IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : C : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI N.K. CHOUDHRY, JUDICIAL MEMBER

ITA No.396/Del/2021
Assessment Year: 2016-17

Gurbakshish Singh Batra, E-1511, Wazir Nagr, Kotla Mubarakpur, New Delhi.	Vs	Pr.CIT-12, New Delhi.

PAN: ADSPB2480J

(Appellant)	(Respondent)

Assessee by	:	Shri R.S. Singhvi, CA
Revenue by	:	Shri Shashi Bhushan Sukla, CIT, DR
Date of Hearing	:	15.02.2022
Date of Pronouncement	:	31.03.2022

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 22nd March, 2021 of the PCIT, Delhi-12, passed u/s 263 of the IT Act for the assessment year 2016-17.

2. Facts of the case, in brief, are that the assessee is an individual and filed his return of income on 6th October, 2016 declaring the total income at Rs.44,86,160/-.

The return was processed u/s 143(1) of the IT Act. Subsequently, the case of the assessee was selected for 'limited scrutiny' based on the following reasons:-

(i) Whether Sales turnover/receipts has been correctly offered to tax.

(ii) Whether capital gains/loss on sale of property has been correctly shown in the return of income.

3. The AO, thereafter, issued notice u/s 143(2) of the Act on 03.07.2017. Subsequently, notices u/s 142(1) on 11th April, 2918 and 15th May, 2018 were also issued and served on the assessee. In response to the statutory notices issued by the AO, the ld. AR of the assessee appeared from time to time. After considering the various submissions made by the assessee, the AO passed the order u/s 143(3) on 28.11.2018 determining the total income of the assessee at Rs.45,50,550/- by making an addition of Rs.64,386/- on account of Interest u/s 244A of the Act.

4. Subsequently, the ld. PCIT perused the assessment record and found that the assessee has claimed capital loss of Rs.5,76,814/- on one of the properties sold in the computation of income. Further, The market value of such property was Rs. 68,50,000 - whereas the property was sold at Rs. 24,00,000/-which attracts provisions of Section 50C of the Act. The Assessing Officer has not made any disallowance u/s 50C of the Act. She further noted that the assessee got possession of land on 26.11.2015, the lease deed was registered on 21.01.2016 and sold the same on 16.02.2016. The period of holding was less than 36 months and, therefore,

the Capital Gain shall be treated as Short Term Capital Gain. However, in computation, the assessee has taken it as long term capital Asset. The above facts according to her clearly show that the AO has not made proper inquiry and verification. She, therefore, was of the opinion that the assessment order passed by the Assessing Officer in respect of A.Y. 2016-17 is erroneous in so far as it is prejudicial to the interests of revenue as the AO has passed the assessment order without making inquires or verification which should have been made during the assessment proceedings. Therefore, she initiated proceedings u/s 263 of the Income Tax Act and issued a notice u/s 263 of the IT Act asking the assessee to explain as to why the assessment should not be reframed u/s 263 of the IT Act. Rejecting the various explanations given by the assessee, the ld. PCIT passed her revisional order u/s 263 of the Act by making the following observation:-

> "From the discussion made above, it is clear that the AO has not done any enquiry and verification which he should have done as per the details given above. I therefore, hold that the assessment order passed u/s 143(3) of the Income Tax Act, 1961 dated 28/11/2018 for A.Y. 2016-17 is erroneous in as much as it is prejudicial to the interest of revenue. The Assessment is cancelled with the direction that the assessment be made afresh de novo after conducting appropriate enquiries keeping in view of the facts mentioned above on the issues on which the case was selected for limited scrutiny. The A.O will give reasonable opportunity to the Assessee of being heard before completion of assessment."

5. Aggrieved with such order of the PCIT, the assessee is in appeal before the Tribunal by raising the following grounds:-

> " 1.1 That on the facts and circumstances of the case, the Pr. Commissioner of Income Tax, New Delhi was not justified in invoking provisions of section 263 of the Income Tax Act, 1961 even though the assessment order passed u/s. 143(3) is neither erroneous nor prejudicial to the interest of the revenue.

1.2 That the Assessing Officer having passed the Assessment order u/s 143(3) after due verification and enquiry of facts of the case, the same cannot be considered as erroneous or prejudicial to the interest of the revenue.

1.3 That in any case, the Pr. CIT, New Delhi having failed to conduct any independent enquiry or expressing any conclusive error as regarding order being erroneous and prejudicial in the interest of revenue, there is no justification for setting aside the assessment order passed u/s 143(3) of the Act.

1.4 That assumption of jurisdiction u/s 263 is merely based on reappraisal of same facts and on surmises and conjectures.

2.1 That on the facts and circumstances of the case, the Pr. CIT, New Delhi was not justified in treating the long term capital asset as short term capital asset in total disregard to the facts of the case and settled legal principles.

2.2 That there being no dispute regarding the date of allotment of leasehold rights in the year Financial Year 2004-05, the Pr. CIT, New Delhi was not justified in treating the long term capital asset as short term capital asset and thereby making consequential disallowance of the benefit of indexation.

2.3 That the leasehold right in the land having been acquired by the Appellant upon the date of allotment in terms of section 2(47), the period of holding of such right should be considered from the date of allotment.

2.4 That the Appellant had paid the entire cost in Financial Year 2004-05 and the rights having been successfully allotted in Appellant's name, there was creation of a capital asset in form of leasehold right in terms of section 2(14) of the Act.

2.5 That the decision of Hon'ble Delhi High Court in the case of Gulshan Malik vs. CIT (2014) 223 Taxmann 243 is not relevant and has been applied on illegal and arbitrary basis.

3.1 That the provisions of section 50C of the Act is applicable only in case of sale or transfer of immovable property being land or building and the same is not applicable on transfer of leasehold rights.

