit and loss account of the assessee for the impugned assessment year reflects sale of land as a measure 31 canals (3.25 acres or 1550 0 yd^2) for a consideration of Rs, 4 crores. The cost of the above land was INR 1 9071127/– and thus it resulted into taxable income of INR 2 0928872/-. The learned AO asked the assessee to justify the market price of such land through furnishing of comparable instances. The assessee did not furnish the same. Therefore the learned AO noted that in the contiguous plot of land and high-end residential apartments were constructed and sold by the company in financial year 2000 to 2003 which yielded a profit of INR 1 3.52 crores. AO noted that assessee has sold 22.69 acre of land on 26/2/2001 at the rate of INR 1.90 crores per acre to ITC Ltd. Further on 17/3/2003 4.43 occurs were sold to ITC at the rate of Rs. 2 .03 crores per acre. He compared the situation of the plot sold during the year with the plots sold in the earlier year and found that assessee has under shown the sale consideration. Therefore, he noted that the estimated sale price should have been Rs. 7.26 Crore per acre resulting into the sale consideration of INR 2 35950000/– instead of only INR 40,000,000 is shown by the assessee thus, he made an addition of INR 1 95950000/– as

suppression of the sale consideration. The matter reached to the learned CIT – A who deleted the addition. Therefore, revenue is in appeal.

50. The learned departmental representative vehemently supported the order of the learned assessing officer and submitted that when the sale price of the plot of land earlier was stated to be much higher, the sale consideration shown by the assessee is definitely understated. He further submitted that assessee did not furnish the comparative sale instances. He further stated that assessee also failed to explain the understated price, which is highly incompatible with the actual sale made by the assessee in earlier. He therefore submitted that the addition made by the learned assessing officer should have been sustained by the learned CIT – A.

51. The learned authorised representative vehemently submitted that the assessing officer has made the addition based on the conjectures and surmises and false and baseless allegation of suppression of the sale consideration from sale of land. He submitted that there is no evidence available with the learned assessing officer that the actual sale consideration received is not the real consideration received by the assessee and assessee has received much more than whatever is stated in the sale deed. He further stated that in absence of any evidence of actual receipt of sale consideration outside the books of accounts unless brought on record by the learned assessing officer no addition should have been made under the provisions of the law. He further stated that the full value of the consideration received has been shown which cannot be construed as the market value but must be taken to be the price bargained by the parties to the sale. He referred and relied upon the decision of the honourable Supreme Court in 66 ITR 622/– and 131 ITR 597. He further referred to the decision of the honourable Delhi High Court in 309 ITR 233 (Del) wherein it has been categorically held that the provisions of section 48 of the act does not have any reference to the market value but only to the consideration referred to in the sale deed as the sale price of the assets which have been transferred. He further referred to the plethora of the decision to support its contention. He therefore submitted that the learned CIT – A has correctly deleted the addition.

52. We have carefully considered the rival contention and perused the orders of the lower authorities. During the year under consideration, the assessee had, vide sale deed dated 26th May, 2004, transferred a plot of land admeasuring 31 canals 2 Marlas (about 3.89 acres), situated at Village Sukhrali, Tehsil & Dist. Gurgaon to M/s. Green Max Estates Pvt. Ltd., for total consideration of Rs. 4 crores . The cost of the said land was reflected at Rs. 1,90,71,127 in the books of accounts, resulting in taxable `business income' of Rs. 2,09,28,872, which was shown as income in the profit and loss account. In the impugned assessment, the assessing officer, on the basis of certain other transactions of sale of land/ flat, substituted actual consideration of Rs. 4 crores by notional/ hypothetical amount of Rs. 23,59,50,000 and made addition of the difference amounting to Rs. 19,59,50,000 as alleged undisclosed income.

> "6.1 The findings of the A.O. in the assessment order as well as in the remand report & the written and oral submission(s) made on behalf of the appellant have been carefully considered. It has been the case of A.O. that the consideration shown by the appellant was not the real consideration, but this has been done without bringing on record any evidence- direct or inferential- in support of the same. It is a trite law that the onus to prove otherwise than the fact, lies on the person who alleges. It has been consistently held by the courts of laws that it is for the Revenue to establish that there has been an understatement of consideration by the assessee & the consideration actually received is more than the one disclosed before the tax authorities. In case the A.O. wants to make out a case that the assessee had received more consideration then he should have basic material and evidence in his hands, which suggest that the consideration exceeded the amount shown in the document. Reliance is placed on the decisions of the Supreme Court in CIT v. George Henderson Co Ltd(1967) 66 ITR 622(SC), CIT v. Gillanders Arbuthnot & Co (1973) 87 ITR 407(SC), K.P. Varghese v. ITO(1981) 131 ITR 597(SC), CIT V. Shivakami Co. (P) Ltd. (1986) 159 ITR 71 (SC) and CIT Vs. Godawari Corpn. Ltd. (1993) 200 ITR 567 (SC), wherein it has been held that unless there is evidence that more than what was stated was received, no higher price or value

