

## **Gift of Immovable Property which is not a Capital Asset – Taxability Thereof**

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Section 122 of Transfer of Property Act, 1882 defines the phrase 'Gift'. Vide such section, 'gift' is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

The taxation of 'gift' was one interesting journey. In order to deal with taxation of gifts, the legislature has introduced, the Gift Tax Act, 1958 with effect from 01.04.1958. The said act was in effect till 30.09.1998 and been rescinded later. The important aspect of Gift-Tax Act was the tax was on the donor. In 2004, the legislature has re-introduced the taxation of gifts in specified circumstances by insertion of Section 56(2)(vii) in the Income Tax Act, 1961 (Act/Income Tax Act). Vide Section 56(2)(vii), the tax on gifts received was to be paid by donee in specified circumstances.

Section 56(2)<sup>1</sup> has been amended many a times to tax and exclude certain transactions. The same is summarised at the end of this article for providing the snapshot of timelines for the benefit of readers.

Section 56(2) (vii)/(x) covers transactions where an 'immovable property' is gifted. It lays down taxation in cases where an 'immovable property' is received without or inadequate consideration except in certain circumstances as detailed in the table at the end of this article.

In this article, we try to analyse, whether 'immovable property' for the purposes of Section 56(2)(vii)/(x) covers only 'capital assets' as defined in Section 2(14) or covers all types of 'immovable property'. In simpler words, an immovable property which was not a capital asset for the purposes of taxability of capital gain, is also subjected to taxation under Section 56(2) or for the purposes of taxation under Section 56(2), the immovable property should satisfy the definition of capital asset?

The term 'immovable property' is not defined for the purpose of Section 56(2). However, the term 'Property' is defined for the purpose of this clause. The term 'Property' "means the following **capital asset** of the assessee, namely immovable property being land or building or both, shares and securities, jewellery, archaeological collections, drawings, paintings, sculptures, any work of an art or bullion.

From the above definition, it is evident that 'property' covers only the immovable properties which are in the nature of 'capital asset'. However, Section 56(2) (vii)/(x) has used the word **any** immovable property while fixing the taxation. Now, the challenge is whether we should

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<sup>1</sup> Clause (v) and (vi) covers only transaction involving money.

interpret the phrase 'any' in light of 'capital asset' or 'any' in its normal meaning. If we adopt the former, only such immovable properties which are in nature of capital assets are covered under the ambit of Section 56(2). If we adopt the latter, any kind of immovable property is covered and there is no necessity to go and examine whether such immovable property would fit under the definition of capital asset.

In our view, the latter is more accurate keeping the intent of the legislature in the background. That is to say, the immovable property which is trying to be taxed under Section 56(2) need not be a capital asset, despite of the fact that the phrase 'property' uses the phrase 'capital asset'.

However, it can be argued that the phrase 'capital asset' has been defined vide Section 2(14) is not only for the purposes of capital gains and for the entire purposes of the Act and hence the immovable property which is not in nature of capital asset is not taxable under Section 56(2). However, such a view narrows the ambit of Section 56(2) and expanding the exclusion list provided in said section. If that was the intention of the legislature, the exclusions provided in Section 56(2) should have specifically mentioned that only capital assets are covered and all other are excluded. Nothing of such sort, in our view all the immovable properties, whether or not capital assets, are subjected to tax under Section 56(2).

Further, Section 49(4) which provides for cost of acquisition of capital asset being a **property**, the value of which has been subject to tax inter-alia under Section 56(2)(vii)/(x) shall be the value which has been considered for taxing income under those clauses. Here also the reference is only to property and not immovable property. Hence, to tax income under above clauses as far as immovable property is concerned it need not be a capital asset.

Further, Section 2(1A) excludes from the scope of 'agricultural income' any gains on transfer of urban agricultural land. So, gains from rural agriculture land is an agriculture income as result exempt from tax by virtue of provisions of Section 10(1). But the same benefit was not extended to the person who receives rural agricultural land at a bargained price and be taxable under 56(2)(vii)/(x). Hence, we conclude that ambit of Section 56(2) is wider and cannot be restricted by any means except as specified under the Act.

We also wish to bring to your kind attention that the subject issue was discussed by Honourable ITAT, Jaipur<sup>2</sup> recently. The question of receipt of agricultural land which is not 'capital asset' as per Section 2(14) is subject to provisions of Section 56(2)(vii) is raised before the Honourable Tribunal. The Honourable Tribunal held as under:

*On reading of provisions of 56(2)(vii)(b), we find that it refers to any immoveable property and the same is not circumscribed or limited to any particular nature of immoveable property.*

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<sup>2</sup> ITO vs Shri Trilok Chand Sain – ITA No. 449/JP/2018- TS-8-ITAT-2019

*It refers to any immovable property which by its grammatical meaning would mean all and any property which is immovable in nature, i.e, attached to or forming part of earth surface.*

***Whether such agriculture land falls in the definition of capital asset u/s 2(14) or whether such agriculture land is stock-in-trade of the assessee, in our considered view, are issues which cannot be read in the definition of “any immovable property” used in context of Section 56(2)(vii)(b) and are thus not relevant.***

**(emphasis supplied)**

**Summary of changes in Section 56 from 01.09.04 to till date**

<b>Section</b>	<b>Applicability</b>	<b>Taxability</b>	<b>Exclusions</b>
Sec 56(2)(v) [01/09/04 to 31/03/06]	Any sum of money received without consideration by Individual or HUF of more than Rs. 25,000/-	Whole of such sum	Sum received from Relatives/ By will/Inheritance/ On Contemplation of Death of Payer/on occasion of marriage of individual/from Local Authority/ Fund or Foundation referred to in Sec 10(23C)/ Trust or institution registered U/S 12AA
Sec 56(2)(vi) [01/04/06 to 30/09/09]	Any sum of money received without consideration by Individual or HUF of more than in aggregate of Rs. 50,000/-	Whole of such sum	Sum received from Relatives/ By will/Inheritance/ On Contemplation of Death of Payer/on occasion of marriage of individual/from Local Authority/ Fund or Foundation referred to in Sec 10(23C)/ Trust or institution registered U/S 12AA
Sec 56(2)(vii) [01/10/09 to 31/03/17]	Any sum of money received without consideration by Individual or HUF of more than in aggregate exceeding Rs 50,000/-	Whole of such sum	Sum/Property received from Relatives/ By will/Inheritance/ On Contemplation of Death of Payer/on occasion of marriage of individual/from Local Authority/ Fund or Foundation referred to in Sec 10(23C)/ Trust or institution registered U/S 12AA/ Transactions not regarded as transfer U/S 47(vicb) or (vid) or (vii)
	Any immovable property received by Individual or HUF without consideration or inadequate consideration with reference to Stamp Duty Value assessed or assessable more than of Rs.	<b>Without consideration-Stamp Duty Value</b>  <b>Inadequate Consideration-Difference</b>	

	50,000/- in both cases	between Stamp Duty Value and consideration paid	
	Any property, other than immovable property, received by Individual or HUF without consideration or inadequate consideration with reference to FMV of such property more than of Rs. 50,000/- in both cases in aggregate	<b>Without consideration-FMV</b> <b>Inadequate Consideration-</b> Difference between FMV and consideration paid	
Sec 56(2)(x) [01/04/17]	Sum of money received by any person without consideration by any person in aggregate of Rs. 50,000/-	Whole of such sum	
	Any immovable property without consideration or for inadequate consideration with reference to stamp duty value assessed or assessable more than Rs. 50,000/- in both cases	<b>Without Consideration-</b> Stamp Duty Value <b>Inadequate Consideration-</b> Difference [being more than 5% of the consideration] between stamp duty value and the consideration paid]	Sum/Property received from Relatives/ By will/Inheritance/ On Contemplation of Death of Payer/on occasion of marriage of individual/from Local Authority/ Fund or Foundation referred to in Sec 10(23C)/ received by fund or trust or institution referred to in Sec 10(23C)(iv)(v)(vi)(via)Trust or institution registered U/S 12AA/ Transactions not regarded as transfer U/S 47(iv)(v)(vi)(via)(viaa)(vib)(vic)(vica)(vicb) or (vid) or (vii)
	Any property, other than immovable property, received by any person without consideration or inadequate consideration with reference to FMV of such property more than of Rs. 50,000/- in both cases in aggregate	<b>Without consideration-FMV</b> <b>Inadequate Consideration-</b> Difference between FMV and consideration paid	