3.2 In any case, this being a case of bonafide sale made in accordance with prevailing market rate, the Pr. CIT, New Delhi was not justified in disputing the sale consideration u/s 50C without appreciating the factual position or making any reference to the Valuation Officer in terms of provisions of section 55A of the Income Tax Act, 1961.

3.3 That observation with regard to applicability of section 50C is merely on the basis of surmises & conjectures and not sustainable under law.
4 That order u/s 263 is not sustainable on facts and under the law as the same is not erroneous or prejudicial to the interest of revenue."

6. The ld. Counsel for the assessee strongly challenged the order of the PCIT in invoking her revisional power u/s 263 of the IT Act. He submitted that the only issue in dispute as per the order of ld. PCIT is whether it is a case of long term or short term capital gain and value of sale consideration in terms of 50C of the Income Tax Act, 1961. In the light of above position, he made a reference to the following details as mentioned in his synopsis:

- On 30/03/1996, the Appellant applied for allotment of industrial plot vide Application no. 10019.
- On 02/01/2004, the Appellant was allotted plot admeasuring 250sq. m. by President of India through agency of DSICDC
- On the basis of allotment, full consideration was paid as under:

Particulars	Amount
First Payment made on 30/03/1996	1,20,000
Second Payment made on 26/05/1998	94,500
First Payment made on 22/ 07/2004	8,35,500
Total Cost of Acquisition of Leasehold Rights	10,50,000

- On 26/11/2015, the physical possession of the plot was allotted.
- On 04/02/2016, a Perpetual Lease Deed was executed in conformity with allotment of plot for consideration of Rs. 10,50,000/-

- On 16/02/2016, the Appellant sold the leasehold rights to Sh. Ram Chet Singal vide Agreement to Sell for a consideration of Rs. 24,00,000/-

7. The ld. Counsel for the assessee submitted that it is not a case of lack of enquiry/verification by the Assessing officer during the course of Assessment proceedings. The AO, during the course of assessment proceedings, has thoroughly verified the details furnished by the assessee. Vide questionnaire dated 11th April, 2018, the AO had asked the assessee to furnish computation of capital gains on sale of property along with supporting documents for deductions claimed in order to arrive at the figure of capital gains copy of which is placed in the paper book. Referring to pages 24 to 25 of the paper book, he submitted that the AO, vide questionnaire dated 08.11.2018 had asked the assessee to explain the reason for sale consideration of property in ITR which is less than the value as per stamp duty. He submitted that the assessee, in response to the said notice has filed various replies dated 21st May, 2018, 4th July, 2018, 27th August, 2018, 3rd September, 2018 and 09.11.2018 wherein the sale consideration of leasehold rights was duly explained by the assessee and the AO, after being fully satisfied by the explanation offered by the assessee, accepted the sale consideration of Rs.24 lakhs. The ld. Counsel for the assessee drew the attention of the Bench to the various replies given by the assessee on various dates copies of which are placed in the paper book. He submitted that a perusal of the questionnaire issued by the AO and replies filed by assessee during the course of Assessment proceedings would

clearly show that it is not a case where the Assessing officer has not conducted any enquiry/verification. He submitted that once the AO was satisfied by the explanation given by the assessee with regard to sale price, there was no case for substituting Stamp duty value or any reference to the Department Valuation Officer in terms of provisions of section 50C of the Act.

8. The ld. Counsel for the assessee drew the attention of the bench to the provisions of section 50C regarding reference to valuation cell and submitted that the same arises only when AO is not satisfied about the consideration declared and supported from legal documents. He submitted that the provisions of sub-clause 2 of section 50C is for the benefit of the Assessee to safeguard its interest and not to apply stamp duty value on a mechanical basis.

9. Referring to the decision of the coordinate Bench of the Tribunal in the case of M/s Charm Investment Private Limited vs Pr. CIT (ITA No. 3505/DEI/2019) (Dt. 1/05/2020) he submitted that the Tribunal in the said decision has held that 'it is not mandatory for the Assessing Officer to make a reference to the DVO in all cases where the stamp duty valuation exceeds the fair market value. Referring to various other decisions filed in the case law compilation and the synopsis, the ld. Counsel submitted that the PCIT does not have unfettered powers to initiate revisionary proceedings u/s 263, in case the Assessing officer has already conducted proper and reasonable enquiry on the issue involved. Moreover, the Assessing Officer after deeply examining the issue involved has reached to the

conclusion that there is no requirement to substitute the stamp duty value for computing capital gain on sale of asset. Therefore, the action of the Pr. CIT in treating the Assessment Order as erroneous or prejudicial to the interest of the Revenue for taking a plausible view is arbitrary and merely on the basis of presumption and surmises. For the above proposition, the ld. Counsel for the referred to the following decisions:-

i. PCIT vs. Shreeji Prints (P.) Ltd. [2021] 130 taxmann.com 294 (SC);
ii. CIT vs. Leisure Wear Exports Ltd. [2012] 341 ITR 166 (Delhi HC) [14-09-2010];
iii. Commissioner of Income-tax vs. Ansal Housing & Construction Ltd. [2014] 45 taxmann.com 223 (Delhi HC);
iv. Commissioner of Income-tax vs. Honda Siel Power Products Ltd. [2010] 194 Taxman 175 (Delhi HC);
v. CIT vs. DLF Ltd. [2013] 31 taxmann.com 158 (Delhi HC);
vi. CIT vs. Sunbeam Auto Ltd. [2011] 332 ITR167 (Delhi HC);
vii. CIT vs. International Travel House Ltd. [2012] 344 ITR 554 (Delhi HC);
viii. M/s. Virtusa Consulting Services Pvt. Ltd vs. DCIT (March 30 , 2021) (T.C.A. No. 997 of 2018) (Delhi HC);
ix. CIT vs. Smt. Padmavathi [2020] 120 taxmann.com 187 (Madras HC) [06-10- 2020]
x. M/s SUTURES INDIA PVT. LTD vs. PCIT (ITA No. 115 OF 2010) (Dt. 02/12/2020) (Karnataka HC);