can be taken to be the basis for computation of capital gains. Reliance is also placed on the decisions of the jurisdictional High Court of Delhi in CIT V. Gulshan Kumar (Deed.) (2002) 257 ITR 703 (Del.) & CIT V. Naresh Khattar HUF (2003) 261 ITR 664 (Delhi), CIT V. Sm. Sushila Devi (2002) 256 ITR 179 (Delhi) and CIT v. Smt. Nilofer I. Singh (2009) 221 CTR 277/ (2009)176 Taxman 252/(2008)14 DTR 108. These decisions make it more than clear that the expression 'the full value of consideration' as contemplated in section 48 of the Act does not have any reference to the market value but only to the consideration referred to in the sale deeds or other supporting evidences as the sale price of the assets which have been transferred.

6.2 In the instant case, no material has been confronted by the department, so as to suggest that the assessee paid consideration of Rs. 23,59,50,000/- i.e. Rs. 7.26 crores per acre multiplied by 3.25 acres in place of Rs. 4,00,00,000/- . In the instant case, all that the A.O. has done is to rely upon the hypothetical sale price, which does not show or prove that there is some underhand dealing & consideration has passed more than what is disclosed by the assessee. The sale consideration disclosed by the assessee, supported by documentary evidence cannot be .disbelieved merely on the basis of a hypothetical sale price adopted by the Assessing Officer. In view of the aforesaid discussion, I am of the considered view that the A.O. has failed to adduce evidence on record in support of understatement of the sale consideration by the assessee. Therefore, A.O. is directed to adopt me sale consideration of the impugned plot of residential land at the figure as disclosed by the assessee. As a result, ground no.3 is allowed."

53. The aforesaid land was, as stated above, sold by the assessee to Green Max Estates (P) Limited vide sale deed dated 26thMay, 2004 for total sale consideration of Rs. 4 crores. On perusal of the sale deed, it will be kindly noticed that the entire sale consideration of Rs. 4 crores was received by the assessee vide cheque No. 736042 dated 26thMay, 2004, drawn on Standard Chartered Bank, Greater Kailash, New Delhi. The said cheque was deposited by the assessee in its bank with Standard Chartered Bank. On perusal of

the sale deed, it will also be kindly noticed that the stamp duty of Rs. 32 lacs was paid on the total sale consideration of Rs. 4 crores, which had been duly accepted by the Stamp Authorities. Apart from the consideration of Rs. 4 crores received by the assessee, no other consideration was received the assessee from the buyer against sale of aforesaid land in Village Sukhrali, Tehsil & Dist. Gurgaon, Haryana. It is the emphatic submission of the assessee that the assessing officer proceeded solely on conjectures and surmises to make false and baseless allegation of suppression of sale consideration from sale of land at Village Sukhrali, Tehsil & Dist. Gurgaon. It is respectfully submitted that no evidence, whatsoever, has been brought on record by the assessing officer to substantiate the baseless allegation of receipt of sale consideration outside the books of accounts. Naturally, in the absence of any evidence of actual receipt of sale consideration outside the books of accounts by the assessee being brought on record, no addition could be made under the provisions of the Act. Hon Supreme Court in the case of K.P. Varghese v. ITO: 131 ITR 597 has held that :

> "........ If, therefore, the revenue seeks to bring a case within sub-s. (2), it must show not only that the fair market value of the capital asset as on the date of the transfer exceeds the full value of the consideration declared by the assessee by not less than 15% of the value so declared, but also that the consideration has been understated and the assessee has actually received more than what is declared by him............ The revenue must go further and prove that the second condition is also satisfied. Merely by showing that the first condition is satisfied, the revenue cannot ask the court to presume that the second condition too is fulfilled, because even in a case where the first condition of 15% difference is satisfied, the transaction may be a perfectly honest and bona fide transaction and there may be no understatement of the consideration. The fulfillment of the second condition has, therefore, to be established independently of the first condition and merely because the first condition is satisfied, no inference can necessarily follow that the second condition is also fulfilled. Each condition has got to be viewed and established independently before sub-s. (2) can be invoked and the burden of

> doing so is clearly on the revenue. It is well-settled rule of law that the onus of establishing that the conditions of taxability are fulfilled is always on the revenue and the second condition being as much a condition of taxability as the first, the burden lies on the revenue to show that there is an understatement of the consideration and the second condition is fulfilled. Moreover, to throw the burden of showing that there is no understatement of the consideration, on the assessee would be to cast an almost impossible burden upon him to establish a negative, namely, that he did not receive any consideration beyond that declared by him."

