IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER
ITA No. 60/SRT/2022 (AY: 2016-17)
(Hearing in Physical Court**)**

Kanubhai Vanmalibhai Patel HUF,6, Siddharth Society, Behind Afil Tower, Lambe Hanuman Road, Surat-395010. **PAN: AAKHP 0725 K**	Vs.	I.T.O.,Ward 1(2)(1), Surat.
APPELLANT		**RESPONDEDNT**

Assessee by	Shri Hiren Vepari, CA
Department by	Shri Ashok B. Koli, CIT-DR
Date of hearing	16/03/2023
Date of pronouncement	17/04/2023

Order under Section 254(1) of Income Tax Act

PER: PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by the assessee is directed against the order of learned Principal Commissioner of Income tax-1, Surat [in short the ld. Pr.CIT] dated 21/02/2022 passed under Section 263 of the Income Tax Act, 1961 (in short, the Act) for the Assessment Year (AY) 2016-17. The assessee in his appeal has raised the following grounds of appeal:-

(I) Assumption of Jurisdiction:

"1. The Principal Commissioner of Income Tax was not justified in assuming jurisdiction u/s 263 without satisfying conditions

2. The appellant submits that the Principal Commissioner of Income Tax ought not to have invoked provisions of Section 263 on the very same point on which the Assessing Officer had made inquiry and taken position.

3. *The appellant further submits that the Principal Commissioner of Income Tax did not appreciate the settled position of law where proceedings u/s 263 do not stand to sustain if Principal Commissioner of Income Tax opts to take different view in the same matter.*

4. *The learned Pr.CIT was driven by extraneous consideration in not dropping the proceedings u/s 263.*

5. *The revision fails because under the same jurisdiction, the appellant's shave (2/3) in the land is taken for revision, while on the same set of facts, the balance spare (1/3) of relative of the assessee passed u/s 143(3) is allowed to be continued to be classified as "capital gains".*

(II) Merits:

1. *With the assessee indisputably being an agriculturist, selling its agricultural land as agricultural land after holding it for a period of 10 years, would not characterize such transaction one-off in a year into adventure in the nature of trade.*

2. *If every transaction of capital gains if considered as though the Assessing Officer did not put inquiry on the point of view of adventure in the nature of trade, each of the case would be amenable to revision.*

3. *On the facts and circumstances of the case, transaction of sale of agricultural land squarely fell within the head "Capital Gains."*

(III) Miscellaneous:

The appellant craves leave to add, alter or vary any of the grounds of appeal."

2. Brief facts of the case are that the assessee HUF, filed its return of income for the A.Y. 2016-17 on 31/03/2017 declaring loss at Rs. 4,53,97,120/-. The case was selected for scrutiny. Notice under Section 143(2) and 142(1) of the Act was served upon the assessee for seeking certain information about short term/long term capital gain and agricultural income and accepted the returned income in assessment order dated 13/12/2018 passed under Section 143(3) of the Act. The

assessment order was revised by the ld. Pr.CIT vide his order dated 31/03/2021. The order dated 31/3/2021 was challenged before the Tribunal vide ITA No. 38/Srt/2021. The assessee while challenging the order dated 31/03/2021 besides challenging the order on merit also raised grounds of appeal that the assessee was not given adequate opportunity of hearing and not considered its submission and that revision order was passed at the fag end of the time limit of two years of passing such order. This Tribunal after hearing the parties, restored the appeal of assessee to the file of ld. Pr.CIT, vide order dated 10.06.2021 to consider their reply and to pass order afresh in accordance with law, without being influenced of observation therein after giving reasonable opportunity to the assessee.