xi. CIT vs. VodafoneEssar South Ltd. (ITA No.119/2012) (Delhi High Court);

xii. IT vs. Gabriel India Ltd [1993] 203 ITR 108 (Bombay HC);

xiii. CIT vs. Anil Kumar Sharma [2011] 335 ITR 83 (Delhi HC);

xiv. M/s Arun Kumar Garg HUF vs. Pr. CIT (ITA No. 3391/Del/2018) (Delhi Trib.) (Dt. 08/01/2019);

xv. Narayan Tatu Rane vs. ITO [2016] 70 taxmann.com 227 (Mumbai) [06-05-2016];

xvi. JRD Tata Trust vs. DCIT [2021] 85 ITR (T) 431 (Mumbai-Trib.) [28.12.2020];

xvii. Bhandari Hospital and Research Center vs. PCIT [2020] 116 taxmann.com 258 (Indore - Trib.);

xviii. Hill Queen Investment (P.) Ltd. vs. PCIT [2021] 127 taxmann.com 682 (Kolkata - Trib.)

xix. Maharashtra Engineering vs. PCIT (ITA No. 859/PUN/2018) (ITAT Pune)

10. The ld. Counsel for the assessee submitted that the issue of sale consideration being less than stamp duty value and period of holding of leasehold rights have already been considered and examined by the Assessing Officer in detail and there being no lapse on the part of the A.O., the Pr. CIT has no power to assume jurisdiction u/s 263 of the Income Tax Act, 1961.

11. The ld. Counsel for the assessee, in his next plank of argument, submitted that the Pr. CIT has not conducted any enquiry/verification herself before initiating revisionary proceedings u/s 263 of the Income Tax Act, 1961. He submitted that before invoking the provisions of section 263 of the IT Act, ld. Pr. CIT should have conducted some minimum enquires on the issues involved to assume jurisdiction u/s 263 of the Income Tax Act, 1961. However, in the present case, the Pr. CIT has blatantly ignored the submissions made by the assessee and has acted in a mechanical manner without conducting any enquiry/verification even to verify the reason for difference between the actual sale consideration and stamp duty value of the plot. He submitted that the Pr. CIT has not even read the terms and conditions specified in the Lease Deed specifying the procedure for sale/ subletting of plot allotted to the assessee.

12. The ld. Counsel for the assessee submitted that in case the Revisionary Authority opined that further enquiry was required, such inquiry should have been conducted by the revisionary authority himself to record a finding that assessment order passed by Assessing Officer was erroneous and prejudicial to the interests of the Revenue. However, this has not been done in the instant case. Therefore, on this count also the order passed u/s 263 by the PCIT being not in accordance with the law has to be quashed. For the above proposition, the ld. Counsel for the assessee referred to the following decisions:-

(i) DIT vs. Jyoti Foundation [2013] 38 taxmann.com 180 (Delhi HC);

(ii) Jitindar Singh Chadha vs. PCIT [2019] 102 taxmann.com 93 (Delhi - Trib.);

&

(iii) Delhi Airport Metro Express (P.) Ltd. vs. PCIT [2017] 88 taxmann.com 767 (Delhi - Trib.)

13. The ld. Counsel for the assessee submitted that even on merits also, the Pr. CIT without appreciating the fact that transaction of sale of leasehold rights is an impermissible sale in breach of the conditions specified in the Lease Deed; has blatantly invoked the provisions of section 50C of the Act. He submitted that as per clause 5(a) of the Lease Deed, the assessee cannot sell/sublet the land to any other person without the permission of the Lessor and further, it is stated that no such permission will be given by the Lessor before the period of ten years. Moreover, in point 5(b) of the Lease Deed it has been agreed upon by the assessee that in case of sale of such plot, the Lessor shall be entitled to claim and recover 50% of the unearthed increase in the value of the plot and as such the assessee is liable to pay 50% of the difference between purchase and sale price to the Lessor. He drew the attention of the Bench to the relevant portion of the Lease Deed which reads as under:

> "5(a) The Lease shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the industrial plot except with the previous consent in writing of the Lessor which he shall be entitled to refuse in his absolute discretion.

Provided that such consent shall not be given for a period of ten years from the commencement of this lease unless, in the opinion of the lessor exceptional circumstances exist for the grant of such consent.

5(b) Notwithstanding anything contained in sub-clause (a) above, the Lessee may within the previous consent in writing of Lt. Governor of Delhi (hereinafter called the Lt. governor) mortgage or charge the industrial plot to such person as may be approved by the Lt. Governor in his absolute discretion.

Provided that, in the event of the sale or fore-closure of the mortgaged or charged property, the Lessor shall be entitled to claim and recover the fifty percent of the unearthed increase in the value of the industrial plot as aforesaid, and the amount of the Lessor's share of the said unearthed increase, shall be a first charge having priority over the said mortgage or charge. The decision of the Lessor in respect of the market value of the said industrial plot shall be final and binding on all the parties concerned.

14. He submitted that a perusal of the above Lease terms, it is clear that the assessee is not entitled to sell/sublet the plot without prior permission of the Lessor and moreover, if in case the plot is sold by the Lessee then the assessee has to pay 50% of the profit earned on sale of such plot. However, the assessee in the present case made an impermissible sale of leasehold rights to Sh. Ram Chet Singal for a consideration of Rs. 24,00,000/- vide Agreement to Sell dated 16/02/2016. The transfer of rights being in total disregard to the terms and conditions specified in the Lease Deed, the Lessor has issued a Show-cause Notice to the assessee regarding impermissible sale of leasehold rights. To substantiate the same, the ld.