The aforesaid observations of Hon. Supreme Court lay down a general proposition of law that it is for the Revenue to prove that the assessee has actually received money/cash more than what is declared by the assessee before seeking to substantiate the apparent consideration by any fictional/notional sum. It is trite law that in terms of section 45 read with section 48 of the Act, what could be taxed is only the actual consideration received and the same could not be substituted by any other amount unless there is positive evidence to establish any receipt/ movement of money over and above the stated consideration. In the case of CIT v. George Henderson And Co. Ltd.: 66 ITR 622 (SC), it is held that, the expression "full value of the consideration" could not be construed as the market value but must be taken to be the price bargained for by the parties to the sale. Further the assessee before the learned CIT – A has clearly stated that the comparable sale of land to ITC Ltd that the above agreement did not materialize and subsequently it was cancelled since the assessee was not able to obtain the required permission and it is still continues to be owned and possessed by the assessee. Even further, the comparison of the sale of the plot of land with the sale of flat in the adjoining area is not comparing apples with Apple but Apple with oranges. Thus, in absence of any corroborative evidence of having received the consideration higher than what has been stated in the sale deed and in the books of account, the addition made by the learned assessing officer is not in accordance with the law. In view of this, we do not find any infirmity in the order of the learned CIT – A and deleting the above addition which is made purely on the basis of the conjectures and

surmises. Accordingly, ground number 3 of the appeal of the revenue is dismissed.

54. Now we come to ground number 4 of the appeal of the assessee where the learned CIT – A has deleted the addition of Rs 497184511/– made by the learned assessing officer being the long-term capital gain on transfer of ownership of ITC Ltd. The above addition has been made subject to the exact details of the date on acquisition cost of the land on protective basis and on substantive made a basis the addition has been made in assessment year 2001 – 02 and 2003 – 04 on the basis of agreement to sale dated 16th/2/2001 and 17/3/2003. The brief fact shows that assessee owns 238.25 acres of land in Haryana. Out of which the assessee on 16/02/2001 entered into an agreement to sale for sale of about 22.691 of land to ITC Ltd for a consideration of INR 450,000,000. Further, on 17/03/2003, the assessee further entered into an agreement to sale of 4.43 acres of land with ITC Ltd for a consideration of INR 90,000,000. Thus out of the total consideration of INR 5 4 crores the assessee only received 53,50,00,000 but continued to retain possession of the said land and the sale could not be affected in absence of various provisions from the government and regulatory bodies. Ultimately, the above agreements were cancelled and the entire money was refunded to the buyer. The learned assessing officer held that there is a transfer of land in assessment year 2001 – 02 and 2003 – 04 and consequently the assessee was liable to pay tax on capital gain in those relevant years. For assessment year 2001 – 02 and 2003 – 04 for the above additions were deleted by the learned CIT – A and the order of the learned CIT – A has been affirmed by the coordinate bench as per order dated 15/6/2016 in ITA number 3549/del/2009 and 4847/2009. In view of this, it is apparent that when the substantive addition has already been deleted on the merits of the issue, the protective addition made during the year also does not survive.

55. The learned CIT – A has dealt with the above issue as under:-

> "8. Ground of Appeal No.5 relates to the grievance of the appellant against the action of the Assessing officer in adding a sum of Rs. 49,7184,511/- on account of Long-term capita! gains on protective basis. It was submitted on behalf of die appellant that the said issue is

covered in favour of the appellant by the order of my predecessor-in-office in appellant's own case for assessment year 2001-02.

8.1 I have carefully considered the findings of the Assessing Officer and the written submissions made on behalf of the appellant. I find that the identical issue in the appellant's own case was decided in its favour by my predecessor-in-office in Appeal No. 141/2007-08 vide order dated 22-05-2009 for assessment year 2001-02 by holding that "In totality of all the facts and circumstances, I have come to the conclusion that in the present case there was neither sale nor transfer of possession as covered in clause (i) to (v) of section 2(47) of the Act.

……In view of the facts as discussed above, I do not find justification to bring Rs.45 crores received by the appellant from I.T.C. as an Agreement to Sale of land measuring 22.69 acres to Capital Gains Tax. The same is directed to be deleted. "

8.2 On verification of the details furnished by the appellant during the appellate proceedings, it is found that the appellant continues to hold possession of the land and legal title over the land in question. Further, the appellant still occupies and uses the aforesaid land for its business activities. During the year under consideration neither any sale agreement and /or any sale deed was executed nor was possession handed over to the party who has paid the sale consideration in A.Y.2001-02 and 2003-04. In view of the aforesaid, it can be safely concluded that the transfer of the land has not taken place during the year under appeal and therefore, the question regarding the taxability of the transfer of the impugned land under Capital Gains does not arise during the year under consideration. As already mentioned above, the identical issue in the appellant's own case was decided in its favour by my predecessor-in- office in A. Y. 2001-02. As the facts and circumstances of the case are pari materia with the case of. The appellant in A.Y. 2001-02, for the reasons as discussed in the aforesaid order of my predecessor-in-office, this ground of appeal is allowed."