3. Thus, in pursuance of direction of this Tribunal, the ld. Pr.CIT granted opportunity of hearing to the assessee and again held that the Assessing Officer while passing the assessment order, presumed that the assessee was eligible for deduction under Section 54B of the Act without making any inquiry on issue and that without making inquiry on vital issue whether the sale of land was in the nature of business transaction or adventure in the nature of trade, passed the assessment without application of mind. The relief allowed to assessee under Section 54B was without proper application of mind and in absence of relevant documentary evidence regarding agricultural use of land 2

years prior to sale of land. The ld. Pr.CIT held that the assessment order dated 12/12/2018 passed under Section 143(3) is erroneous in so far as it is prejudicial to the interest of revenue and directed the Assessing Officer to make proper enquiry and pass the assessment order in time and in accordance with law in the order and as per the provisions of law.

4. Facts leading to invocation of jurisdiction under section 263 by ld PCIT was that on perusal of assessment order, the ld. Pr.CIT noted that the assessee and his co-owner sold piece of land at Revenue Survey No. 371, Vesu, Taluka-Majura, Surat for a sale consideration of Rs. 33.82 crores and claimed deduction under Section 54B of Rs. 17.75 crores on purchase of other agricultural land. The purchaser of land used it for commercial development. The ld. Pr.CIT also recorded that in three preceeding year, the assessee frequently transacted in the land as a commodity in a large quantity which signifies that the assessee was doing a business of land dealing and not holding it as a capital asset. The land held by assessee was in stock in trade and the income arising of such sale is to be treated as business income. The assessee before transfer of sale obtained permission from Deputy Collector, Surat under Section 63 of Tenancy Act for selling agricultural land for non-agricultural purposes. During the assessment, the assessee has not produced any documentary evidence about the agricultural activities

carried out by the assessee in the said land, thus, the assessee was not eligible for deduction under Section 54B of the Act. On the basis of such observation, the ld. Pr.CIT issued notice dated 23/03/2021 for fixing the date on 26/03/2021 in response to show cause notice, the assesse sought adjournment for a week. However, the assessee was granted time to file reply on or before 29/03/2020. The ld. Pr.CIT noted that though the assessee has furnished his reply but it was not uploaded in a proper format, thus could not be opened for consideration. The ld. Pr.CIT issued another notice on the same date on 29/03/2021 for furnishing reply in a proper format either on ITBA portal or through e-mail by 30/03/2021. The ld. Pr.CIT recorded that neither the assessee uploaded reply nor sent it through e-mail. Accordingly, the ld. Pr.CIT proceeded to decide the issue on the basis of material available on record before him. The ld. Pr.CIT further noted that in the A.Y. 2013-14, 2014-15 to 2018-19, the assessee traded in various lands. The assessee frequently purchased and sold the land which proved that the assessee is in the business of land and land was not held as a capital asset for personal use. The land was sold for a consideration of Rs. 33.82 crores on which deduction under Section 54B of the Act was claimed. No evidence to show that the land was used for agricultural purpose or some expenses were incurred for agricultural yield, therefore, in absence of any documentary evidence, it is not proved

that the land was used for agricultural purpose, which is primary condition for claiming deduction under Section 54B of the Act. The transaction of purchase and sale is organized activity and adventure in nature of trade. The Assessing Officer while passing the assessment order erred in treating the land as capital asset instead of stock in trade. The assessee was not eligible for deduction under Section 54B of the Act. Non-application of mind by Assessing Officer coupled with non-verification of details of property, made the assessment order dated 12/12/2018 erroneous and prejudicial to the interest of revenue.