Counsel drew the attention of the Bench to the show cause notice dated 26.07.2018 issued to the assessee.

15. The ld. Counsel for the assessee submitted the leasehold rights acquired by the assessee are available with certain restrictions and the assessee is not free to exercise his complete authority over the land. However, the Pr. CIT without appreciating the strict restrictions imposed upon on the assessee has erred in imposing the provisions of section 50C by substituting the stamp duty value in place of sale consideration received by the assessee. He submitted that it is a well-settled legal position that a contract of sale, that is, an agreement to sell does not, by itself, confer any ownership right and thus, transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred. He submitted that an immovable property can be legally and lawfully transferred only by way of a registered deed of conveyance and as such no transfer can be made merely through an Agreement to Sell. However, in the present case, that assessee having acquired only leasehold rights in the plot situated at Bawana and there being stringent conditions specified in the Lease Deed in relation to transfer of such leasehold rights, the transaction of transfer of leasehold rights initiated by the assessee is impermissible and in breach of the terms of the Lease Deed.

16. He submitted that the assessee in the present case has not sold the leasehold rights by way of any sale deed and rights have only been transferred by way of unregistered Agreement to Sell and as such there is no transfer of leasehold rights as per the provisions of section 54 of the Transfer of property Act, 1882 read with section 2(47) of the Income Tax Act, 1961. For the above proposition, the ld. Counsel for the assessee referred to the decision of the Hon'ble Supreme Court in the case of Suraj Lamp & Industries (P) Ltd. Vs. State of Haryana [2011] 14 taxmann.com 103 (SC) and the decision of the Hon'ble Gujarat High Court in the case of Ushaben Jayantilal Sodhan vs. ITO [2018] 93 taxmann.com 453 (Guj).

17. So far as the observation of ld. PCIT that the Assessing Officer should have invoked the provisions of section 50C for computing sale consideration of the land sold by the assessee is concerned, he submitted that the provisions of section 50C will come into play only if the transfer is valid under the provisions of Income Tax Act and the assessee having transferred the leasehold rights in breach of conditions specified in the Lease Deed, there is no case of any chargeability arising out of impermissible transfer of leasehold rights.

18. Without prejudice to the above, he submitted that even if the transfer of leasehold rights by the assessee is held to be a valid transfer then also the Pr. CIT has erred in invoking provisions of section 50C of the Income Tax Act, 1961 without appreciating the intent and scope of this section which is applicable on sale consideration received or accruing as a result of the transfer by an assessee of a

capital asset, being 'land or building or both', whereas in the present case the consideration received is on account of transfer of leasehold rights which is a distinct capital asset.

19. The ld. Counsel for the assessee submitted that the provisions of section 50C are deeming in nature and have been incorporated to substitute the value adopted or assessed or assessable by stamp valuation authority in place of consideration received or accruing as a result of transfer of only land or building and as such these provisions cannot be extended beyond the purpose for which it is enacted. For the above proposition, he relied on the following decisions:-

(i) Decision of Hon'ble Patna ITAT in the case of Sangeeta Ramuka vs. ACIT (ITA No. 03/PAT/2013) (Dt. 06/10/2017);

(ii) Atul G. Puranik vs. ITO [2011] 11 ITR (T) 120 (Mumb. Trib.);

(iii) Noida Cyber Park (P.) Ltd. vs. ITO [2021] 123 taxmann.com 213(Delhi-Trib.);

(iv) Ritz Suppliers (P.) Ltd. vs ITO [2020] 113 taxmann.com 349 (Kolkata - Trib.);

(v) CIT vs Greenfield Hotels & Estates (P.) Ltd. [2017] 77 taxmann.com 308 (Bombay HC)

20. He accordingly submitted that since the deeming provisions of section 50C for assessing the stamp duty value as sale consideration are only applicable in case of transfer of land or building and as this provision cannot be invoked in respect of

transfer of leasehold rights and since this legal position has been duly examined and accepted by the Assessing officer while passing the Assessment order u/s 143(3) of the Act, therefore, there is no case for treating the Assessment order as erroneous or prejudicial to the interest of revenue.

21. The ld. Counsel for the assessee submitted that the action of Pr. CIT in holding that the period of lease-hold rights as short term capital asset is arbitrary and without appreciating the factual position that the assessee was allotted such rights by the President of India through agency of DSICDC and as such period of holding will be counted from the date of allotment of property as entire consideration was duly paid at the time of allotment of lease hold rights.

22. He submitted that a perusal of the date of application, dates of payment, date of allotment, etc., would show that the assessee had fully acquired the leasehold rights in the plot in the financial year 2003-04 on the date when the assessee was allotted the land and the Assessee has also made complete payments for acquiring the plot rights in F.Y. 2004-05. However, the assessee after taking a conservative view has itself computed the indexed cost of acquisition from the F.Y. 2004-05 i.e. the year in which complete payment for acquiring the leasehold rights was made and the assessee having sold such rights after holding them for more than 36 months, the capital asset is a long term asset in terms of provisions of section 2(29A) of the Act. For the above proposition, he referred to the following decisions:-

(i) CIT vs. Frick India Limited 369 ITR 328 (Del);

(ii) PCIT vs. Vembu Vaidyanathan [2019] 108 taxmann.com 339 (SC);

(iii) CIT vs. K. Rama krishnan [2014] 48 taxmann.com 55 (Delhi HC);

(iv) Ms. Madhu Kaul vs. CIT [2014] 43 taxmann.com 417 (Punjab & Haryana HC);

(v) Anita D. Kanjani vs. ACIT [2017] 79 taxmann.com 67 (Mumbai - Trib.);

(vi) L. Vivekananda vs. ACIT [2021] 124 taxmann.com 67 (Bangalore - Trib.); and

(vii) Yogesh Mavjibhai Gala vs. PCIT [2020] 117 taxmann.com 783 (Mumbai - Trib.).