56. As the revenue could not point out that what is the trigger point of taxing the above amount in this year and further in which year the transfer of the capital asset has happened, the above addition has rightly been deleted by the learned CIT – A. In view of this we do not find any infirmity in the order of the learned CIT – A deleting the protective addition of Rs. 497184511/–. Thus, ground number 4 of the appeal is dismissed.

57. The ground number 5 of the appeal is with respect to the deletion of addition of INR 2 031305/– made by the learned assessing officer on account of interest disallowances. The above disallowance has been made by the learned assessing officer on the basis of the cash flow statement attached with the audited financial statements for the year ended on 31st of March 2005 holding that the assessee had out of the fresh loan of INR 7.75 crores received from ITC during the year under consideration utilized only INR 4.95 crores for repayment of old Tom loan and interest due thereon. Thus, the learned AO held that only 64 percentage of the new borrowed funds were utilized for non- business purposes and therefore disallowed proportionate sum of INR 2031305/– out of the total interest of INR 3 173915/–. The learned CIT – A deleted the above addition after verification of the details holding that the out of the total borrowing of INR 77,500,000 only INR 7 5,00,000, if at all, had been utilized for repayment of the old borrowings and interest thereon of INR 4.95 crores. He further held that the learned assessing officer has not brought on record anything to show that assessee has utilized the borrowed funds for non-business purposes. Thus, he deleted the above disallowance.

58. The learned departmental representative vehemently supported the order of the learned assessing officer whereas the learned authorised representative referred to the submission made before the learned CIT – A and findings recorded by him.

59. We have carefully considered the rival contention and perused the orders of the lower authorities. On careful reading of para number 9.1 of the order we do not find any infirmity in the order of the learned CIT – A wherein it has been held that that fresh borrowing of INR 7.75 crore were utilized for repayment of loan pertaining to earlier years and the purpose of the loan has been accepted by the learned assessing officer, the disallowance made

by the learned assessing officer is not sustainable. We also do not find any infirmity in the order of the learned CIT – A mentioning the reasons for deletion of the disallowance in para number 9.1 of his order. Accordingly, ground number 5 of the appeal of AO is dismissed.

60. The ground number 6 is against the deletion of the addition of INR 5 108772/– made on account of the excess depreciation claimed on the golf course holding that golf course is a plant and machinery and not the building as claimed by the learned assessing officer. The above issue has been squarely dealt with by us in the appeal of the assessee for assessment year 2001 – 02 wherein we have held that the golf course is a plant and not a building. For the same reasons given therein, we dismiss the ground number 6 of the appeal of the AO.

61. In view of this appeal number 4721/del/2009 for assessment year 2005 – 06 preferred by the learned assessing officer is dismissed.

Penalty appeals u/s 271 (1) (c)
for A Y 2005-06
Assessee and AO

62. For assessment year 2005 – 06, the penalty proceedings were initiated by the learned assessing officer u/s 271 (1) (C) of the act on completion of the assessment proceedings as well as before the first appellate authority. The learned AO levied the penalty u/s 271 (1) (c) of the act as per the order dated 14/3/2011 of INR 1 28005767/– on several additions made by the learned assessing officer as under:-

a. provision no longer written back of INR 8 416051/–
b. undisclosed income on sale of land of INR 1 95950000/–
c. treatment of security deposit of INR 3 40542851/– as income of the assessee
d. disallowance of interest expenditure of INR 2 031305/–
e. disallowance of bad debts of INR 7 229915/–
f. disallowance of depreciation of INR 5 108772/–
g. taxability of the long-term capital gain on protective basis of Rs. 497184511/–

63. Assessee preferred the appeal before the learned CIT – A who confirmed the penalty on following issues only:-

    a. disallowance of bad debts or advances return of amounting to INR 7 229915/– upheld by the learned CIT – A
    b. Confirmation of the addition of INR 2 041449/– because of provision of liabilities returned back.

64. Thus, the assessee is aggrieved by the confirmation of penalty on these two above counts, and therefore it is in appeal in ITA number 4560/Del/2019.

65. The revenue is also aggrieved with the order of the learned CIT – A in deleting the penalty only on the one account that the learned CIT – A has deleted the penalty on the taxability of non-refundable membership fee and security deposit amounting to INR 3 40542851 as income chargeable to tax. Such appeal is preferred in ITA number 4849/Del/2011.

66. The assessee has raised the following grounds of appeal in ITA No. 4560/Del/2011 for the Assessment Year 2005-06 against the order of the learned Commissioner of income tax (appeals) –VII common New Delhi dated 16/8/2011 wherein the penalty levied by the learned assessing officer u/s 271 (1) (c) of the income tax act as per order dated 14/3/2011 of INR 12,80,05,767/– has been partly confirmed:-

"1. That the CIT(A) erred on facts and in law in confirming the penalty imposed under section 271(1)(c) of the Income Tax Act, 1961 ('the Act') on disallowance of deduction of bad debts / advances written off aggregating to Rs. 72,29,915 for alleged furnishing of inaccurate particulars of income.

1.1 That the CIT(A) erred on facts and in law in not appreciating that the claim made by the appellant was a bonafide claim and therefore, no penalty was leviable under section 271(1)(c) of the Act.

1.2 That the CIT(A) erred in holding that the conduct of the appellant creates doubt about the bonafides and that there was no reasonable cause in not disclosing the full particulars.

2. That the CIT(A) erred on facts and in law in confirming the penalty imposed on account of addition of provision written back by the

appellant amounting to Rs.20,41,449 out of total provision of Rs. 84,16,051 for alleged furnishing of inaccurate particulars of income.

2.1 That the CIT(A) has failed to appreciate that the claim made by the appellant was a bonafide claim, which is clearly evident form the fact that:

(a) out of total provision of Rs.'84,16,051, provision of Rs. 63,74,602 was allowed by the CIT(A), and

(b) the provision of Rs. 20.41,449 was sustained only due to non-availability of old records.

2.2 That the CIT (A) erred in holding that the appellant filed to prove the genuineness of its claim in respect of Rs. 20,41.449.

3. That the CIT(A) has erred on facts and in law in confirming the penalty imposed without appreciating that the appellant has been consistently incurring huge losses and has not been able to claim the set off of the said losses even till date, which clearly establishes the bonafide of the appellant."

67. The brief fact shows that the learned assessing officer levied the penalty of INR 128010000/– on all the additions made in the case of the assessee for assessment year 2005 – 06, the learned CIT – A on the issue of

a. claim of the allowability of bad debts written off INR 7 229915/– upheld by the learned CIT – A and confirmed by us also in this order
b. Taxability of sum of INR 2 041449/– u/s 41 (1) (a) of the act made by the learned assessing officer and confirmed by the first appellate authority and the coordinate bench.

68. Thus, the penalty has been substantially deleted by the learned CIT – A and the assessee is contesting confirmation of the penalty on the about two counts only.

69. On the issue of disallowance of INR 7 229915/– in respect of the bad debts written off, before the learned assessing officer the assessee was not able to furnish the details of the exact nature of the, the year of the accrual, the reasons of the dispute and the evidence of a 4 speed for recovery along with the evidence of litigations et cetera to establish the genuineness of such claim. The above addition was sustained by the learned CIT – A and by us

in the appeal of the assessee. However, the issue here is whether the assessee has furnished inaccurate particulars of income to that extent. The claim of the assessee is that the assessee has return of the above sum on the basis of the commercial decision taken by the management, as there are no chances of the recovery. The claim of the assessee is that it is a business loss or bad debts or allowability of expenditure u/s 37 (1) of the act. The assessee also submitted that assessee could not furnish the details because of the reason that operations of the assessee were closed in October 2006 on account of lockout due to labor disturbances further due to this the office of the assessee was vandalized by the labor union. Such facts were also demonstrated by the police complaint of the assessee dated 5/10/2006. In view of this, it was submitted that assessee has not been able to furnish certain documentary evidences before the lower authorities however, the commercial justification were given by the assessee. It was rejected. It was further stated that there is no requirement of proving that the debt has become bad during the year. The assessee submitted that bad debts amounting to INR 1 286282/– was confirmed for the reason that assessee failed to furnish the evidence of fulfillment of the condition. Further with respect to the writing of advances of INR 5 943633/– the assessee submitted the complete details. Therefore, there is no reason of confirming the disallowance, which is supported by the several judicial precedents. It was further stated that it is a bona fide claim and therefore penalty should not be levied. However the learned CIT – A confirmed the penalty vide para number 6.2 of his order as he held that the default on the part of the assessee in not disclosing full particulars was attributable to reasonable clause.

70. With respect to the taxability of sum of INR 2 041449/– u/s 41 (1) (a) of the act which was claimed to be because of the non availability of the documentary evidences, it was submitted that the above sum was part of the liabilities returned back and the provision is no longer required of INR 8 752240/–. The learned assessing officer disallowed the same whereas the learned CIT – A upheld the disallowance of INR 2 041449/– holding that the balance sum of INR 6 374602/– was already disallowed by the assessee in the earlier assessment year and therefore the provisions of section 41 of the

income tax act does not apply. Thus disallowance of INR 2 041449 was upheld. The same was also upheld by the coordinate bench. Therefore the levy of the penalty was contested before the learned CIT – AO in para number 7.1 of his order confirmed the same on the disallowance of INR 2 041449/–.

71. Before us, during the course of hearing, the assessee has preferred an application for admission of the additional ground invoking the rule 11 of the income tax (appellate tribunal's) rules, 1963 stating that the penalty levied by the learned assessing officer is beyond jurisdiction and bad in law. It is further challenge that the satisfaction in the assessment order is not properly recorded and further the notice issued on 18/12/2007 u/s 274 of the act for initiating the penalty proceedings is without specifying any charge of default. Thus, it was also prayed that the above issue is purely legal in nature and goes to the root of the matter and therefore these additional ground number 4 of the appeal should be admitted.

72. The learned departmental representative vehemently contested the above application of admission of the additional evidence and stated that such grounds of never been raised before the learned lower authorities and therefore now should not be admitted.

73. We have carefully considered the rival contention and find that the above ground of appeal is purely legal in nature and no further facts are required to be investigated. Thus in the interest of justice, we admit the additional ground raised by the assessee which is related to the jurisdictional facts about the proper satisfaction as well as the initiation of the penalty proceedings by the learned assessing officer.

74. On the merits of the issue, the learned authorised representative referred to the copy of the notice dated 18/12/2007 issued u/s 271 (1) © of the act which is placed at page number 64 of the paper book wherein it has been stated that penalty proceedings have been initiated on the assessee for the concealment of the particulars of income or furnishing inaccurate particulars of such income. The learned authorised representative submitted that the penalty should be deleted on this ground itself. He further stated that the claim of the assessee is also supported by the decision of the honourable Karnataka High Court in 73 taxmann.com 241

against which the special petition has been dismissed by the honourable Supreme Court in 242 taxman 180.

75. The learned departmental representative vehemently contested the above issue and stated that proper satisfaction has been recorded by the assessing officer and it is a non-statutory notice, which has been referred by the learned authorised representative.

76. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also carefully considered the notice issued by the learned assessing officer, which is placed at page number 64 of the paper book wherein none of the twin charges have been struck off by the learned assessing officer in notice dated 18/05/2007. Therefore, the issue squarely covered in favour of the assessee by the decision of the Karnataka High Court against which the special petition has been dismissed in 242 taxman 180 by the honourable Supreme Court. Further recently the honourable Delhi High Court in [ITA number 475/2019 dated 2/8/2019] as per paragraph number 21 of that order has also upheld the view of the coordinate bench that notice issued by the learned assessing officer would be bad in Law if it did not specify under which limb of section 271 (1) (c), penalty proceedings had been initiated. In view of this, we allow the ground number 4 of the appeal of the assessee and direct the learned AO to delete the penalty u/s 271 (1) (c) of the act.

77. Accordingly we allow ITA number 4560/Del/2009 filed by the assessee for assessment year 2005 – 06 against the penalty sustained by the learned CIT – A.

78. The revenue has raised the following grounds of appeal in ITA No. 4849/Del/2011 for the Assessment Year 2005-06:-

"1. The order of the learned CIT (APPEALS) is erroneous & contrary to facts & law.

2. On the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in deleting the penalty u/s 271(1) (c) of the Act levied by the AO on the ground that the assessee furnished inaccurate particulars of income by not showing non-refundable membership fee and security deposit amounting to Rs. 34,05,42,851/- as income chargeable to tax.

3. The CIT (A) erred in not appreciating the fact that penalty u/s 271(1) (c) can be levied on civil infraction of law.

4. The Ld. CIT (A) erred in not appreciating that the case position of law was amply clear and there was no scope of difference in opinion on this issue. Thus, the assessee intentionally chose not to declare income in respect of membership fee and scrutiny deposit received during the year."

79. As we have already crash the penalty order passed by the learned assessing officer in ITA number 4560/Del/2011 holding that the notice issued by the learned assessing officer does not specify the charge on which the penalty is levied, on the basis of the decision of the honourable Karnataka High Court against which the special leave petition by the honourable Supreme Court is dismissed and also the decision of the honourable Delhi High Court on that issue, we do not find any merit on this issue in the appeal filed by the learned AO. Therefore the ITA number 4849/Del/2011 filed by the learned Asst Commissioner of income tax, New Delhi is dismissed.

80. Accordingly, in the penalty proceedings for assessment year 2005 – 06, the appeal of the assessee is allowed an appeal of the revenue is dismissed.

AY 2007-08

81. For the assessment year 2007 – 08, assessee filed its return of income declaring loss of INR 6 8685141 on 27/10/2007. The assessment u/s 143 (3) of the act on 30/12/2009 determining the total income of the assessee assessing the total loss of INR 6 3950975/–. The learned assessing officer disallowed the depreciation on the golf course amounting to INR 1 085614/– . He also held that membership fees and non-refundable security deposit received of INR 3 648552/– is also assessable as the taxable income of the assessee. On appeal before the learned CIT – A, he confirmed the addition of INR 3 648552/– holding that membership fees on refundable security deposit received by the assessee during the assessment year 2007 – 08 is income of the assessee. Therefore, the assessee is aggrieved with the order of the learned CIT – A has preferred this appeal. The assessee has raised the following grounds of appeal in ITA No. 653/Del/2011 for the Assessment Year 2007-08:-

“1. That the CIT(A) erred on facts and in law in confirming the addition of Rs.36,48,552 on account of membership fees and refundable security deposit received during the assessment year 2007-08.

1.1 That the CIT(A) erred on facts and in law in confirming the action of the assessing officer without appreciating that Rs. 33,81,750 was received as advance membership fees and was offered for tax on mercantile basis by the appellant in the subsequent year(s) to which the same relates.

1.2 That the CIT(A) failed to appreciate that the Rs. 2,66,762 was amount received on account of refundable security deposit owed by the appellant to its individual members and the same could not, therefore, be regarded as taxable income of the appellant.”

82. Both the parties submitted before us that this issue is covered in the appeal of the assessee for assessment year 2005 – 06 wherein, identical issue arose. Therefore the submitted that their arguments on this issue are similar to the arguments raised in that appeal on that issue.

83. We have carefully considered the rival contention and perused the orders of the lower authorities. The only issue involved in this appeal is whether the sum of Rs. 3381750/– received by the assessee as an advance membership fees is chargeable to tax in this year or not. Further, refundable deposit of INR 2 66762/– received by the assessee from individual members which is shown by the assessee is a liability, is chargeable to tax as income of the assessee or not. Identical issue has been dealt with by us in ground number 2 and 3 of the appeal of the assessee for assessment year 2005 – 06. Therefore, for the similar reasons given therein we hold that membership fees received by the assessee of Rs. 3381750/– as advance membership fees, and shall be chargeable to tax on the basis of the accrual income to which it pertains. For such verification as in assessment year 2005 – 06, we set aside the issue back to the file of the learned assessing officer. With respect to the issue of taxability of the non-refundable security deposit we have already hold that such receipt is not an income of the assessee. Accordingly, we hold for this year too that non-refundable security deposit received by the assessee is not an income chargeable to tax. Accordingly, ground number 1 of the appeal of the assessee is allowed.

84. In the result ITA number 653/del/2011 for assessment year 2007 – 08 filed by the assessee is allowed.

Assessment Year 2008-09

85. The assessee has raised the following grounds of appeal in ITA No. 4098/Del/2011 for the Assessment Year 2008-09:-

"1. That the CIT(A) erred on facts and in law in confirming the addition of Rs.3,65,667 on account of membership fees and refundable security deposit received during the assessment year 2008-09.

1.1 That the CIT(A) failed to appreciate that Rs. 1,44,000/- was received as advance membership fees and was offered for tax on mercantile basis by the appellant in the subsequent year(s) to which the same relates.

1.2 That the CIT(A) failed to appreciate that Rs. 1,85,667/- out of total membership fees of Rs.3,65,667, was received on account of refundable security deposit owed by the appellant to its members and the same could not, therefore, be regarded as taxable income of the appellant.

1.3 That the CIT(A) erred in not adjudicating the alternative ground taken by the appellant to the effect that the assessing officer having assessed membership fees in the earlier assessment years, ought to have excluded the very same amount from the taxable income of the appellant for the year under appeal."

86. Identical issue has been dealt with by us in the appeal of the assessee for assessment year 2005 – 06 wherein we have held that membership fees received in advance by the assessee is chargeable to tax on the accrual basis to which it pertains to and the non-refundable security deposit received by the assessee is a capital receipt not chargeable to tax as income in the hands of the assessee. This is decided as per ground number 2 and 3 of the appeal of the assessee for that year. Both the parties confirmed that there is no change in the facts and circumstances of the case. Therefore, for the similar reasons we also hold that membership fees received in advance by the assessee is not an income in this year but is chargeable to tax in the

year in which it has accrued to the assessee and as well as the non-refundable security deposit received by the assessee is not income. Accordingly, ground number 1 of the appeal of the assessee is allowed.

87. In the result, appeal of the assessee for assessment year 2008 – 09 is allowed.

Assessment Year 2009-10

88. The assessee has raised the following grounds of appeal in ITA No. 1516/Del/2014 for the Assessment Year 2009-10:-

1. That the CIT(A) erred on facts and in law in confirming the addition of Rs.2,03,944 on account of refundable security deposit received by appellant during the relevant assessment year, merely by following the CIT(A) orders for preceding assessment years.

1.1 That the CIT (A) failed to appreciate that the security deposit received by the appellant was in the nature of interest free security deposit and the appellant was under a legal obligation to refund the same on a member ceasing to be so.

1.2 That the CIT(A) failed to appreciate that the security deposit received by the appellant was a continuing legal obligation and the same could not be regarded as trading surplus/ income for the relevant assessment year."

89. Identical issue has been dealt with by us in the appeal of the assessee for assessment year 2005 – 06 wherein we have held that membership fees received in advance by the assessee is chargeable to tax on the accrual basis to which it pertains to and the non-refundable security deposit received by the assessee is a capital receipt not chargeable to tax as income in the hands of the assessee. This is decided as per ground number 2 and 3 of the appeal of the assessee for that year. Both the parties confirmed that there is no change in the facts and circumstances of the case. Therefore, for the similar reasons we also hold that membership fees received in advance by the assessee is not an income in this year but is chargeable to tax in the year in which it has accrued to the assessee and as well as the non-

refundable security deposit received by the assessee is not income. Accordingly, ground number 1 of the appeal of the assessee is allowed.