5. As the Tribunal set aside the earlier revision order dated 31/03/2021 vide order dated 10/06/2021, the ld. Pr.CIT given fresh show cause notice to the assessee to file his reply on or before 30/11/2021. In response to such fresh show cause notice, the assessee filed his reply through e-filing portal on 01/12/2021. In the reply, the assessee objected for exercising jurisdiction under Section 263 of the Act by raising objection that the order under Section 263 is being exercised with 2/3rd parcel of land while on 1/3rd parcel of land, capital gain is allowed. The earlier revision order was set aside as the ld. Pr.CIT in the first round of litigation has not considered the reply of assessee. The assessee further objected that Explanation-2 of Section 263 laid down certain condition for treating the order as erroneous in so far as prejudicial to the interest of revenue where the ld. Pr.CIT can exercise

his jurisdiction. The Assessing Officer raised specific enquiry on the transaction of land which were duly responded in a specific manner demonstrating that the Assessing Officer had made due application of mind and formed a conscious opinion that sale of land was a transaction of capital gain and assessee was eligible for claiming of deduction under Section 54B of the Act. The Assessing Officer vide notice dated 23/07/2018 asked to file computation of income, profit and loss account with balance sheet, which was duly responded alongwith all details vide reply dated 13/09/2018. Further the Assessing Officer vide notice dated 01/10/2018 asked the assessee to furnish copy of sale deed of the land sold during the year under consideration with copies of their respective purchase deed to show the cost of acquisition. Copy of purchase deed of new property in order to clarify of deduction under Section 54B was filed. The Assessing Officer also sought evidence regarding agriculture activities immediately preceeding years, before transfer of agricultural land on which deduction under Section 54B is claimed and details of crops grown and yield of each crop for F.Y. 2013-14 to 2015-16. Details of head wise of agricultural expenses like labour, irrigation, transportation, seeds expenses fertilizer expenses etc. Complete name, address, PAN to whom the agricultural produce were sold in F.Y. 2013-14 to 2015-16, justification of claim of agriculture income with cogent and sufficient evidence with Hak Patra, Form-6, sales of bills of

agriculture product. The assessee furnished complete details vide reply dated 11/12/2018. The Assessing Officer again vide notice dated 16/10/2018 asked various details about the deduction under Section 54B to 54G of the Act and sale consideration of property in Income tax return is less than the consideration reported in Form 26QB, details of long term capital gain. The assessee vide reply dated 24/10/2018 again furnished complete details. Again show cause notice dated 06/11/2018 about seeking the details of immovable property purchased which was responded by reply dated 14/11/2018. The assessee further stated that as can be seen on various particular queries related to transaction of capital gain on more than four different notices, the Assessing Officer has expressly recognized the nature of assessee's activities in para 2 of assessment order under Section 143(3) of the Act. The Assessing Officer treated the isolated transaction on sale of land of agricultural land at Vesu, held for more than 10 years as capital gain and allowed deduction under Section 54B, which was conscious one, bearing in mind, explanation furnished by assessee against the specific enquiries raised during the course of assessment. On the other issue identified in the notice under Section 263, that there was a non-application of mind by the Assessing Officer, in not treating the sale of land as a business income and proposal of revision, when solitary transaction of land took place, then it is too much to presume as a business transaction as an

adventure in nature of trade. The assessee retreated that transaction is a solitary transaction of sale during the year, other transactions of sales of land were of compulsorily acquisition by Government, where the assessee had no choice. The assessee is unquestionably is an agriculturist. The assessee undertook agriculture operation since the land was acquired. The land was sold after a gap of 10 years after obtaining permission under Section 63 of Gujarat Tenancy and Agricultural Land Act. The assessee always shown the land as investment in its books of account. During the year, the assessee sold impugned agricultural land to Rising Reality for a total consideration of Rs. 33.82 crores, wherein the assessee has share of 66.67% (2/3) and balance (1/3) belongs to Ramesh Chandra Purshottamdas Patel. On the transaction of assessee, the jurisdiction under Section 263 was invoked while in respect of remaining 1/3rd share of Ramesh Chandra Purshottamdas Patel, it was accepted as capital gain. In case of Ramesh Chandra Purshottamdas Patel, the assessment was completed under Section 143(3) of the Act on 06/12/2018, copy of such assessment order was also filed. The relevant enquiry raised by Assessing Officer and the submission made by Ramesh Chandra Purshottamdas Patel was also furnished before the ld. Pr.CIT. The assessee specifically stated that the jurisdiction of Ramesh Chandra Purshottamdas Patel is also with the same Pr.CIT. The assessee on the observation that land was

sold after obtaining permission under Section 63 of Gujarat Tenancy Act, the assessee explained that obtaining permission is an obligation to convert the land into non-agriculture by the seller which is a condition precedent under the Tenancy Act as business activities on the agriculture land is not permissible. To support various conditions, the assessee also relied on various case laws and prayed to drop the proceedings under Section 263 of the Act.

6. The ld. Pr.CIT after considering the submissions of assessee as recorded in para 7 of his order, noted that the assessee is involved in the business of builder as a partner in a firm Kabir Corporation. The assessee follows regular practice to purchase land, hold the property for few years, get necessary approval and permission to convert the land into non-agriculture (NA) by paying necessary charges and sales it, for non-agriculture/commercial used when it fetches goods price. The land in question was also sold after converting into non-agriculture land for commercial use. The assessee never seems to have held the property for personal use, possession or enjoyment. The transaction of purchase and resale was in fact is organized activity which would be in the nature of business income. The claim of assessee that there was a solitary sale transaction during the year after 10 years from the purchase has not been examined and enquired by the Assessing Officer. In the light of frequency of land transaction of purchase and sale across

the year and the motive of assessee while purchasing of land to ascertain, if the said transaction was adventure in the nature of trade. The ld. Pr.CIT on the objection of assessee that no revision was proposed in case of co-owner on a composite sale transaction, the ld. Pr.CIT held that such objection is not acceptable as the fact of said case with regard to involvement of said person in the real estate business, frequency of land transaction, intention of that person to purchase the land for resale or for personal use etc have not been stated. The different cases have different aspects and could not be related to each other just on the basis of fact that the other person was also partly involved in the transaction of same land. There is no basis to raise such objection that consciously no revision was proposed in that case. The ld. Pr.CIT further noted that no enquiry was made by the Assessing Officer with respect to sale of land transaction being in the nature of business or adventure in the nature of trade which should have been made. Whether any agriculture operation have been carried out by the assessee over last preceeding years or not. The assessee has not disclosed the agricultural income in preceeding assessment year. Though, the Assessing Officer raised question for seeking evidence of agriculture income, the assessee failed to prove that land was being used for agricultural purpose by furnishing valid documentary evidence. Although, the assessee claimed that agricultural income was shown in

all past three years which is not supported by evidence of actual carrying out of agriculture operations. During the assessment, no cross verification or investigation was made about the letter issued by Shree Maruti Gaushala regarding taking entire product/crops grown on the said land and donated to such Gaushala. The Assessing Officer has not made any enquiry from agriculture department or revenue agency about the crop cultivation. The Assessing Officer accepted the reply without any further enquiry or verification which should have been made to ascertain the correctness of such averment particularly when the assessment has not disclosed any agriculture income in two preceeding assessment years which clearly reflects non-application of mind by Assessing Officer and referred the assessment order erroneous in so far as prejudicial to the interest of revenue. On such observation, the ld. Pr.CIT, again upheld the order of setting aside the assessment order dated 13.12.2018 with the direction to reframe the assessment order after examining the issues and making proper enquiries and give due opportunity to the assessee in his order dated 21/02/2022. Further aggrieved, the assessee has filed present appeal before this Tribunal.

7. We have heard the submissions of the learned Authorised Representative (AR) of the assessee and the learned Commissioner of Income Tax-Departmental Representative (ld. CIT-DR) for the revenue. The ld. AR of the assessee submits that the assessing officer while

passing assessment order took reasonable view while passing the assessment order. The view taken by assessing officer is legally sustainable view. The assessing officer examined the facts in detail with regard to solitary transaction of impugned land by raising question at least four times and only thereafter hold surplus earned on sale of such land is capital gain. Reclassifying the transaction as business transaction is only possible view and not certainty. The assessee purchased the impugned agriculture land on 03.12.2005 and held it for a period of 10 years. The assessee has shown such land as investment in his books of account. Other transaction during the year was of compulsory acquisition by State Government, in such transaction the assesse has no choice. The assessee is admittedly agriculturist and sold the land used for agriculture purpose. The assesse sold the said land after obtaining permission under section 63 of The Gujarat Tenancy Act, in absence of such permission the assessee could not sale such land to non-agriculturist i.e. Raising Reality. The copy of order under section 63 of Gujarat Tenancy Act is filed on record. The ld AR for the assessee submits that whether someone holding agriculture land for 10 years is said to have made and adventure in the nature of trade by acquiring the property with a motive of sale, the answer will be, No. The parcel of land hold by the assessee was exclusively used for

agriculture purpose. The finding in the order of ld Pr CIT that the land sold by the assessee was non-agriculture land are factually incorrect.

8. On non-verification of issue on the details of property and non-application of mind of assessing officer during the assessment, the ld AR for the assessee submits that assessing officer issued notice dated 23.07.2018, 01.10.2018y, 16.10.2018 and 06.11.2018, copies of such notices are placed on record. The assessee filed its reply by replies dated 13.09.2018, 11.12.2018, 24.10.2018 and 14.11.2018, copies of such replies are also placed on record. The assessing officer made specific quarry vide notice dated 01.10.2018 about deduction under section 54B and ask for sale deed of the property, purchased deed of the land so purchased for examining the nature of exemption under section 54B, evidence of agriculture activities carried out during last three preceding years before transfer of land, details of the crops grown and yield of crop grown, expenses for agriculture activities with details of person to whom such agriculture product was sold. The assessee vide its reply dated 11.12.2018 furnished complete details required by assessing officer. The assessee furnished copy of sale deed of the land with the purchase deed of the land purchased subsequently to substantiate the deduction under section 54B. The assessee also furnished the details of crops grown and form-12 evidencing crop. The details of agriculture expenses were also furnished, with copy of profit

and loss account debiting such expenses. The assessee explained that the entire crop grown in the land was donated to 'Shree Maruti Gaushala', hence, no income was earned from such land, confirmation of Gaushala was also filed. The assessing officer on considering and verification of all such evidences and after satisfying himself took conscious and legally sustainable view in accepting the transaction of capital gain. The ld AR for the assessee submits that ld PCIT himself admits that there was inquiry and evidences, however, the order cannot be termed erroneous for the want of bills and vouchers, when the assessing officer himself accepted all the evidences. The nature of land sold is clearly mentioned as agriculture land, the permissions was obtained only for the purpose of selling to it to non-agriculturist. The stamp duty was paid as per rate applicable to agriculture land. The ld AR for the assessee also filed his written synopsis, which was taken on record. To support his various submissions, the ld AR for the assessee relied on the following case laws;

- Malabar Industrial Company Private Limited (2000) 243 ITR 83-SC,
- Shreeji Prints (2021) 130 taxmann.com 293 (Gujarat),
- CIT Vs Sidharth J Desai (1983) 139 ITR 628 (Guj),
- Ashok Motilal Kataria (308 ITR (AT)-298),
- Rajesh Kumar Kabra (93 TTJ -252) (Ranchi),
- Narayan Prabhu Gavali (2006) 5 SOT-558 (Bang.),
- S K. Kantilal (231 CTR 531- P&H),
- Delhi Apartment (P) Limited (135 ITD-441) (Delhi),

- Harjit Singh Sanga (37 taxmann.com 63 P& H),
- P. K. N. & Co Limited (60 ITR 65-SC),
- Kaur Singh (144 ITR 756 P & H),
- Michael Kallivayalil (102 ITR 202 Ker),
- Kasturi Estate (P) Limited (62 ITR 578 Madras),
- Omkarmal Rambilas Ginning and Processing Factory (44 SOT 544 Hyd Trib.),
- Rewashanker A Kothari (283 ITR 338- Gujarat),
- Marudhar Hotels (P) Limited (92 DTR-1 Jodhpur Trib.) and
- D.N. Krishanappa (21 DTR -11 Bangalore –Trib.)

9. At the time of making submissions by ld AR for the assessee, we raised quarry, if the order of Tribunal in first round of appeal was appealed in the High Court or not. The ld AR for the assessee fairly accepted that they filed appeal against the order of Tribunal in ITA No. 38/Srt/2021, however, the appeal of the assesse was dismissed vide order dated 29.11.2021 in Tax Appeal No. 275 of 2021. However, the Hon'ble High Court while dismissing the appeal held that challenge under section 263 (assumption of Jurisdiction by PCIT) and challenges on merit were kept open in para-10 of the order. The ld. AR for the assessee submits that appeal of the assessee may be allow by quashing the order under section 263.

10. On the other hand, the ld CIT-DR for the revenue supported the order of the ld Pr CIT. The ld. CIT-DR for the revenue submits that the assessing officer has not made requisite enquiry which ought to have

made by him for verification of deduction under section 54B. the ld CIT-DR for the revenue submits that the assessee is partner in a firm-Kabir Corporation and engaged in the business of sale and purchase of various property after converting the land use of the lands. The ld Pr CIT in his order has clearly noted that the assessee never seems to have held the property for its personal use. The assessing officer has not made any inquiry from agriculture department about the activities carried out by the assessee in the impugned land. The assessing officer simply accepted the reply of the assessee. The entry in Form-7/12 are not the conclusive proof of the activities claimed by the assessee. Operation of agriculture activities were not proved by the assessee. The land was situated in the Vesu area of Surat City, which is fully developed area. Most crucial point is that at the time of sale of the land its nature was converted from agriculture to non-agriculture purpose, thus, deduction on the surplus earned on sale of non-agriculture land is not available to the assessee, such facts are not considered by the assessing officer. The ld CIT-DR for the revenue submits that order of ld Pr CIT may be upheld.

11. In the short rejoinder, the ld AR for the assessee submits that case law cited by him in CIT Vs Sidharth J Desai (1983) 139 ITR 628 (Guj), has considered almost all similar contention.

12. We have considered the rival submissions of both the parties and have further gone through the contents of the assessment order and the order passed by ld PCIT. We have also deliberated on various case laws relied by ld PCIT as well as by ld AR for the assessee at the time of making his submissions. We have also considered the finding / or of Hon'ble Gujarat High Court in assessees appeal in Tax Appeal 275 of 2021 dated 29.11.2021. On careful consideration of order dated 29.11.2021, we find that there is no impediment in adjudication the present appeal on merit. We find that while passing the assessment order, the assessing officer accepted the returned income in his order dated 13.12.2018. The ld PCIT revised assessment order by taking view that the assessee is involved in the business of builder as a partner in a firm Kabir Corporation. The assessee has a practice to purchase land, hold it for few years, get necessary approval and permission to convert the land into non-agriculture by paying necessary charges and sale it for non-agriculture/commercial used when it fetches goods price. The land in question was also sold after converting into non-agriculture land for commercial use. It was held that the assessee never seems to have held the property for personal use, possession or enjoyment. The ld PCIT ultimately held that no enquiry was made by the Assessing Officer with respect to sale of land transaction being in the nature of business or adventure in the nature of trade which should have been made. No

inquiry was made if any agriculture operations have been carried out by the assessee over last preceeding years or not. The assessee has not disclosed the agricultural income in preceeding assessment year.

13. We find that though, it was accepted by ld PCIT that the assessing officer raised question for seeking evidence of agriculture income, the assessee failed to prove that land was being used for agricultural purpose by furnishing valid documentary evidence. The assessee claimed that agricultural income was shown in all past three years, is not supported by evidence of actual carrying out of agriculture operations. No cross verification or investigation was made during assessment about the letter issued by Shree Maruti Gaushala regarding taking entire product/crops grown on the said land and donated to such Gaushala. The Assessing Officer has not made any enquiry from agriculture department or revenue agency about the crop cultivation.

14. As recorded above the ld AR for the assessee during the hearing of appeal invited our attention on the various show cause notices issued under section 142(1) and their reply filed by the assessee. We find that during assessment the assessing officer, in case of assessee, the assessing officer, vide notice dated 23/07/2018 directed assessee to file computation of income, profit and loss account with balance sheet, which was duly responded alongwith all details vide reply dated 13/09/2018. Again vide notice dated 01/10/2018, assessing officer

asked the assessee to furnish copy of sale deed of the land sold during the year under consideration with copies of their respective purchase deed to show the cost of acquisition, copy of purchase deed of new property in order to clarify of deduction under Section 54B. The Assessing Officer also sought evidence regarding agriculture activities immediately preceeding year before transfer of agricultural land on which deduction under Section 54B is claimed and details of crops grown and yield of each crop for F.Y. 2013-14 to 2015-16. Details of head wise of agricultural expenses like labour, irrigation, transportation, seeds expenses fertilizer expenses etc. Complete name, address, PAN to whom the agricultural produce were sold in F.Y. 2013-14 to 2015-16, justification of claim of agriculture income with cogent and sufficient evidence with Hak Patra, Form-6, sales of bills of agriculture product. We find that the assessee in its reply dated 11/12/2018 furnished required details. The Assessing Officer again vide notice dated 16/10/2018 asked various details about the deduction under Section 54B to 54G of the Act and sale consideration of property in Income tax return is less than the consideration reported in Form 26QB, details of long term capital gain. The assessee further vide its reply dated 24/10/2018 furnished complete details. We find that the assessee again in response to show cause notice dated 06/11/2018, furnished the details of immovable property purchased vide its reply dated

14/11/2018. From the various reply furnished by the assessee, it can be concluded that the assessing officer thoroughly examined the issue of the deduction under section 54B. No doubt that there is no such observation about conducting such detailed inquiry, in the assessment order.

15. The Punjab & Haryana High Court in S.K. Kantilal (supra) held that when the assessee having sold the land after holding it for two decades and using it for agriculture purpose without effecting any improvement on the land, the earning from such sale of is to be treated as capital gain and not income from business and profession. Further, Punjab & Haryana High Court in Harjeet Sing Sangha (supra) also took the view that when the assessee purchased agriculture land and it was being used as such by assessee, later on it was sold in a small plots to different persons, it was held that activity could not be termed as adventure in nature of trade and cannot be taxed as business income. Again adverting to the facts of present case, the assessee before sale of land has only got its conversation from agriculture to non-agriculture purpose as it is the condition precedent for selling the land to the person who is not registered farmer in the revenue record of the State Government. The Hon'ble Gujarat High in CIT Vs Sidharth J Desai (1983) 139 ITR 628 (Guj) held that there are several factor to determine the real and held that permission under section 63 of the

Bombay Tenancy and Agricultural Lands Act was obtained by the assessee to sell the lands to the society for residential purposes would not, militate against the land continuing to be agricultural on the date of its sale, as the permission was obtained only about two and a half months prior to the sale. Therefore, till the land was held by the assessee its character as agricultural land was not changed either as a result of its reclassificanon in the revenue records or by the actual alteration of its use.

16. In view aforesaid legal and factual discussions coupled with the facts the assessing officer has examined the issue in depth and allow relief to the assessee. Therefore, the view taken by the assessing officer is one of the reasonable and plausible and legally sustainable, which cannot be said as erroneous.

17. We also find that before ld PCIT, it was submitted that the assessee was owner of 2/3 part which is sought to be taxed as business income, however, on remaining part of 1/3 shareholders case the department has accepted capital gain. To strengthen such contention, the assesse has filed copy of assessment order dated 067.12.2018 passed under section 143(3) in case of co-owner namely Ramesh Chandra Purshottamdas Dass Patel alongwith the copies of the notices issued by his assessing officer. Similar submissions were made before us by ld AR for the assessee. We find that on such submissions, ld PCIT while

setting aside the assessment order held that such objection is not acceptable as the fact in case of co-owner of said case with regard to involvement of said person in the real estate business, frequency of land transaction, intention of that person to purchase the land for resale or for personal use etc have not been stated. And that there is no basis to raise such objection that consciously no revision was proposed in that case. In our view the observation of ld PCIT is not correct. Once, the department has accepted the capital gain in the hand of co-owner in respect of the common transaction, the assessee cannot be treated indifferently. Thus, on such principle the assessment order cannot be branded as erroneous.

18. The Supreme Court in a celebrated case of Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 832 (SC), held that the prerequisite for the exercise of jurisdiction by the Commissioner *suo-motu* is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (*i*) the order of the Assessing Officer sought to be revised is erroneous; and (*ii*) it is prejudicial to the interests of the revenue. If one of them is absent - if the order of the Income-tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue - recourse cannot be had to section 263(1) of the Act. It can be exercised only when an order is erroneous,

the section 263 will be attracted. Further, Hon'ble Bombay High Court in CIT Vs Gabriel India Ltd (233 ITR 108 Bom /71 Taxman 585) held that the power of *suo-motu* revision under sub-section (1) of section 263 is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this sub-section, viz., (i) the order is erroneous; and (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the revenue.

19. The Hon'ble Jurisdictional High Court in Aryan Arcade Ltd., Vs PCIT (2019) 412 ITR 277 (Gujarat) held that merely because Commissioner held a different belief that would not permit him to take the order in revision, it if further held that when Assessing Officer made full enquiry, he made up his mind, the notice of revision is not valid. In CIT Vs Nirma Chemical Works (P) Ltd (309 ITR 67 Gujarat)/ 182 Taxman 183 Gujarat*,* the Hon'ble High Court also held that when assessing officer after making due inquiries had adopted one of the view and granted partial relief, merely because Commissioner took a different view of the matter, it would not be sufficient to permit commissioner to exercise his powers under section 263. The Hon'ble Court in para 22 of its order on the objection of the revenue that there is no discussion of the issue in the assessment order held that the contention on behalf of the

revenue that the assessment order does not reflect any application of mind as to the eligibility or otherwise under section 80-I of the Act requires to be noted to be rejected. An assessment order cannot incorporate reasons for making/granting a claim of deduction. If it does so, an assessment order would cease to be an order and become an epic some. The reasons are not far to seek. Firstly, it would cast an almost impossible burden on the Assessing Officer, considering the workload that he carries and the period of limitation within which an order is required to be made; and, secondly, the order is an appealable order. An appeal lies, would be filed, only against disallowances which an assessee feels aggrieved with. (* emphasis added by us).

20. Thus, in view of the above discussion the twin conditions as enunciated under section 263 cannot be said to have been fulfilled. Thus, the order passed by ld PCIT under section 263 failed in our legal scrutiny, hence order dated 21.02.2022 is set aside.
21. In the result, the grounds of appeal raised by the assessee is allowed.
22. In the result, the appeal of the assessee is allowed.

Order pronounced on 17/04/2023 in open court.

Sd/-	Sd/-
(Dr. ARJUN LAL SAINI)	(PAWAN SINGH)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Surat, Dated: 17/04/2023
**Ranjan*

Copy to:

1. Assessee
2. Revenue
3. Pr.CIT
4. CIT
5. DR
6. Guard File

By Order

Sr. Private Secretary, ITAT Surat