23. He submitted that the Pr. CIT in the order passed u/s 263 of the Act has referred to the decision in the case of Gulshan Malik vs. CIT [2014] 43 taxmann.com 200(Delhi-HC) wherein it has been held that period of holding of 36 months in respect of booking rights of an apartment has to be counted from the date of execution of buyer's agreement. He submitted that the decision relied on by the Pr. CIT is distinguishable on facts as in the case of Gulshan Malik the builder had provisionally allotted the apartment to the buyer on 06.08.2004 and buyer's agreement was entered on 04.11.2004 and the rights were sold by Agreement to Sell on 02.11.2007. However, in the present case, the assessee was allotted a plot of land under a reallocation scheme by the President of India on 02.01.2004 and the leasehold rights have been sold on 16.02.2016. He submitted that the Pr. CIT

without appreciating the intention of the buyers and process of acquisition of plot rights has arbitrarily applied the judgment of Gulshan Malik without even appreciating that complete payment for acquiring these rights was also made till F.Y. 2004-05. He accordingly submitted that assessee has held the leasehold rights for more than 36 months and the same being in the nature of long term capital asset, the Pr. CIT has arbitrarily rejected the contentions of the assessee and totally failed to even prima facie show that the Assessment order passed u/s 143(3) of the Act is erroneous and prejudicial to the interest of the Revenue.

24. The ld. Counsel for the assessee, in his another plank of argument, submitted that the provisions of section 263 of the Income Tax Act, 1961 cannot be invoked if the assessment order is neither erroneous nor prejudicial to the interest of revenue. He submitted that the view adopted by the AO in the instant case in accepting the actual sale consideration received by the assessee for the purposes of computing long term capital gain is a legally permissible view formed by the A.O. after making detailed verification of terms of lease deed, cancellation notice and provisions of section 50C of the Act. Whereas in the present case, the Pr. CIT without even properly appreciating the inflexible terms of lease deed & claim of the Lessor being 50% of the unearthed profit if the Lessee sells the said leasehold rights prior to limitation has held that the Assessment order is prejudicial to the interest of the revenue.

25. The ld. Counsel for the assessee submitted that in case the Pr. CIT intends to treat the impermissible sale as a legal act in the context of the Income Tax Act, 1961, then the assessee will have to convert the said property into a freehold property after payment of due charges and obtaining prior approval. He submitted that the Pr. CIT in the notice issued u/s 263 of the Act has show-caused the assessee as to why the Stamp Duty value of Rs. 68,50,000/- should not be taken for the purposes of computing Capital gains. He submitted that for the purposes of converting the said leasehold property into freehold, the assessee will have to incur various expenses in the form of stamp duty, registration charges, etc. and this procedure could take months to complete and then only the assesee would have been able to sell this land. Further, on sale of such land, the assessee is also liable to pay 50% of the unearthed profit to the Lessor and as such the working of capital gain on such transfer cannot be considered as prejudicial to the interest of the revenue. He accordingly submitted that the assessment order passed by the Assessing Officer was neither erroneous nor prejudicial to the interest of revenue. Moreover, it was passed after appreciating the circumstances faced by the assessee while conducting such sale transaction. However, the Pr. CIT has applied the provisions of section 50C and period of holding of Capital Asset u/s 2(29A) of the Act in a mechanical way and as such the same deserve to be quashed. Further, the order passed by the PCIT is in total disregard to principle laid down by the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT [2000] 243 ITR 83 (SC) and as such the same is not sustainable.

26. The ld. Counsel for the assessee further submitted that the observations made by the Pr. CIT in the Order passed u/s 263 of the Act shows complete non-application of the mind. He submitted that the Pr. CIT without appreciating the facts of the case, terms & conditions specified in Lease Agreement and without even appreciating the efforts of the Assessing Officer in making detailed enquiry with respect to the issues involved has arbitrarily formed an opinion that the stamp duty value has to be substituted in place of sale consideration for computing capital gain on sale of asset. He submitted that the decision of the Hon'ble Delhi High Court in the case of CIT vs. Leisure Wear Exports Ltd. [2012] 341 ITR 166 (Delhi HC) [14-09-2010] as relied on by the PCIT is, in fact, in favour of the assessee and not in favour of the Revenue. He submitted that it has been held that if two views are possible on the same issue and the A.O. has taken one view with which the Pr. CIT does not agree, the Assessment order cannot be prejudicial to the interest of the Revenue. He accordingly submitted that the revisional proceedings initiated by the PCIT not being in accordance with law should be quashed.

27. The ld. DR, on the other hand, heavily relied on the order of the PCIT. Relying on various decisions, the ld. DR submitted that the PCIT was fully justified in invoking the jurisdiction u/s 263 of the IT Act since the AO, in the instant case, has not made any enquiry. Therefore, the order has become both erroneous as well as prejudicial to the interests of the Revenue and, therefore, the

grounds raised by the assessee should be dismissed. For the above proposition, he relied on the following decisions:-

i) Daniel Merchants Pvt. Ltd.;

ii) Malabar Industrial Company Ltd. Vs. CIT, 243 ITR 83;

iii) Surya Financial Services

iv) Surya Jyoti Software

28. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the PCIT and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find, the assessment in the instant case was completed u/s 143(3) on 28.11.2018 determining the total income of the assessee at Rs.45,50,550/- where the AO had made an addition of Rs.64,386/- on account of interest u/s 244A. We find, the case of the assessee was selected for limited scrutiny based on the following reasons:-

(i) Whether Sales turnover/receipts has been correctly offered to tax.