90. In the result, appeal of the assessee for assessment year 2009-10 is allowed.

Assessment Year 2010-11

91. The assessee has raised the following grounds of appeal in ITA No. 4998/Del/2015 for the Assessment Year 2010-11:-

"1. That the CIT(A) erred on facts and in law in upholding the action of assessing officer in making an addition of Rs.56,78,661/- on account of security deposits and membership fees received during the relevant assessment year.

1.1 That the CIT(A) erred on facts and in law in not appreciating that the amount received on account of refundable security deposit was amount owed to the members and the same could not, therefore, be regarded as taxable income of the appellant.

1.2 Without prejudice, the CIT(A) erred on facts and in law not excluding membership fees already taxed in assessment for the earlier year(s) from the taxable income of the appellant for the year under consideration."

92. Identical issue has been dealt with by us in the appeal of the assessee for assessment year 2005 – 06 wherein we have held that membership fees received in advance by the assessee is chargeable to tax on the accrual basis to which it pertains to and the non-refundable security deposit received by the assessee is a capital receipt not chargeable to tax as income in the hands of the assessee. This is decided as per ground number 2 and 3 of the appeal of the assessee for that year. Both the parties confirmed that there is no change in the facts and circumstances of the case. Therefore, for the similar reasons we also hold that membership fees received in advance by the assessee is not an income in this year but is chargeable to tax in the year in which it has accrued to the assessee and as well as the non-refundable security deposit received by the assessee is not income. Accordingly, ground number 1 of the appeal of the assessee is allowed.

93. In the result, appeal of the assessee for assessment year 2009-10 is allowed.

Assessment year 2011-12

94. The assessee has raised the following grounds of appeal in ITA No. 4999/Del/2015 for the Assessment Year 2011-12:-

"1. That the CIT(A) erred on facts and in law in upholding the action of assessing officer in making an addition of Rs.37,06,534/- on account of security deposits and membership fees received during the relevant assessment year.

1.1 That the CIT (A) erred on facts and in law in not appreciating that, the amount received because of refundable security deposit was amount owed to the members and the same could not, therefore, be regarded as taxable income of the appellant.

1.2 Without prejudice, the CIT(A) erred on facts and in law not excluding membership fees already taxed in assessment for the earlier year(s) from the taxable income of the appellant for the year under consideration."

95. Identical issue has been dealt with by us in the appeal of the assessee for assessment year 2005 – 06 wherein we have held that membership fees received in advance by the assessee is chargeable to tax on the accrual basis to which it pertains to and the non-refundable security deposit received by the assessee is a capital receipt not chargeable to tax as income in the hands of the assessee. This is decided as per ground number 2 and 3 of the appeal of the assessee for that year. Both the parties confirmed that there is no change in the facts and circumstances of the case. Therefore, for the similar reasons we also hold that membership fees received in advance by the assessee is not an income in this year but is chargeable to tax in the year in which it has accrued to the assessee and as well as the non-refundable security deposit received by the assessee is not income. Accordingly, ground number 1 of the appeal of the assessee is allowed.

96. In the result, appeal of the assessee for assessment year 2011-12 is allowed.

Assessment Year 2012-13

97. The assessee has raised the following grounds of appeal in ITA No. 138/Del/2016 for the Assessment Year 2012-13:-

"1. That the CIT (A) erred on facts and in law in upholding the action of assessing officer in making an addition of Rs. 16,10,000/- on account

of security deposits received from members during the relevant assessment year.

1.1 That the CIT(A) erred on facts and in law in not appreciating that the amount received on account of refundable security deposit was amount owed to the members and the same could not, therefore, be regarded as taxable income of the appellant."

98. Identical issue has been dealt with by us in the appeal of the assessee for assessment year 2005 – 06 wherein we have held that membership fees received in advance by the assessee is chargeable to tax on the accrual basis to which it pertains to and the non-refundable security deposit received by the assessee is a capital receipt not chargeable to tax as income in the hands of the assessee. This is decided as per ground number 2 and 3 of the appeal of the assessee for that year. Both the parties confirmed that there is no change in the facts and circumstances of the case. Therefore, for the similar reasons we also hold that membership fees received in advance by the assessee is not an income in this year but is chargeable to tax in the year in which it has accrued to the assessee and as well as the non-refundable security deposit received by the assessee is not income. Accordingly, ground number 1 of the appeal of the assessee is allowed.

99. In the result, appeal of the assessee for assessment year 2012-13 is allowed. Order pronounced in the open court on 26/08/2019.

-Sd/-	-Sd/-
(BEENA A PILLAI)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 26 /08/2019
A K Keot
Copy forwarded to
1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi