

**IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM**

आयकर अपील सं./ITA No.282/SRT/2023

निर्धारण वर्ष/Assessment Year: (2018-19)

(Physical Hearing)

Kiran Kasturchand Shah, 235-236, Shankheshwar Complex, Kailash Nagar, Sagram pura, Surat – 395002.	Vs.	The PCIT-1, Surat
(Appellant)		(Respondent)
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.: AGZPS1397K		

Appellant by	Shri Kiran K. Shah, AR
Respondent by	Shri Ashok B. Koli, CIT(DR)
Date of Hearing	24/05/2023
Date of Pronouncement	06/06/2023

आदेश / ORDER

PER DR. A. L. SAINI, AM:

By way of this appeal, the assessee has challenged the correctness of the order dated 27.03.2023, passed by the Learned Principal Commissioner of Income Tax (in short 'Ld. PCIT'), Surat-1, under section 263 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The grounds of appeal raised by the assessee are as follows:

"1) The learned PCIT grossly erred in passing order u/s. 263 of the Act and directed to verify the application of section 56 (2) of the Act in respect of two documents executed during the year though the said document is in the nature of correction of defects of the title as the property was already purchased in the earlier years (1/2 share in F.Y.2003-04 and the rest 1/2 in F. Y. 2010-11) and the payments were also made by account payee cheques in the relevant years.

2) The learned PCIT ought to have held that the possession of the property was taken in the earlier years and the entire payments were also made and, therefore, effective transfer had taken place in the earlier year hence, provisions of section 56 (2) are not applicable.

3) *The appellant reserve right to odd, alter and withdraw any grounds of appeal.*”

3. Succinctly, the factual panorama of the case is that assessee before us is an Individual and had filed his return of income for the A.Y. 2018-19, on 10/09/2018, declaring total income at Rs.23,07,440/-. Subsequently, the assessee's case was selected for Limited scrutiny through CASS for examination of following issue: (1) Investment in immovable Property (Purchase Value of Property less than the value as per stamp authority [u/s 56(2) or any other relevant section] (Business ITR). The Scrutiny assessment under section 143(3) r.w.s. 143(3A) & 143(3B) of the I.T. Act, 1961 was finalized in assessee's case on 30.07.2020, accepting the Return Income i.e. Rs.23,07,440/-.

4. Later, Learned Principal Commissioner of Income Tax (in short 'Ld. PCIT'), Surat-1, exercised his jurisdiction under section 263 of the Income Tax Act, 1961. On verification of information available in ITS (Individual Transaction Statement) for FY 2017-18, it was noticed by Id PCIT that during the year under consideration the Assessee had purchased two immovable properties below the Stamp duty value as determined by the Stamp Valuation authorities. The details of these two properties are as under:

Sr. No	Date of Purchase of property	Purchase Value	Stamp duty value	Difference between Stamp Duty Value and Purchase Value.
1	17.02.2018	24,10,000/-	Rs.1,02,81,600/-	Rs, 78,71,600/-
2	07.02.2018	2,50,000/-	Rs. 2,14,10,560/-	Rs. 2,11,60,560/-

The Id PCIT noted that during the course of Assessment Proceedings, the Assessing Officer, vide notices u/s 142(1) of I.T. Act dated 16.12.2019 and 20.03.2020, has asked the Assessee to submit details of immovable properties purchased during the year with copy of purchase deeds, stamp

duty value of the Properties and explain the reason for difference in Stamp duty value and purchase value with supporting documents.

5. In compliance, the Assessee, vide letter dated 25.06.2020 has submitted details in respect of property appearing at Sr. No.1 of the above mentioned table. In respect of property appearing at Sr. No. 2 of the above mentioned table, the Assessing Officer has examined the issue with the help of the material available in records of the Assessing Officer.

6. The Id PCIT observed that as per ITS details, the Assessee has purchased an immovable property for total purchase consideration of Rs.2,50,000/- on 07.02.2018. However, the stamp duty valuation authorities had determined the fair market value of the property at Rs.2,14,10,560/-. Thus, it is clear that the Assessee had purchased the property below the stamp duty value and the provisions of section 56(2)(x) of I.T. Act are clearly applicable in the case of Assessee. During the course of assessment proceedings difference of Rs.2,11,60,560/- (Rs.2,14,10,560 – Rs.2,50,000) between the Fair market value and actual purchase value of the immovable property was required to be added to the total income of the Assessee u/s 56(2)(x) of I.T. Act, which the AO has failed to do so. Therefore, Id PCIT issued a show cause notice to the assessee, dated 22.03.2023 which was duly served upon the assessee.

7. In response to the notice issued by the Ld. PCIT, the assessee submitted the written submission before the Ld. PCIT, which is reproduced below:

“It is submitted that I had purchased the abovesaid plot catted Plot No. 270 at Village Dumas in F. Y, 2003-04 by making full payment by account payee cheques for Rs.2.50/- lacs and possession was also taken F, Y. 2003-04, The said plot was purchased jointly with Ankin S. Zaveri and accordingly I had 1/2 share in the said property. The document was executed on 13.03.2008.

The details of payments are as under:

16.04.2002 Surat People's Bank 55824 50,000

24.04.2003	Surat People's Bank	55837	50,000
29.04.2003	Syndicate Bank	655928	1,00,000
19.08.2003	Syndicate Bank	655934	50,000
		Total	2,50,000

b) the possession of the property was taken as soon as the full payment was made. This fact is evident from the para 5 of the purchase deed dated 13.03.2008.

English version para 5 of the purchase deed dated 13.03.2008/registration no.3373

(c) On payment of the entire sale consideration, we hand over the possession of the plot as prescribed in below mentioned annexure as a member of the society thereof. Thus, since the possession is given to you, we the seller or our legal heirs shall not take back the possession and shall not raise any dispute in this regard and shall not cancelled the allotment of plot by way of document.

(d) Again in para no, 8 of the said purchase deed, the fact of possession is repeated,

Since the possession was given in F.Y.2003-04, the assessee had become owner of the said property by virtue of section 2(47) of the Act. The original deed was executed on 13.03.2008.

(e) Since there were defects in title of the property, the same was cured by executing the revised deed of the same property ie. Plot No. 270 at Village Dumas on 07.02.2018. It is submitted that, in this deed again the same details of payment are repeated on page no. 10 of the revised deed, it is further submitted that the fact of sale in F.Y. 2003-04 is mentioned on page 11 of the revised purchase deed The English version is as under:

"We had sold the plot in F. Y. 2003-04 and as said earlier, we have not created any mortgage or sale or gift on that property. No loan /debt is raised and no guarantee is given of the same. The said property is not in the attachment of any lenders and there is no dispute of any type in this regard. We have no raised any right for our residence or for maintenance for food. The said land was not acquired for public notice and there is notice like that. Thus, the said land is clear without debt and without any rise and that trust, the sale was done and still if any person raised any right, it would be void."

On page No. 12 of the revised purchase deed, it is clearly mentioned that all taxes on revenue are paid by us (seller) till F.Y.2003-04 and, thereafter, they are paid by you (purchase) as owner of the property.

In short, the revised purchase deed registered in the year under consideration is just to clear the defects in the title and there is no payment during the year to the seller. Since the entire payment was made by- account payee cheque in F.Y. 2003-04 and therefore the ownership was obtained by way of the possession as per section 2(47) of the Act. Thus the plot was actually purchased in F.Y.2003-04 Even it is considered as acquired by registered deed was acquired in FY.2007-08 and when the original document was executed, there was no purchase of property viz 270 of village Dumas and therefore question of application of section 56(2)(x) does not arise.

It is further submitted that one needs to look into the proviso of section 56(2)(x) which is reproduced for ready reference:

Provided that where the date of agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of agreement may be taken for the purpose of the clause.

The above said proviso is applicable only when the payment was made by account payee cheques on or before the date of agreement for transfer of such immovable property)

In the present case, the original document was executed in F.Y.2007-08 and the payment was made by account payee cheques in F.Y. 2003-04 and, therefore, the stamp duty value of F.Y.2003-04 ought to be taken. As per the original document, no additional stamp duty was viable on the base of payment in F.Y.2003-04 when the document was registered in FY.2007-08.

In view of the above, the value of Rs.2,50,000/- ought to be considered as the value for stamp duty purpose as the payment was made by account payee cheques for the sake of repetition. I further submit that, since the possession was already taken on full payment by account payee cheques in F.Y.2003-04, the property was deemed to be transferred by virtues of section 2(47) of the Act in that year. It is submitted that provisions of section 56(2)(x) are applicable from 01.04.2017, the same is not applicable as the payment of cheques was made in F.Y. 2003-04 and the possession was also taken in that year.

Your Honour has confronted details of document executed in FY.2017-18 i.e. A.Y.2018- 19 as per para 2 of the letter.

As said earlier, the abovesaid plot no. 270 was purchased jointly by the assessee and Shri Ankin S Zaveri both having share 1/2.

The second co-owner Ankin S Zaveri sold his 1/2 share in F.Y.2010-11 for consideration of Rs.24,10,000/-. The document was executed for purchase of 1/2 share by the assessee on 25.03.2011 vide document no.5975.

Since there were defects in title of the property, the same was cured by executing the revised deed the same property i.e. Plot 270 (1/2 share) of Village Dumas 17.02.2018, is submitted that, deed again same details payment are repeated page 14 of the revised deed, further submitted that of sale F.Y.2010-11 mentioned page English version of relevant para as under:

"The possession of the sold land was already handed over to the first part the second part and thereafter, maintenance of the society were paid by the first part means that had independent ownership and possession and administration and yourself and your possessor and right holder of the said property."

On page No 16 the revised purchase deed, it is clearly mentioned that all taxes revenue by (seller) F.Y.2010-11 and, thereafter, they are paid by you (purchaser) as owner of property.

In short, the revised purchase deed was registered in the year under consideration, is just to clear the defects in the titles and there is no payment during the year to the seller. Since the entire payment was made by account payee cheques in F.Y.2010-11 and the possession was also taken and, therefore, the ownership was obtained by way of possession as per section 2(47) of the Act. Thus, the plot was actually purchased in FY.2010-11. In short, there was no purchase of property viz. Plot No. 270 (1/2 share) at Village Dumas and therefore, question of application of section 56(2)(x) does not arise.

It is further submitted that, one needs to look into the proviso of section 56(2)(x) which is reproduced for ready reference.

Provided that where the date of agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of agreement may be taken for the purpose of this clause.

The abovesaid proviso is applicable only when the payment was made by account payee cheques on or before the date of agreement for transfer of such immovable property, in the present case, the original document was executed in F.Y. 2010-11 and the payment was made by account payee cheques in F.Y.2010-11. As per the original document, no additional stamp duty was leviable on the base of payment in F.Y.2010-11.

In view of the above, the value of Rs.24,30,000/- ought to be considered as the value for stamp duty purpose as the payment was made by account payee cheques. For the sake of repetition, I further submit that, since the possession was already taken on full payment by account payee cheques in F.Y. 2010-11, the property was deemed to be transferred by virtue of section 2(47) of the Act in that year, it is submitted that provisions of section 56(2)(x) are applicable from 01.04.2017, the same is not applicable as the payment of cheques was made in F.Y. 2010-11 and the possession was also taken in that year.

The assessee relies on the decision of Hon'ble ITAT in the case of Bajrangial Naredi V/s. ITO (ITA No.327/Ran/2018)."

8. However, the Ld. PCIT has rejected the contention of the assessee and held that the assessee vide notice u/s 142(1) of the Act dated 20.03.2020 was requested to furnish the details of investment in property during the year with supporting documents and the assessee did not disclose before the AO. The AO has failed to inquire the purchase of the immovable property made on 07.02.2018 and to examine the provisions of section 56(2)(x) of IT Act. In view of the facts and circumstances of the case, the assessment order passed on 30.07.2020, u/s 143(3) r.w.s.

143(3A) & 143(3B) of the Act, in the case of the assessee for the A.Y. 2018-19 is held to be erroneous in so far as it is prejudicial to the interest of Revenue. Accordingly, the assessment order passed u/s 143(3) r.w.s. 143(3A) & 143(3B) of the Act, dated 30.07.2020, in the instant case was set aside by Ld. PCIT with a direction to the Assessing Officer to pass fresh assessment order after taking into consideration the issues as may have been already considered together with the issue discussed herein above also.

9. Aggrieved by the order of Ld. PCIT, the assessee is in appeal before us.

10. Learned Counsel for the assessee argued that assessee had filed return of income showing taxable income at Rs.23,07,440/- on 10.09.2018 and the same was under limited scrutiny through CASS and the returned income was accepted. During the 263 proceedings, the learned PCIT had issued show cause notice for verification of application of provisions of section 56(2)(x) of the IT Act. The ld Counsel submitted before us a chart showing various events in respect the transaction under consideration, which is reproduced below:

Sr. No.	Revised document for purchase of property	Purchase value	Stamp duty value	Diff. between stamp duty value and purchase value
1	07.02.2018	2,50,000	2,14,10,560	2,11,60,560
2	17.02.2018	24,10,000	1,02,81,600	78,71,600

Sr. No. 1 (1/2 share of the appellant)

	Description of Property	Year for entire payment of consideration and possession thereof.	Year in which the deed was registered / re-registered.	Stamp duty Authority determined the value
A	½ Share in plot no. 270 of R. S. No. 828 paikar at Village Dumas.	F.Y. 2003-04 – Rs. 2,50,000/-. The assessee had paid Rs. 1,50,000/- being his share of investment (Page 19 & 20 of PB-1).	a) The Document was executed on registered on <u>13.03.2008</u> . (Page 15 to 28 of PB-1) b) The defect was removed by registered document on <u>07.02.2018</u> . (Page 60 to 84 of PB-1). Details of payment in F. Y. 2003-04 and possession thereof is mentioned on <u>page 69 to 71 of PB-1</u> .	Rs. 2,50,000/- Rs. 16,06,500/- (appellant ½ share i.e. Rs. 8,03,250/-) (Page 83 of PB-1)

Sr. No. 2 (the balance ½ share of the plot)

	Description of Property	Year for entire payment of consideration and possession thereof.	Year in which the deed was registered.	Stamp Authority determined the value	duty the value
B	The balance ½ share in Plot No. 270 of R. S. No. 828 paikiee at Village Dumas.	F.Y. 2010-11 - Rs. 24,10,000/- (Page 125 of PB-1)	a) The document was executed at registered on 25.03.2011. (Page 110 to 135 of PB-1) b) The defect was removed by registered document on 17.02.2018. (Page 168 to 196 of PB-1) . Details of payment in F. Y. 2010-11 and possession thereof is mentioned on page 181 & 183 of PB-1.	Rs. 24,10,000/- Rs. 24,10,000/- (Page 195 of PB-1)	

11. With help of the above chart, the Id Counsel explained the Bench that the original document was executed in F.Y.2007-08 and the payment was made by account payee cheques in F.Y. 2003-04 and, therefore, the stamp duty value of F.Y.2003-04 ought to be taken. As per the original document, no additional stamp duty was liable on the basis of payment in F.Y.2003-04 when the document was registered in FY.2007-08. Therefore the value of Rs.2,50,000/- ought to be considered as the value for stamp duty purpose . The Id Counsel stated that payment of stamp duty was made by account payee cheques and since the possession was already taken on full payment by account payee cheques in F.Y.2003-04, hence the property was deemed to be transferred by virtues of section 2(47) of the Act in F.Y.2003-04. Later on there was correction in the purchase deed, therefore correction in purchase deed and payment of additional duty on the occasion of correction does not attract the capital gain as the transaction was materialized in F.Y.2003-04.

12. The Id Counsel also argued that provisions of section 56(2)(x) of the Act are applicable from 01.04.2017, hence the same is not applicable to the assessee, as the payment of cheques was made in F.Y. 2003-04 and the possession was also taken in F.Y. 2003-04. Besides, the assessing officer made adequate enquiry during the assessment proceedings in respect to the said issue and assessee has replied to the assessing officer, hence it is not a case of inadequate enquiry. Therefore, Id Counsel contended that order passed by the Id PCIT may be quashed.

13. On the other hand, Ld. CIT(DR) for the Revenue submitted that during the assessment stage, the Assessing Officer has not conducted any enquiry and the assessee has not disclosed the true facts before the Assessing Officer, therefore Assessing Officer has failed to conduct enquiry about the purchase of the immovable property by assessee. The provisions of section 56(2)(x) of the Income Tax Act, 1961 are applicable to the assessee. The Ld. DR also pointed out that nature of defect in title deed has not been examined by the assessing officer. Therefore, Ld. DR for the Revenue submitted that order passed by the AO is erroneous as well as prejudicial to the interest of revenue.

14. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the Id. PCIT and other material brought on record. We note that property was already purchased in the earlier years (1/2 share in F. Y. 2003-04 and the rest ½ share in F.Y.2010-11) and the entire payments were also made by account payee cheques in these relevant years and possession was taken. The documents executed during the assessment year under consideration, were in the nature of correction of defects of the title of the property. To correct the defect in the title of

the property does not mean that assessee has purchased the new property in the year under consideration. We also note that possession of the property was taken in the earlier years and the entire payments were also made in the earlier years and, therefore, effective transfer had taken place in the earlier years, hence the provisions of section 56(2)(x) of the Act are not applicable to the assessee under consideration. We also observe that provisions of section 56(2)(x) of the Act are applicable with effect from 01.04.2017, which are not applicable to the assessee under consideration as the payments by cheques were made by assessee in F.Y. 2003-04 and the possession was also taken in Financial Year (FY) 2003-04 and the documents were also registered in Financial Year (FY) 2003-04, later on, to correct the defect in the title of the property, the assessee has deposited additional stamp duty. Just to correct the defect in the title of the property does not mean that assessee has purchased new property in the year under consideration. Thus, we note that order passed by the assessing officer should not be erroneous.

15. We note that the transfer of property as per the provisions of section 2 (47) of the Act (Purchase of property) had already taken place in the A.Y. 2004-05 by way of full payments by cheques as well as possession thereof. Since the property was already transferred in earlier year, the provisions of section 56(2)(x) of the Act were not invoked by assessing officer while passing order u/s 143(3) of the Act. We also note that assessing officer conducted sufficient enquiry during the assessment proceedings about the issue raised by Id PCIT, by way of issuing notices to the assessee. The assessing officer had information regarding purchase of balance share of the said plot and the issue was raised during assessment proceedings, regarding application of provisions of section 56(2)(x) of the Act, however, after considering the reply of the assessee

dated 24.06.2020 (page no. 207 & 208 of the paper book), no addition was made by the assessing officer. Therefore assessment order is not erroneous, as the provisions of section 56(2)(x) were duly considered for the balance 1/2 share of property. So far as the original 1/2 share of the property is concerned, the payment was made by cheques in the A.Y. 2004-05, the same was not required to be looked into. We note that the provisions of section 56(2)(x) of the Act are not applicable in the year under consideration and therefore, order passed by the assessing officer is not prejudicial to the interest of revenue.

16. We note that, vide para 7 of order of Id PCIT, wherein Id PCIT has given a general direction to the assessing officer, stating as follows:

“.....the instant case was set aside with a direction to the Assessing Officer to pass fresh assessment order after taking into consideration the issues as may have been already considered together with the issue discussed herein above also...”

17. Therefore, we note that Id PCIT directed the assessing officer to examine the issue raised by him in his 263 order and the issues already considered by the assessing officer while framing the assessment order. According to us, such general direction is bad in law, and order of Ld. PCIT in respect of issues already examined by Assessing Officer should be quashed.

18. We note that Coordinate Bench of ITAT Mumbai in the case of Shri Azad Zabarchand Bhandar, ITA No. 7800/Mum/2011, order dated 26.04.2013 held that in order to bring the sale proceeds to tax under the head “Capital Gains” transfer of the property has to take place in the relevant previous year and in order to come to the conclusion that the transfer has taken place within section 2(47)(v) of Income Tax Act r.w.s. 53A of Transfer of Property Act twin conditions have to be satisfied, i.e.

execution of the agreement and handing over of possession. The detailed findings of the Coordinate Bench is reproduced below:

“11. We have carefully considered the rival submissions and perused the record. At the outset it may be stated that there is dichotomy in the approach of the tax authorities; on one hand the sale proceeds are sought to be taxed in A.Y. 2006-07 implying thereby that the transfer took place in this year and not on 16.03.2005 but on the other hand, for the limited purpose of disallowing the claim of exemption under section 54EC of the Act, the AO as well as the CIT(A) proceeded on the presumption that 16.03.2005 is the date of transfer and reckoned from that date the investment is to be made within six months and hence the investment made in December, 2005 cannot be considered for the purpose of seeking benefit under section 54EC of the Act. It is equally important to notice that the AO seeks to tax the income on sale of the property in the year under consideration on protective basis by observing that “consequently the substantive addition may be made in A.Y. 2005-06 as per the law”. The expression “may be made” in itself indicates that the AO is not sure as to whether the transfer took place in A.Y. 2005-06 or not and in fact his subsequent action/inaction of not initiating any proceeding in respect of A.Y. 2005-06 speaks volumes about the conduct of the AO. In fact it is a matter of serious concern.

12. Article 265 of the Constitution of India postulates that there cannot be levy of tax without authority of law. It is not in dispute that capital gains tax can be levied only in the year when the transfer of immovable property takes place. If the AO is of the firm view that the transfer had taken place on 16.03.2005, for capital gains tax purpose, then it is mandatory to bring to tax, the said income, in A.Y. 2005-06 in which event he ought to have excluded the income offered to tax in A.Y. 2006-07, having observed that reckoned from the date of transfer the assessee has not invested, within six months, the sale proceeds in the long term specified assets. The first appellate authority, in para 3.5, impliedly accepts that in the instant case the date of agreement is different from the date of possession; in his opinion the moot point is whether the date of agreement, i.e. 16.03.2005 or the date of possession, i.e. 20.09.2005 is the relevant date for computing capital gains tax. It is well settled that in order to bring the sale proceeds to tax under the head “Capital Gains” transfer of the property has to take place in the relevant previous year and in order to come to the conclusion that the transfer has taken place within section 2(47)(v) of Income Tax Act r.w.s. 53A of Transfer of Property Act twin conditions have to be satisfied, i.e. execution of the agreement and handing over of possession. It is not necessary that both conditions should be satisfied in one year but at the same time only upon satisfying the second condition also it would amount to transfer. In this case also there is no dispute that the agreement is dated 16.03.2005 whereas with regard to the date of possession the learned CIT(A) assumed that it took place on 20.09.2005, which falls in the financial year relevant to A.Y. 2006-07. In the peculiar nature of this case, if at all the plea of the AO has to be accepted, it would amount to holding that the transfer had not taken place in this year and consequently the sale proceeds cannot be assessed in this year, but the AO having not initiated any proceedings with respect to A.Y. 2005-06 till date the impugned income would escape taxability even in A.Y. 2005-06

and it would really be prejudicial to the interest of the Revenue. Under this peculiar circumstance we have to rationally interpret the findings of the AO as well as the CIT(A) in the backdrop of the clauses in the agreement. As rightly pointed out by the learned counsel for the assessee, the Hon'ble Bombay High Court in the case of Chatrubhuj Dwarkadas Kapadia (supra) has decided the issue by reading the terms of the contract as a whole and by specially taking note of the fact that in the guise of agreement of sale a development agreement was contemplated whereby the developer was held to have taken possession on account of the irrevocable licence granted to him to enter upon the property whereas in the instant case no such finding was given by the tax authorities. In fact the learned CIT(A) opined that the date of handing over of possession in the instant case was 20.09.2005, and based on this factual premise it has to be held that the transfer had taken place in the previous year relevant to A.Y. 2006-07. Reckoned from the date of possession, i.e., 20.09.2005, the assessee having invested the money within six months in long term specified asset, the benefit of exemption under section 54EC deserves to be extended to the assessee in the instant case. In substance, we hold that the assessee is entitled to exemption under section 54EC of the Act in the year under consideration and we direct the AO accordingly. This disposes of ground No. 1, 2 & 3 set, out in the Revised Grounds of Appeal”

19. Now, let us take the guidance of judicial precedents laid down by the Hon'ble Apex Court in *Malabar Industries Ltd. vs. CIT* [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble

Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. “*prejudicial to the interest of the revenue*” has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue **“unless the view taken by the Assessing Officer is unsustainable in law”**.

20. Taking note of the aforesaid dictum of law laid down by the Hon’ble Apex Court, in the case of Malabar Industries Ltd. (supra), we note that the transfer of property as per the provisions of section 2 (47) of the Act had already taken place in the A.Y. 2004-05 and ½ property in F.Y.2010-11, by way of full payments by cheques as well as possession thereof. The provisions of section 56(2)(x) of the Act are not applicable in the year under consideration. A mere observation that no proper details have been obtained, cannot be sufficient to come to a conclusion that the AO did not make proper and adequate inquiries which he ought to have made in the given facts and circumstances of this case. In fact, the assessing officer has conducted sufficient enquiry during the assessment proceedings. In the conclusion, we are of the view that none of the reasons set out by the CIT for invoking the jurisdiction u/s 263 of the Act are sustainable. The impugned order of the CIT has to be quashed for the reason that order of the AO sought to be revised in the impugned order was neither erroneous nor prejudicial to the interest of the revenue for the reason of any lack of inquiry that the AO ought to have made in the given

facts and circumstances of the case. We accordingly quash the order u/s. 263 of the Act and allow the appeal of the assessee.

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

Order pronounced on 06/06/2023 in the open court.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

सूरत /Surat

दिनांक/ Date: 06/06/2023

SAMANTA

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

By Order

// TRUE COPY //

Assistant Registrar/Sr. PS/PS
ITAT, Surat