(ii) Whether capital gains/loss on sale of property has been correctly shown in the return of income.

29. We find, the ld.PCIT, after examining the records, came to the conclusion that the order passed by the AO is erroneous and prejudicial to the interests of the Revenue since the AO has not made enquiry and verification which he should have done in respect of transfer of assets. According to the PCIT, the assessee has

disclosed capital gain from sale of industrial plot at Bawana Industrial area as long-term capital gain by taking the date of allotment for counting the period of holding for the purpose of short-term capital gain or long-term capital gain. Further, the assessee has taken the actual sale consideration as sale value, but, not the value assessable by the stamp valuation office for the purpose of stamp valuation and the actual consideration received by the assessee was less than the value assessable by the stamp valuation officer.

30. In our opinion, the assumption of jurisdiction by the PCIT is not justified for more than one reason. From the various details furnished by the assessee, we find, the AO, during the course of assessment proceedings, has explicitly raised query regarding the issue of capital gain on sale of plot and consideration being less than the stamp duty value. Vide questionnaire dated 11th April, 2018, the AO has asked the assessee to give the following:-

> " 2. Computation of Capital gains on sale of property along with supporting documents for deductions claimed in order to arrive at the figure of capital gains."

31. Similarly, vide questionnaire dated 08.11.2018, the AO has asked the assessee the following question:-

> " 8. Please explain the reason for the sale consideration of property in ITR is less than the value as per Stamp Duty."

32. From the paper book filed on behalf of the assessee, we find, the assessee, vide reply dated 21.05.2018, 4th July, 2018, 27th August,2008, 3rd September, 2018

and 09.11.2018 had duly explained the sale consideration of the leasehold rights and the AO, after considering the various replies given by the assessee, has accepted the reply filed by the assessee. Therefore, we find merit in the argument of the ld. Counsel for the assessee that it is not a case where the AO has not conducted any enquiry/verification. The AO, after being satisfied by the explanation given by the assessee with regard to the sale that there was no case of substituting the stamp duty value or any reference to the DVO in terms of provisions of section 50C has accepted the reply.

33. So far as the reference to valuation cell as per the provisions of section 50C is concerned, the same shall arise only when the AO is not satisfied about the consideration declared and supported from legal documents. We find, the coordinate Bench of the Tribunal in the case of M/s Charm Investment Private Limited (supra) has held that it is not mandatory for the AO to make a reference to the DVO in all cases where the stamp duty valuation exceeds the fair market value. The relevant portion of the decision read as under:-

> " 5.0 We have heard the rival submissions and have also perused the material on record. It is seen that in response to the query raised by the Assessing Officer, the assessee had furnished copies of sale deed and purchase deed and also the bill pertaining to renovation work carried out in the residential flat sold by the assessee. It is undisputed fact that the assessee has shown a lower amount as sale consideration than as mentioned in the sale deed for the purposes of stamp duty. The Ld. Pr. CIT was of the opinion that the Assessing Officer should have referred the matter to the DVO as there was a variation in the two valuations and that the failure of the Assessing Officer to make a reference to the DVO was an error as a result of which the assessment order became erroneous and prejudicial to the interest of the Revenue. However, the provisions of Section 50C(ii) lay

> down that where the assessee claims before any Assessing Officer that the valuation adopted and assessed or assessable by the Stamp Valuation Authority under sub-section (i) exceeds the fair market value of the property as on the transfer, the Assessing Officer 'may' refer the valuation of the capital asset to Valuation Officer. Thus, going by the language used, it is not mandatory in the Assessing Officer to make a reference to the DVO in all cases where the stamp duty valuation exceeds the fair market value. Therefore, it is our considered opinion that the order of the Assessing Officer cannot be held to be erroneous in so far as being prejudicial to the interest of the Revenue on this count. For, this proposition, we draw support from the order of the Co-ordinate Bench of ITAT Delhi Bench in the case of Jitindar S. Chadha Vs. Pr. CIT reported in 120191 200 TTT (Del) 98 wherein it had been held that the powers of the Assessing Officer u/s 55A of the Act were discretionary and that the Assessing Officer can take plausible view of the matter. Thus, in the present case also, it is our considered opinion that by not referring the issue of valuation to the DVO, the Assessing Officer had taken one of the possible views and this discretion of the Assessing Officer cannot be termed as being erroneous as has been held by the Ld. Pr. CIT."

34. Even otherwise also we find merit in the submission of the ld. Counsel for the assessee that the PCIT does not have unfettered powers to initiate revisionary proceedings u/s 263 in a case where the AO has conducted proper and reasonable enquiry on the issue involved. Since the AO, in the instant case, after deeply examining the issue involved has reached to the conclusion that there is no requirement to substitute the stamp duty value for computing capital gain on sale of asset, the action of the PCIT in treating the assessment order as erroneous or prejudicial for taking a plausible view is arbitrary and merely on the basis of presumption and surmises.

35. We find, the Hon'ble Supreme Court in the case of PCIT vs. Shreeji Prints (P.) Ltd., 130 taxmann.com 294, has upheld the decision of the Hon'ble High Court in quashing the 263 proceedings where the Hon'ble High Court has held that

since Assessing Officer has made inquires in detail and accepted genuineness of loans received by assessee, such view of Assessing Officer was a plausible view and same cannot to be considered erroneous or prejudicial to interest of revenue. Accordingly, the SLP filed by the Revenue was dismissed.

36. We find, the Hon'ble Delhi High Court in the case of Leisure Wear Exports Ltd. (supra) has held that where the AO has passed the order after taking into account assessee's submissions and documents furnished by him and no material whatsoever has been brought on record by CIT which showed that there was any discrepancy or falsity in evidences furnished by assessee, the order of Assessing Officer cannot be set aside for making deep inquiry only on presumption and assumption that something new may come out.

37. We find, the Hon'ble Delhi High Court in the case of CIT vs. Ansal Housing & Construction Ltd. (supra) has held that where the issue is a debatable one for which more than one plausible view is reasonably possible and if Assessing Officer has taken one plausible view, it cannot be said that assessment is erroneous or prejudicial to interest of revenue.

38. We find, the Hon'ble Delhi High Court in the case of CIT vs. Sunbeam Auto Ltd. (supra) has held that when the facts clearly showed that Assessing Officer had undertaken exercise of examining as to whether expenditure incurred by assessee in replacement of dyes and tools was to be treated as revenue expenditure or not

and on being satisfied with assessee's explanation, he accepted same, it could not be said to be a case of lack of inquiry. Similar view has been held in various other decisions relied on by the assessee in the case law compilation.

39. We further find the PCIT, in the instant case has not conducted the basic minimum enquiry on the issues involved to assume jurisdiction u/s 263 of the IT Act. She has blatantly ignored the submissions filed by the assessee and has acted in a mechanical manner without conducting any enquiry/verification even to verify the reason for difference between the actual sale consideration and stamp duty value of the plot, the terms and conditions specified in the Lease Deed specifying the procedure for sale/ subletting of plot allotted to the assessee. We find, the Pr. CIT, in the instant case, without appreciating the fact that transaction of sale of leasehold rights is an impermissible sale in breach of the conditions specified in the Lease Deed, has blatantly invoked the provisions of section 50C of the IT Act which is not correct. A perusal of clause 5(a) of the Lease Deed shows that the assessee cannot sell/sublet the land to any other person without the permission of the Lessor. Further, no such permission will be given by the Lessor before the period of ten years. Similarly, in point 5(b) of the Lease Deed it has been agreed upon by the assessee that in case of sale of such plot, the Lessor shall be entitled to claim and recover 50% of the unearthed increase in the value of the plot and as such the assessee is liable to pay 50% of the difference between purchase and sale price to the Lessor. Therefore, we find merit in the argument of the ld. Counsel that

leasehold rights acquired by the assessee are available with certain restrictions and the assessee is not free to exercise his complete authority over the land. Therefore, the Pr. CIT, without considering the strict restrictions imposed upon on the assessee has erred in imposing the provisions of section 50C by substituting the stamp duty value in place of sale consideration received by the assessee. The same, in our opinion, being not in accordance with the facts of the case, the jurisdiction u/s 263 could not have been invoked. We further find, the assessee in the instant case has not sold the leasehold rights by way of any sale deed and rights have only been transferred by way of unregistered Agreement to Sell and as such there is no transfer of leasehold rights as per the provisions of section 54 of the Transfer of Property Act, 1882 read with 2(47) of the Income Tax Act, 1961. Since the provisions of section 50C will come into play only if the transfer is valid under the provisions of Income Tax Act and since the assessee has transferred the leasehold rights in breach of conditions specified in the Lease Deed, there is no case of any chargeability arising out of impermissible transfer of leasehold rights. Further, even if in case the transfer of leasehold rights by the assessee is held to be a valid transfer, the Pr. CIT has erred in invoking provisions of section 50C of the Act without appreciating the intent and scope of this section which is applicable on sale consideration received or accruing as a result of the transfer by an assessee of a capital asset, being 'land or building or both', whereas in the present case consideration received is on account of transfer of leasehold rights which is a distinct capital asset. We, therefore, find merit in the argument of the ld. Counsel

that the ld.PCIT should not have invoked the provisions of section 50C for computing the sale consideration of the land sold by the assessee since it is a debatable issue and, therefore, on such debatable issue jurisdiction u/s 263 cannot be assumed when the AO has taken a plausible view.

40. Further, from the various details furnished by the assesseee, we find the assessee applied for purchase of plot on 30th March, 1996 and an amount of Rs.1,20,000/- was paid on 30th March, 1996. Further payment of Rs.94,500/- was made on 26th May, 1998 and the land was allotted to the assessee on 2nd January, 2004 but physical possession of land was given on 22.11.2015. The assessee acquired the leasehold rights by the lease deed on 4th February, 2016 and the sale of leasehold rights or agreement to sell was entered on 16th February, 2016. Therefore, these events, in our opinion, clearly show that the assessee has fully acquired the leasehold rights in the plot in the F.Y. 2003-04 and the assessee has also made complete payments for acquiring the plot rights in FY 2004-05. The assessee, after taking a conservative view computed the indexed cost of acquisition for F.Y. 2004-05, i.e., the year in which complete payments for acquiring the leasehold rights was made and the assessee having sold such rights after holding for more than 36 months, computed the long-term capital gains in terms of the provisions of section 2(29A) of the Act. We find, the Hon'ble Delhi High Court in the case of CIT vs. Frick India Limited 369 ITR 328 has held that the expression

'held by the Assessee' means the date from which the assessee acquired right to hold the asset. The relevant observation of the Hon'ble High Court read as under:-

> " 10. We would like to elucidate and explain the expression, "held by the assessee" in some detail. General words should normally receive plain and ordinary construction but this principle is subject to the context in which the words are used as the words reflect the intention of the Legislature. The words have to be construed and interpreted to effectuate the object and purpose of the provision, when they are capable of multiple meanings or are ambiguous. Isolated reading of words can on occasions negate the very purpose. Lord Diplock had referred to the term, "business" as an 'etymological chameleon', which suits its meaning to the context in which it is found. The background, therefore, has to be given due regard and not to be ignored, to avoid absurdities. This principle is applicable when we interpret the word, "held" in Section 2(42A) of the Act, for the said word is capable of divergent and different connotations and understanding.
>
> 11. The word, 'held' as used in Section 2(42A) of the Act is with reference to a capital asset and the term, 'capital asset' is not confined and restricted to ownership of a property or an asset. Capital assets can consist of rights other than ownership right in an asset, like leasehold rights, allotment rights, etc. The sequitur, therefore, is that the word 'held' or 'hold' is not synonymous with right over the asset as an owner and has to be given a broader and wider meaning. In Black's Law Dictionary, Sixth Edition, the word 'hold' has been given a variety of meanings under nine different headings. Four of them, i.e, 1, 4, 8 and 9 read as under:
>
> > '1. To possess in virtue of a lawful title; as in the expression, common in grants, "to have and to hold," or in that applied to notes, "the owner and holder."
> >
> > 4. To maintain or sustain; to be under the necessity or duty of sustaining or proving; as when it is said that a party "holds the affirmative" or negative of an issue in a cause.
> >
> > 8. To possess; to occupy; to be in possession and administration of; as to hold office.
> >
> > 9. To keep; to retain; to maintain possession of or authority over.'
>
> As per clause 8, the word 'hold' means to possesss or occupy, to be in possession and would also include to keep, retain and maintain possession or authority over an asset.

12. The word 'held' thus can be interpreted to embrace the idea of actual possession of the assessee. In Budhan Singh v. Babi Bux AIR 1970 SC 1880 (at page 1884) the word 'held' was interpreted to mean "lawfully held, to possess by legal title". The term 'legal title' here not only includes ownership, but also title or right of a tenant, which will mean actual possession of the land and a right to hold the same and claim possession thereof as a tenant (we are not examining rights of a rank trespasser in the present decision and we express no opinion in that regard).

13. The Tribunal in our opinion has rightly relied upon the decision of the Punjab and Haryana High Court in CIT v. Ved Prakash & Sons (HUF) [1994] 207 ITR 148/73 Taxman 70 in which it has been held as under:-

> 'As is clear from a bare reading of Section 2(42A) of the Act, the word "owner" has designedly not been used by the Legislature. The word "hold", as per dictionary meaning, means to possess, be the owner, holder or tenant of (property, stock, land.). Thus, a person can be said to be holding the property as an owner, as a lessee, as a mortgagee or on account of part performance of an agreement, etc. Conversely, all such other persons who may be termed as lessees, mortgagees with possession or persons in possession as part performance of the contract would not in strict parlance come within the purview of "owner". As per the Shorter Oxford Dictionary. Edition 1985, "owner" means one who owns or holds something; one who has the right to claim title to a thing' (Emphasis supplied)

14. The said decision was followed by the Punjab and Haryana High Court subsequently in Ms. Madhu Kaul v. CIT [2014] 363 ITR 54/225 Taxman 86/43 taxmann.com 417. The Delhi High Court in CIT v. K. Ramakrishnan [2014] 225 Taxman 123/48 taxmann.com 55 has held that for the purpose of calculating period of holding we have to look and take into account the date since the assessee got 'beneficial interest' in the property. The Allahabad High Court in CIT v. Rama Rani Kalia [2013] 358 ITR 499/[2014] 221 Taxman 72/38 taxmann.com 176 has drawn distinction between holding of an asset and the nature of title over the property and it has been observed that period of holding will determine whether the consideration should be taxed as a short-term capital gains or long-term capital gains. Thus, conversion of leasehold right into freehold by way of improving the title over the property would not affect the taxability of the gain from such property, which is relatable to the period over which the property is held. Thus the asset, i.e. the tenancy rights were held for nearly 14 years and consideration received on surrender has been rightly treated as a long term capital gain.

> 15. In view of the aforesaid discussion, the question of law is answered in favour of the assessee and against the appellant-Revenue. Costs will be payable by the appellant as per the Delhi High Court Rules."

41. Similar view has been taken in various other decisions relied on by the ld. Counsel for the assessee in the paper book.

42. So far as the decision relied by the Lt. Pr. CIT in the case of Gulshan Malik vs. CIT [2014] 43 taxmann.com 200(Delhi) is concerned, we find the same is distinguishable and not applicable to the facts of the present case. In that case, it has been held that period of holding of 36 months in respect of booking rights of an apartment has to be counted from the date of execution of buyer's agreement. In that case, the builder had provisionally allotted the apartment to the buyer on 06.08.2004 and buyer's agreement was entered on 04.11.2004 and the rights were sold by Agreement to Sell on 02.11.2007. However, in the present case, the assessee was allotted a plot of land under a reallocation scheme by the President of India on 02.01.2004 and the leasehold rights have been sold on 16.02.2016. The assessee has made complete payment for acquiring these rights before the end of F.Y. 2004-05. Therefore, the said decision, in our opinion is distinguishable and not applicable to the facts of the present case. In view of the above discussion, we are of the considered opinion that the order passed by the AO may be prejudicial to the interest of the Revenue, but cannot be held to be erroneous.

43. It is the settled proposition of law that for invoking the provisions of section 263 of the IT Act, the twin conditions, namely, (a) the order must be erroneous and (b) it must be prejudicial to the interest of the Revenue must be satisfied as held by the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT, reported in 243 ITR 83. Since we have already held in the preceding paragraph that the AO has conducted proper enquiry and has taken a plausible view, therefore, the order cannot be held to be erroneous, therefore, in absence of fulfillment of twin conditions, ld. PCIT is not justified in invoking the jurisdiction u/s 263 of the IT Act, 1961. We, therefore, quash the section 263 proceedings initiated by ld. PCIT and the grounds raised by the assessee are allowed.

44. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 31.03.2022.

Sd/-	Sd/-
(N.K. CHOUDHRY)	(R.K. PANDA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 31st March, 2022.

dk

Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi