

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, CHENNAI

**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.1737/CHNY/2019
Assessment Year: 2015-16**

Deputy Commissioner of Income Tax, Non-corporate Circle-2(1), Chennai Room No. 320, 3rd floor, Wanaparthi Block, Aayakar Bhavan, 121, M G Road, Nungambakkam, Chennai-34.	Vs.	Shri Jayapal Sanjay 78/132, Dr. Radhakrishnan Salai, Mylapore, Chennai-600004. (PAN: AAVPS9647J)
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Suhrith Parthasarathy, Advocate

Respondent by : Shri AR V Sreenivasan, Addl. CIT

Date of Hearing : 25.05.2022

Date of Pronouncement : 19.08.2022

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal by the revenue is directed against the order of Id. CIT(A)-2, Chennai vide ITA No. 161/2017-18/(A)-2 dated 27.03.2019 passed against the order of ACIT, Non-corporate Circle-2, Chennai dated 29.12.2017 u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') for A.Y. 2015-16.

2. Before us Shri Suhrith Parthasarathy, Advocate appeared on behalf of the assessee and Shri AR V Sreenivasan, Addl. CIT appeared on behalf of the revenue.

3. Grounds of appeal taken by the Revenue are reproduced as under:

"The order of the Ld. CIT(A) is contrary to law, facts and circumstances of the case.

1.1. The CIT(A) erred in allowing the interest paid on security deposit to M/s. Ramaniyam Real Estate Pvt. Ltd.

1.2. The CIT(A) failed to obtain the copy of the agreement for sale entered between the assessee and M/s. Synergy Mura Realty Private Limited which led to the cancellation of the joint development agreement entered between the assessee and M/s. Ramaniyam Real Estate Pvt. Ltd.

1.3. The CIT(A) ought to have appreciated that the assessee and his family members owned the land in question and were also the partners in the firm M/s. Sri Arvind Enterprises which had occupied the said land on lease.

1.4 The CIT(A) failed to appreciate that the interest payment made due to cancellation of JDA is not an expenditure incurred wholly and exclusively in connection with the transfer of the property to M/s. Synergy Mura Realty Private Limited leading to capital gains and hence cannot qualify for deduction u/s. 48 of the Act.

1.4. The facts and circumstances of the relied upon decision in the case of Gopeenath Paul & Sons Vs. DCIT (278 ITR 240) is distinguishable from that of the case on hand.

2.1 The CIT(A) erred in allowing the compensation paid to Sri Aravind Enterprises and M/s. B. J. Textile Company Ltd. when major portion of the shares in both the entities are held by the assessee and his family members.

2.2 The CIT(A) failed to appreciate that the assessee had not furnished any documentary evidence for payment of the compensation to M/s. Sri Aravind Enterprises and M/s. B. J. Textile Company Ltd. which has been paid in the earlier assessment years and the same is claimed by the assessee only during the present assessment year in question.

3. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the Ld. CIT(A) be set aside and that of the AO restored.”

3.1 Ld. Sr. DR placed a written submission containing three pages along with copies of judicial precedents relied on vide submission dated 30.03.2022. We also note that Ld. Counsel for the assessee made elaborate written submission along with paper book containing 307 pages, all placed on record.

4. Brief facts as culled out from records are that assessee is an individual and filed his return on 20.08.2016 reporting total income of Rs.1,34,53,470/-, deriving income from sale of land which was offered as long term capital gain. The property sold during the year comprised

of a piece and parcel of land to an extent of 6.50 acres situated at Sholinganallur Village, Saidapet Taluk, Chengapattu District which is jointly owned by the assessee along with his mother Smt. Hansa Jayapal and sister Smt. P. K. Banumathi. The said land property was sold vide registered sale deed dated 15.12.2014. Total sale consideration for the same was received at Rs.71.50 Cr. out of which, share of the assessee is 30.93% amounting to Rs.22,11,49,500/-. While computing the long term capital gain on the impugned sale transaction, assessee deducted a total sum of Rs.14,14,46,699/- u/s. 48 of the Act which were disallowed by the Ld. AO. The amounts claimed as deduction by the assessee are –

(a)	Rs.2,55,57,417/-	Payments to Ramaniyam Real Estates P. Ltd. (in short 'Ramaniyam') as compensation for cancellation of an agreement for development of the property for releasing the encumbrance on the property sold
(b)	Rs.7,58,65,862/-	Payments to M/s. Sri Aravind Enterprise (in short 'SAE') as compensation for termination of tenancy/leasehold rights and vacating the property sold
(c)	Rs.4,00,23,420/-	Payments to M/s. B. J. Textiles Company Ltd. (in short "BJT") as compensation for termination of tenancy/leasehold rights and for loss of business

5. While computing the capital gain tax, assessee worked out the long term capital gains by taking into consideration his portion of sale consideration and corresponding expenses details of which are tabulated in para 2.3 of the Ld. AO's order and the same is reproduced as under:

Sl. No.	Description	Amount (Rs.)	Amount (Rs.)
1.	Sale consideration for capital gain purpose		22,11,49,500
	<i>Less: Expenses on transfer</i>		
	(i) Commission paid to DTZ International Property Advisors Pvt. Ltd.	24,84,836	
	(ii) Interest paid on Security Deposit to	2,55,57,417	

<i>Ramaniyam Real Estates P. Ltd.</i>			
	<i>(iii) Compensation paid to Sri Aravind Enterprise (AY 13-14)</i>	4,74,15,690	
	<i>(iv) Compensation paid to Sri Aravind Enterprise (AY 14-15)</i>	93,41,618	
	<i>(v) Compensation paid to Sri Aravind Enterprise (AY 14-15)</i>	1,91,08,554	
	<i>(vi) Compensation paid to BJ Textiles Company Ltd. (AY 14-15)</i>	2,30,11,920	
	<i>(vii) Compensation paid to BJ Textiles Company Ltd. in AY 15-16</i>	1,70,11,500	
	TOTAL		14,38,71,535
	<i>Net consideration</i>		7,72,17,965
	<i>Less: Indexed cost of Acquisition</i>	11,70,551	
	<i>Less: Indexed cost of improvement</i>	1,41,03,943	1,52,74,494
	<i>Taxable LTCG</i>		6,19,43,472

6. In the assessment completed by Ld. AO u/s. 143(3) of the Act, claim of deduction made by the assessee towards interest paid on security deposit to Ramaniyam for clearing the encumbrance and compensation paid to SAE and DTZ were disallowed. Ld. AO recomputed the long term capital gain after considering the disallowance made by him which is tabulated in para 2.5 of the impugned order and is reproduced as under:

<i>Sl. No.</i>	<i>Description</i>	<i>Amount (Rs.)</i>	<i>Amount (Rs.)</i>
1.	<i>Sale consideration for capital gain purpose</i>		22,11,49,500
	<i>Less: Expenses on transfer</i>		
	<i>(i) Commission paid to DTZ International property Advisors Pvt. Ltd.</i>	24,84,836	24,84,836
	<i>Total Net consideration</i>		21,86,64,664
	<i>Less: Indexed cost of Acquisition</i>	11,70,551	
	<i>Less: Indexed cost of improvement</i>	1,41,03,943	1,52,74,494
	<i>Taxable LTCG</i>		10,33,90,170

7. SAE is a partnership firm having following as its partners:

<i>Sl. No.</i>	<i>Name of Partner</i>	<i>% of Holding</i>
1.	<i>B J Textile Company Ltd.</i>	70
2.	<i>Sanjay Jayapal</i>	10
3.	<i>P. K. Banumathi</i>	10

4.	<i>Hansa Jayapal</i>	10
	<i>Total</i>	100

7.1 Further, BJT is a company and its shareholding pattern is tabulated as under:

<i>Sl. No.</i>	<i>Shareholder</i>	<i>% of Holding</i>
1.	<i>Sanjay Jayapal</i>	37.29
2.	<i>P. K. Banumathi</i>	39.05
3.	<i>Hansa Jayapal</i>	22.63
4.	<i>Others</i>	01.03
	<i>Total</i>	100.00

8. From the above holding structures of both SAE and BJT, admittedly, it is a fact that both the entities are related parties vis-a-vis the assessee. In the case of BJT, all the three persons i.e. the assessee, his mother and the sister jointly hold 99% of shares in the said company. Similarly, in the case of SAE, the three persons including assessee taken together have 30% share in its profits and loss and remaining 70% is by BJT, where in turn 99% shareholding is by the same three persons. All the three co-owners including the assessee computed the long term capital gain on the sale of land for their respective shares in the sale consideration of the impugned property and offered it to tax in their respective returns of income. The computation of LTCG is reproduced as under:

COMPUTATION OF CAPITAL GAINS - ANNEXURE						
Capital Asset : At Sholinganallur House Site, Chennai - 600 119.						
Survey No.496						
Sub division nos.7C2B, 8A(part), 8A (part), 9A,9B, 9C,9D, 10A, 10B1, 10B2A2, 10B2A3, 10B2A3, 10B2A4 and 10B2B						
Area : 6.50 Acres						
Year Of Transfer : 2014-2015 (15.12.2014)						
Year Of Acquisition Of Property: 1989-1990 (18.01.1990)						
	Total	PK Banumathi	Sanjay Jayapal	Hansa Jayapalan	Page No.	
	6.5	2.56	1.93	2.01		
	100%	39.38%	30.93%	29.69%		
1 Sale Consideration	715000000					
2 Sale Consideration U/s 50C Valuation	715000000					
Sale Consideration for Capital gain Purpose	715000000	281567000	221149500	212283500	2-36	
Less : Expenses on Transfer						
1 Commission paid to DTZ International property Advisors pvt ltd	8033740	3163687	2484836	2385217	37	
2 Interest Paid on Security Deposit to Ramaniyam Real Estates Pvt ltd	82629943	32539640	25557417	24532806	16,38-60	
3 Compensation paid to Sri Arawind Enterprises (AY 13-14)	153300000	60369540	47415690	45514770	61-71	
4 Compensation paid to Sri Arawind Enterprises in AY 14-15	30202450	11893725	9341618	8967107		
5 Compensation paid to Sri Arawind Enterprises in AY 15-16	61780000	24328964	19108554	18342482		
6 Compensation paid to B] Textiles Company Ltd in AY 14-15	74400000	29298720	23011920	22089360	72-78	
7 Compensation paid to B] Textiles Company Ltd in AY 15-16	55000000	21659000	17011500	16329500		
Net Consideration	Total - A	249653867	98313724	77217965	74122258	
8 Indexed Cost of Acquisition		4293964	1875371	1170551	1248042	79-85
9 Indexed Cost of Improvement		32480297	7333651	14103943	11042701	86-119
	Total - B	36774261	9209022	15274494	12290742	
	Taxable LTCG (Total A-B)	212879606	89104702	61943472	61831515	

9. For the disallowance made by the Ld. AO, assessee went into appeal before the Ld. CIT(A) and claimed that interest paid on security deposit to Ramaniyam for an amount of Rs.2,55,57,417/- was in respect of clearing the encumbrance owing to cancellation of the Joint Development Agreement (in short "JDA") which was entered into with

Ramaniyam for the purpose of development of the impugned property. It was claimed by the assessee that the JDA was cancelled owing to specific condition warranted by the purchaser of the impugned land. It was submitted by the assessee that Ramaniyam was the agreement-holder and was interested in continuing the development project whereas the land owners including the assessee had to make their obligations and were hard pressed for funds since an enquiry to purchase outright had come before them with good price factor and cancelling the JDA was a pre-requisite for the sale. It was also submitted that the land owners including the assessee were in need of funds to settle the leaseholders i.e. SAE and BJT to vacate the land on the promise for payment of compensation. It was thus submitted that the interest was paid for clearing the encumbrance created in respect of development of the impugned land under the JDA with Ramaniyam. By considering the submissions made by the assessee in this respect, Ld. CIT(A) allowed the claim of interest payment as a deduction u/s. 48(i) of the Act by holding that payment of interest to Ramaniyam had to be seen as '*clearance of an encumbrance*' on the capital asset of the assessee which is to be considered as an expenditure incurred wholly and exclusively in connection with the transfer of property since the payment was necessary to vacate it for transfer to the new purchaser i.e. Synergy Mura Realty Private Limited (in short "Synergy").

9.1 In respect of claim of compensation as deduction u/s. 48(i) of the Act, assessee submitted before the Ld. CIT(A) that SAE and BJT were operating their respective businesses from the said impugned land wherein assessee along with his mother and sister had controlling interest in both the entities (holding structures tabulated above). It was submitted that if the land on which their businesses were operating was to be sold then their business operations will get hampered resulting into significant business losses to them. It was also submitted that in

the case of BJT, there would be a possibility that minority shareholders (less than 1% of the total shareholding i.e. 93,000 shares out of total 1 Crore shares of Re. 1/- each) may object on the sale of land. Assessee thus made both the entities agree to receive compensation for vacating the impugned land and obtain its peaceful possession for its sale. Accordingly, it was contended by the assessee that the compensation paid is an allowable expenditure incurred wholly and exclusively in connection with the transfer u/s. 48(i) of the Act and ought to be allowed. Considering the submissions made by the assessee, Ld. CIT(A) allowed the claim of the assessee in respect of compensation paid to SAE and BJT for vacating the land and giving its peaceful possession by holding that minority shareholders could tarnish the image of the management which may obstruct the sale transaction of the impugned property. He further observed that since the new purchaser of the land insisted on vacant and un-encumbered possession as part of the conditions for purchase of land, the compensation so paid for obtaining the un-encumbered land is an allowable expenditure in connection with the transaction.

9.2 Aggrieved, the revenue is in appeal before the Tribunal.

10. Ld. Sr. DR, by referring to his written submission placed on record along with judicial precedents mentioned therein, strongly submitted that there is diversion of sale proceeds towards redeeming the interest of related parties i.e. SAE and BJT and that of Ramaniyam and, therefore, the amount so diverted is exigible to capital gains tax. Ld. Sr. DR reiterated the facts relating to the compensation of SAE and BJT as also the fact of JDA set up with Ramaniyam. Ld. Sr. DR pointed to the fact that out of total amount of Rs.24.52 Cr. claimed to have been paid to SAE, Rs.20 Cr. had been paid by August, 2012. Similarly, Rs.2.5 Cr. had been paid to BJT by August 2012. He thus, submitted that on the

plea of the assessee that minority shareholder may tarnish the image of the management, these amounts were paid much prior to the receipt of letter from the minority shareholder. He also submitted that substantial amounts have already been paid to the two entities wherein the three owners including the assessee hold more than 99% ownership and, therefore, he strongly contended that payments made in the nature of compensation to the two entities namely, SAE and BJT did not qualify as cost of improvement or cost of transfer and thus, the assessee is not eligible to claim deduction from the sale consideration u/s. 48(i) of the Act.

10.1 In respect of payment made to Ramaniyam towards interest on security deposit for the purpose of clearance of encumbrance as held by Ld. CIT(A), Ld. Sr. DR strongly submitted that this finding is incorrect since the land was already in the possession of the assessee and the other two co-owners as they together owned more than 99% of the concerns and no prudent person will shell out more than 50% of the sale consideration to other unrelated concerns in such circumstances. He further pointed out that assessee could not make out any contractual liability to shell out the monies paid to SAE and BJT in the form of compensation as according to him it amounts to self created liability which cannot be allowed as a deduction u/s. 48(i) of the Act.

10.2 For his submissions and contentions that since ultimate beneficiaries for all these payments claimed as deduction are none other than the three co-owners including the assessee, Ld. Sr. DR placed reliance on the decision of Hon'ble jurisdictional High Court of Madras in the case of *Smt. D. Zeenath in TCA No. 2582 of 2006 dated 03.04.2019*. Relevant extracts from the said decision are reproduced as under:

“2. This appeal had been admitted on 23.06.2008, on the following two substantial questions of law:

“1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in not appreciating that no part of the consideration for sale was received by the appellant and same was directly paid to the Bank by the purchaser in discharge of the mortgage amount and therefore no capital gains arises in the hands of the appellant?”

2. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in not holding that there was a diversion of the sale proceeds towards redeeming the interest of the mortgagor and therefore the amount so diverted was not liable to capital gains tax?”

4. The property had been offered as collateral security in a loan obtained by M/s. M.O. Hassan Kuthoos Maricar Pvt. Ltd., from State Bank of India, Pondicherry, to an extent of Rs.3.75 Crores, and the assessee and the other two co-owners stood as guarantors, for the said loan. Mortgage was by deposit of title deeds. No registered mortgage deed was executed. Since the loan was not repaid, the assessee and the other two co-owners consented for sale of the property by Bank to realize its dues. This was purchased by M/s. Royal Park, Tiruchirapalli, for a total consideration of Rs.1,96,18,200/-. The sale was effected during the Assessment Year 1995-1996. The total sale consideration was paid to the Bank by the purchaser M/s. Royal Park, Tiruchirapalli.

27. In the present case, to reiterate the facts, the assessee Smt. D. Zeenath along with two other co-owners, namely, Smt. S. A. Kathija Nachial and Smt. Zubaida had originally purchased land measuring 43,596 sq.ft. at Saram Village, Pondicherry by two sale deeds dated 11.07.1980 and 04.02.1981 for a total consideration of Rs.2,01,000/-. They had offered the said property as collateral security towards the loan of Rs.3.75 Crores obtained by M/s. M.O. Hassan Kuthoos Maricar Pvt. Ltd., with State Bank of India, Pondicherry. Mortgage was by deposit of title deeds. In a mortgage by deposit of title deeds, the mortgagee, in this case, the State Bank of India, Pondicherry, does not acquire title, much less overriding title to the property. The charge created over the property was to the extent of the mortgage amount or not to the extent of value of the property. Since the mortgage had been created voluntarily, the balance sale consideration paid to discharge the mortgage would also be the total value of the property and capital gains is to be computed on the full value of consideration received or agreed as a result of transfer of the capital assets.

37. In the present case, mortgage deed was never registered and State Bank of India, Pondicherry did not have a right to bring the property to sale. The assessee in the present case, continued to have title over the property along with her co-owners. They brought the property to

sale through Bank. In Thressiamma Abraham's case, the mortgagee/financier namely, Kerala Financial Corporation sold the property in auction and realized the sale consideration. Thressiamma Abraham did not voluntarily sell the property.

38. *In view of the above reasonings, we hold that in the present case, there was no diversion of sale proceeds by virtue of overriding title, but on the contrary, there was only a mere application by the owners themselves of the profits realized on the sale of land towards the discharge of loan obligations of same firm. We also hold that the assessee cannot claim any part of such application as cost of acquisition for the purpose of computing capital gains as per the provisions of Section 48 of the Act. We hold that the ratio laid down in the Hon'ble Supreme Court in the case of V.S.M.R. Jagadishchandran (Decd.) (cited supra) and of the Madras High Court in N.Vajrapani Naidu (cited supra) and in Sri Kanniah Photo Studio (cited supra) which followed the ratio in the judgment of R.M.Arunachalam (cited above) laid down the correct position of law.*

39. *We therefore hold that the Authorities below had correctly held that the claim of the assessee had to be rejected. We answer the substantial questions of law framed against the Assessee and in favour of the Revenue. The appeal filed by the Assessee has no merits and consequently has to be dismissed.”*

10.3 He thus, strongly submitted that the order of Ld. CIT(A) is ought to be set aside and disallowance made by the Ld. AO be upheld.

11. Per contra, ld. Counsel for the assessee reiterated the submissions made before the authorities below which have already been noted in the above paragraphs.

12. We have heard the rival contentions and given our thoughtful consideration on the submissions made before us. Admittedly, it is a fact on record that long term capital gain which is the subject matter of present appeal, SAE and BJT are related parties vis-à-vis the assessee who are conducting their business operations from the land which has given rise to long term capital gains. The three co-owners of the land including assessee, holds substantial and significant share in the two entities controlling the entire affairs of SAE and BJT. It is also an undisputed fact that the share of the assessee in the sale transaction is

of 30.93% who has computed the long term capital gain by taking into consideration his proportion of expenses which are claimed to have been incurred wholly and exclusively in connection with the said transaction so also his share of cost of acquisition/cost of improvement (indexed) as contemplated u/s. 48 of the Act.

12.1 The moot points before us are in respect of claim of interest payment on security deposit towards clearance of encumbrance with Ramaniyam and payment of compensation to SAE & BJT for vacating the land and obtaining its peaceful possession for the purpose of completing the sale transaction, as allowable expenditure u/s. 48(i) of the Act for the purpose of computing the taxable component of long term capital gain.

12.2 In respect of payment of compensation to SAE & BJT, from the uncontroverted factual matrix we note that said claim made by the assessee as deduction u/s. 48(i) tantamount to diversion of sale proceeds to the related parties who are none other than the co-owners of the land sold under the impugned transaction including that by the assessee. To our mind, nature of payment which has been claimed to be compensation to SAE and BJT, is nothing but compensation made to the self since 99% of the share/shareholding is with the co-owners including the assessee. We also note that occasion of getting the land vacated will arise only when it is occupied by another third party which is not so in the present case before us since here the land is occupied by the entities/concerns owned and controlled by the co-owners including the assessee (holding structures already tabulated above). Further, the observation raised in respect of minority shareholders was only a possibility. Also, there is no clarity from the material placed on record as to how the issue relating to minority interest was resolved or were the minority shareholders also compensated in the similar

manner. Further, reliance has been placed by the assessee on the legal opinion obtained from an advocate in respect of the impugned transaction of sale. On perusal of the said opinion, we observe that there is nothing opined in the said opinion on the legal obligations and legal consequences and recourse available except for general commercial possibilities which any prudent businessman would consider while executing such business related transaction.

12.3 Ld. Counsel of the assessee laid emphasis on the effect which the businesses of the two entities had which in our understanding is the explanations on the business dynamics. In respect of claim towards payment of compensation to SAE and BJT, we note that ld. Counsel of the assessee contended that compensation has been paid to the two entities to cover up their loss of business for vacating the land. Assessee has furnished charts giving details of return of income and the profits as also their net-worth for the years ending on 31.03.2012 to the year ending on 31.03.2018 which are placed in the paper book at pages 36 and 63, both of which are reproduced as under:

SRI ARAVIND ENTERPRISES
No: 4/24, BEACH ROAD, KAPALEESHWARA NAGAR, NEELANKARAI, CHENNAI - 600041

PARTICULARS	31.03.2012	31.03.2013	31.03.2014	31.03.2015	31.03.2016	31.03.2017	31.03.2018
Income Returned	17,12,100	4,79,610	-1,15,930	0	81,330	-8,10,800	-38,271
Total Tax	5,29,040	1,72,434	0	0	10,494	0	0
Turnover	20,22,88,018	2,56,68,825	2,20,95,008	2,05,11,026	33,85,694	0	0
Less: Purchases	6,43,47,633	42,01,168	37,03,208	45,45,634	20,10,363	1,22,008	0
Profit	13,79,40,385	2,14,67,657	1,83,91,800	1,59,65,392	13,75,331	-1,22,008	0
Add: Other Income	4,11,71,678	5,55,20,619	1,30,09,537	5,65,141	2,43,102	1,07,509	16
Less: Other Expenses	17,72,37,807	7,84,49,000	3,24,34,995	1,67,55,759	15,37,100	7,96,300	38,287
Less: Loss on Sale of Assets	0	0	0	2,61,50,899	0	0	0
Less: Provision for Taxation	0	1,48,196	51,800	0	0	0	0
Net Profit	18,74,256	-16,08,920	-10,85,458	-2,63,76,125	81,333	-8,10,799	-38,271
Net Worth	11,77,46,468	11,03,31,484	8,92,51,698	2,66,90,939	10,00,09,303	10,66,86,577	10,70,52,927

B.J. TEXTILES COMPANY LIMITED
78 / 132, DR. R.K. SALAI, MYLAPORE, CHENNAI - 600 004.

PARTICULARS		31.03.2012	31.03.2013	31.03.2014	31.03.2015	31.03.2016	31.03.2017	31.03.2018
Income Returned		1,07,15,430	-1,42,05,967	-3,78,020	-3,53,62,332	-3,84,276	-9,24,727	-
Total Tax		33,11,070	-	-	-	-	-	-
Turnover	A	19,23,23,102	10,65,10,464	16,10,55,305	9,29,03,134	-	-	-
Less : Cost of Material Consumed	B	6,17,68,515	2,09,42,664	8,46,85,627	6,82,92,682	-	-	-
Profit	A - B (C)	13,05,54,587	8,55,67,800	7,63,69,678	2,46,10,452	-	-	-
Add : Other Income	D	16,39,680	12,68,299	3,50,81,280	5,68,93,041	30,51,817	2,99,177	4,70,893
Less : Other Expenses	E	12,31,75,618	11,26,12,224	12,05,69,724	10,76,41,652	34,36,093	12,23,904	2,61,97,254
Less : Tax Expenses	F	26,67,853	-31,39,527	-	-	-	-	-
Net Profit	C + D - E - F	63,50,796	-2,26,36,598	-91,18,766	-2,61,38,159	-3,84,276	-9,24,727	-2,57,26,361
No. of Shares		1,00,00,000	1,00,00,000	1,00,00,000	1,00,00,000	1,00,00,000	1,00,00,000	1,00,00,000
Earning Per Share		0.64	-2.26	-0.91	-2.61	-0.04	-0.09	-2.57
Net Worth		13,13,86,040	10,87,49,442	9,96,30,676	7,34,92,515	7,31,08,239	7,21,83,512	4,49,57,151
No. Of Shares		1,00,00,000	1,00,00,000	1,00,00,000	1,00,00,000	1,00,00,000	1,00,00,000	1,00,00,000
Net Worth per Share		13.14	10.87	9.96	7.35	7.31	7.22	4.50

12.4 From the perusal of the above two charts, we note that prior to the impugned year AY 2015-16, in the two immediately preceding years ending on 31.03.2013 and 31.03.2014, the net profit reported in both the entities is that of a loss scenario. Both the entities had already been gone into losses prior to the date of sale of land in the impugned year and, therefore, the contentions made by the ld. Counsel of the assessee that sale of land by the co-owners including the assessee would lead to suffering of business losses to the two entities does not stand correct on the strength of verifiable facts placed in the two charts reproduced above.

12.5 In respect of claim of interest paid to Ramaniyam, ld. Counsel for the assessee asserted that it is paid for clearance of encumbrance. Before advertng on this issue, we would like to delve on the term 'encumbrance' for its better understanding:

(i) An 'encumbrance' is a charge or burden created by transfer of any interest in a property. It is a liability attached to the property that runs with the land. [*National Textile Corporation v. State of Maharashtra, AIR 1977 SC 1566 explained in Saradamani Kandappan v. S. Rajalakshmi, (2011) 12 SCC 18*]

(ii) Mere execution of an MOU, agreeing to enter into an agreement to sell the property, does not amount to encumbering a property. Receiving advances or amounts in pursuance of an MOU would not also amount to creating an encumbrance. [*Saradamani Kandappan v. S. Rajalakshmi, (2011) 12 SCC 18*]

(iii) Encumbrance must be a charge on the property. It must run with the property. If by a reason of the statute no such burden on the title which diminishes the value of the land is created, it shall not constitute any encumbrance. [*Ai Champday Industries Ltd. v. Official Liquidator, (2009) 4 SCC 486*]

12.6 In the conspectus of above understanding of the term 'encumbrance', we observe that in the present facts and circumstances, it is nothing but a '*self created encumbrance*' between the co-owners including the assessee and Ramanaiyam by way of a JDA. We fail to understand how can there be an encumbrance created between the two parties who have agreed to transact under a JDA. Nothing is placed on record by the assessee (owners of the land) to demonstrate the efforts put in by them to fulfill the conditions under the said JDA, failing which has resulted into an encumbrance as claimed. We are inclined to accept the contentions made by the Ld. Sr. DR who has relied on the decision of Hon'ble jurisdictional High Court of Madras in the case of *Smt. D. Zeenath (supra)* wherein similar such payments have been held to be tantamounting to diversion of sale proceeds.

13. Hon'ble Supreme Court in the case of *Sumati Dayal v. CIT [1995] 214 ITR 801 (SC)* held that *income tax proceedings are civil proceedings and the degree of proof required is to be judged by preponderance of probabilities*. Further, the Hon'ble Apex Court in the case of *CIT v Durga Prasad More [1971] 82 ITR 540 (SC)* has held that *the taxing authorities were not required to put on blinkers while looking at the documents produced before them they were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents....The apparent must be considered as real only if it is shown that there are reasons to believe that the apparent is not the real and that too taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probability.... Science has not yet invented any instrument to test the reliability of the evidence placed before a court or tribunal. Therefore, the courts and tribunals have to judge the evidence before them by applying the test of human probabilities.*

13.1 The conclusions flowing from the explanations and evidences furnished by the assessee in the present case are leading us to consider the doctrine of 'preponderance of human probabilities' and the 'surrounding circumstances' in respect of the claims made. Instead of adopting superficial approach, claim of the assessee is to be examined in the light of real life probabilities which have been so done by the Id. AO. In respect of impugned land on which computation of long term capital gain is the subject matter of this appeal, on one hand it has been said to be used under lease arrangement for the business operations of two concerns (SAE and BJT) wherein the co-owners including assessee have substantive holding/controlling interest and on the other hand the same land is said to be developed under a JDA with one party Ramanaiyam. Further, the same land has been sold in the year under consideration giving rise to long term capital gains to the three co-owners who have attempted to minimize their taxability on the said gains by resorting to the two arrangements (*supra*) relating to the impugned land with SAE & BJT and Ramanaiyam, respectively. Claims by the assessee under the arrangements made tantamount to diversion of sale proceeds to which we do not ascribe our views favorably considering the facts and circumstances of the case as discussed above.

14. Further, we note that Ld. CIT(A) has placed reliance on certain judicial precedence while granting relief to the assessee which are distinguishable on their own facts. In the case of *CIT v. A. Venkataraman (1982) 137 ITR 846 (Mad)* it is not discernible as to whether the tenants were related parties as in the present case before us in which 99% of the shares/shareholding is by the related co-owners including the assessee. In respect of decision of Hon'ble Delhi High Court in the case of *Kaushalya Devi v. CIT (2018) 404 ITR 136 (Del)* it is not discernible whether the property was free from encumbrance and that the tenants were related party or not. Similarly, in the case of *CIT*

v. C. V. Sundarajan & Anr. (1983) 150 ITR 80 (Mad), the payments were made for relinquishment of rights in the property sold. Also, in the case of *CIT v. Ms. Piroja C. Patel (1999) 242 ITR 582 (Bom)*, it is a case of compensation paid towards compulsory acquisition of land. Thus, the judicial precedents relied on by the Ld. CIT(A) are distinguishable.

15. Considering the factual matrix, circumstances, explanations and submissions made by both the parties and judicial precedents relied upon, we set aside the order of ld. CIT(A) and uphold the disallowance made by the ld. AO in respect of claim of deduction made by the assessee towards payment of compensation to SAE and BJT and to Ramanaiyam towards interest for clearance of encumbrance.

16. In the result, the appeal of the revenue is allowed.

Order is pronounced in the open court on 19th August, 2022.

Sd/-
(MAHAVIR SINGH)
Vice President

Sd/-
(GIRISH AGRAWAL)
Accountant Member

Dated 19th August, 2022

Jd.(Sr.PS)

Copy to:

1. The Appellant:
2. The Respondent:.
3. CIT(A)-2, Chennai
4. CIT , Chennai
5. The DR, ITAT, Chennai Benches, Chennai