

आयकर अपीलिय अधिकरण, 'डी' न्यायपीठ, चेन्नई

**IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, CHENNAI**

**श्री चंद्र पूजारी, लेखा सदस्य एवं श्री जी. पवन कुमार,
न्यायिक सदस्य के समक्ष**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER**

**आयकर अपील सं./ITA Nos. 1216 & 2106/Mds/2013
निर्धारण वर्ष /Assessment Years : 2009-10 & 2010-11**

**M/s. Sivanandha Mills Ltd.,
41, Periasamy Road (East),
R.S.Puram,
Coimbatore-641002.
PAN AAKCS7439J
(अपीलार्थी/Appellant)**

**v. The Assistant Commissioner of
Income-tax / The DCIT,
Company Circle-IV(2),
Coimbatore.
(प्रत्यर्थी/Respondent)**

**अपीलार्थी की ओर /Appellant by : Shri R. Vijayaraghavan, Advocate
प्रत्यर्थी की ओर से/Respondent by : Dr. Milind Madhukar Bhusari, CIT**

**सुनवाई की तारीख/Date of Hearing : 22.03.2016
घोषणा की तारीख/Date of Pronouncement : 17.06.2016**

आदेश / O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER

**These appeals by the assessee are directed against
different orders of the Commissioner of Income-tax(Appeals)
for the assessment years 2009-10 and 2010-11.**

ITA No.1216/Mds/2013 :

2. The grounds for our consideration is with regard to sustaining the following additions by the Commissioner of Income-tax(Appeals):

i) Disallowance of payment of Rs 18 crores incurred for the transfer of land paid to the Bank of Baroda and payment of workmen compensation for settlement at Rs 807,43,083/-.

ii) Disallowance of claim of set off of business expenditure against long term capital gains at ` 3,68,30,254/-

iii) Disallowance of bad debts of rs 14,21,618/-

3. The Id. AR submitted that the assessee is a public limited company with objects, inter alia, of manufacturing yarn. The Assessee filed the return of income on 30/03/2011 for the Assessment year 2009-10, admitting a total income of ` 10,28,03,164/-. The return was initially processed u/s 143(1) of the Income Tax Act, 1961. The case was selected for scrutiny and a notice u/s 143 (2) was issued on 15/09/2011. It is observed that the Assessee company had been incurring losses, since late eighties. There was a strike resorted to by the Labour union of the Assessee Company, way back in 1993,

which later resulted in a lockout declared by the Management. The Management could not continue to carry on the business, primarily owing to the continued strike by the labour union. Owing to the above the Company had gone sick and the Company was constrained to approach BIFR, for remedial measures. However, BIFR had passed an ex-parte order, ordering winding up of the Assessee Company and had accordingly sought to appoint an official receiver.

3.1 The Company challenged the order of the BIFR, by a writ petition before the Madras High Court, being WP No 19907 of 2001. In the meantime owing to the sickness, the Assessee company could not meet expectations of its employees in terms of increment, bonus and other labour measures. The employees post-strike and lockout, erected barbed wire fence around the premises, housing, factory and corporate office thereby virtually preventing all from ingress and egress. In the meantime the secured creditor – Bank of Baroda, which had earlier advanced loan against the security of all the assets, including Stock-in-Trade, had moved petition before DRT (Debts Recovery Tribunal) and also under SARFAESI Act (The

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act), to recover its loan that was earlier advanced. The Bank had already taken over the possession of the properties of the Assessee Company, including the property that was sought to be transferred/sold.

3.2 The Labour Union vis a vis Workmen, to recover its dues, had also impleaded itself in the writ petition filed by the Assessee Company. In the course of proceedings before the Madras High Court, and with the direct involvement and under supervision of the Madras High Court, a Memorandum of Compromise was reached on 29/11/2007, between the Assessee and the Coimbatore District Mill Labour Union, representing the striking labour union of the Assessee, and the secured creditor bank, whereby the Assessee, on the suggestion and helplessly, had agreed to dispose a piece of land at Saravanampatti and to utilize the proceeds to settle dues to workmen and to the secured creditor – vis a vis the Bank.

3.3 In pursuance of the compromise, a formal petition was filed before the Madras High Court, seeking for permission to

implement the Scheme of the Compromise / MOC. The Order of the Madras High Court was necessary as the property was under the possession of the secured creditor. The Assessee had engaged certain persons, to enable and facilitate all aspects surrounding sale of the property, with better terms and conditions. It was with the assistance of services from these persons that the Assessee was able to obtain better price, which was much higher than the guideline value, which would normally have ended as a distress sale, under such circumstances, with much lesser consideration, the sale extracted much higher value which was incredible, considering overall circumstances under which such sale took place. The Assessee had paid these persons for such services, by way of commission, which totaled to about ` 1,98,17,992/-. These commission payments were made by account payee crossed cheques after duly deducting TDS from such payments. The recipients had also duly reflected / accounted for these sums in their respective accounts and returns as applicable. It will be pertinent to point out that this commission works out to less than 5% of the entire sale consideration. It was the contention

of the assessee that it had to do all the above only to ensure that it continues to carry on the business after avoiding winding up, after such business was helplessly remained under lull.

3.4 In the course of the assessment proceeding the Assessee, claimed deduction u/s 48(i) for the following payments made:

- a) Payments made to workmen, of ` 8,07,43,083/- who had physically retained the possession (though the bank had taken token legal possession of the property) of the property by preventing the management from entering the property, by putting barricades etc;
- b) Payment made to secured creditor – Bank of Baroda, to the tune of ` 18.00 Crores/- to secure legal release of the property prior to sale of the property and also in compliance with the implementation of the MOC.
- c) Payment made to the sales tax department to the tune of ` 97,49,342/- to secure/raise the attachment made by the sales tax department.
- d) Payment of commission of ` 1,98,17,992/-
- e) Business expenditure of Rs 3,68,30,254/-
- f) Bad debts of Rs 14,21,618/-.

3.5 It is submitted that the above payments, i.e. payments made to workmen, secured creditor, sales tax department, commission payment to mediators, deserved to be allowed as deductions under section 48(i) of the Income Tax Act 1961 since the same fall under the category of those “expenditure

incurred wholly and exclusively in connection with such transfer” as contemplated under section 48(i) of the Income Tax Act. It is submitted that the section 48 contemplates three amounts for the purpose of computing income chargeable under the head “Capital gains”, which is as under :

“The first is the full value of the consideration for which the capital asset has been transferred. The second is the expenditure incurred wholly and exclusively in connection with such transfer and the third and the last is the cost of acquisition of the capital asset including the cost of any improvement thereto.”

3.6 It is submitted that in the present facts and circumstances, all that the assessee has to prove is that the expenditure incurred was wholly and exclusively in connection with the transfer as contemplated under section 48(i) of the Act. Further the larger question is, whether at all the assessee would have been able to dispose off the property without incurring these expenditure and if the assessee is able to prove the same then the expenditure incurred would form part section 48 (i). It is the contention of the assessee that unless the assessee had settled service charges i.e. commission payments, settle the secured creditor, settle the

sales tax department and also the workmen, the sale transaction with M/s Alliance Mall developers Pvt. Ltd. would not have materialized at all. If this transaction had not materialized, there would perhaps have been no question of capital gains. It is submitted that the expression used is “the expenditure incurred wholly and exclusively in connection with such transfer”. The expression “in connection with such transfer” has to be seen in a wider manner and given a larger liberal interpretation. In the present case, the Assessee shall endeavor to prove that the expenditure incurred or paid was absolutely necessary to effect the transfer and such amounts paid will fall under clause (i).

4. Regarding payment to workmen, it is submitted that the payment made to the workmen should be treated as expenses wholly and exclusively in connection with the transfer as contemplated under section 48(i) of the Income Tax Act 1961. According to the Id. AR, the workmen had forcefully taken possession of the factory premises of the assessee company by erecting barbed wire fence and virtually preventing ingress and egress from the property. This finding of fact was

recorded by the Learned Assessing Officer in his Assessment Order. Thus the forced possession by the workmen had become an encumbrance which was not created by the assessee company by itself but thrust upon it. The management thought it wise, on the grounds of prudence and commercial expediency, not to take back those employees who brought about the strike in the year 1993 and continued till 2007. It is a statutory liability imposed on the employer to redeem by making payment. Thus the employer, the Assessee Company was constrained to make the payment to secure free possession of the property, which is a pre-condition for the transfer, in this context, the payment becomes a necessary to secure free possession of the property and thus qualifies for deduction u/s 48 (1).

4.1 It is submitted that the workmen were demanding their compensation. The workmen were made party to the proceedings. It is submitted that the workmen have claimed/right over the immoveable property of the company and the said right is in pari passu to the extent of the workmen's portion as laid down in Section 529(1)(c) proviso

read with Section 529A of the Companies Act, 1956. It is a well-established legal position, that the winding up of a company shall be deemed to commence at the time of presentation of the petition for winding up of the Company under Section 20 of the SICA.

4.2 The Id. AR placed reliance on the provisions of sec.529 of the Companies Act, which reads as follows:

“Section 529 – Application of insolvency rules in winding up of insolvent companies, the same rules shall prevail and be observed with regard to-

.....

(c) the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent:

Provided that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen’s portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realize his security,-

(a) the liquidator shall be entitled to represent the workmen and enforce such charge;

(b) any amount realized by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen’s dues; and

*(c) so much of the debt due to such secured creditor as could not be realized by him by virtue of the foregoing provisions of this proviso or the amount of the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of Section **529A.**]*

(2) ...

(3) For the purposes of this sections, Section **529A** and Section **530**,-

(a) "workmen", in relation to a company, means the employees of the company, being workmen within the meaning of the industrial Disputes Act, 1947 (14 of 1947);

(b) "workmen's dues", in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely:

(i) to (iv) ...

(c) "workmen's portion", in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of-

(i) the amount of workmen's dues; and

(ii) the amount of the debts due to the secured creditors.

Illustration. – The value of the security of a secured creditor of a company is ` 1,00,000. The total amount of the workmen's dues is ` 1,00,000. The amount of the debts due from the company to its secured creditors is ` 3,00,000. The aggregate of the amount of workmen's dues and of the amount of debts due to secured creditors is ` 4,00,000. The workmen's portion of the security is, therefore, one-fourth of the value of the security, that is ` 25,000.

*e. Section **529A** is crucial for consideration of these appeals and it is reproduced as it is: Section **529A** – Overriding preferential payment. – (1) Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company-*

*(a) workmen's dues; and
(b) debts due to secured creditors to the extent such debts rank under Clause (c) of the proviso to Sub-section (1) of Section **529** pari passu with such dues, shall be paid in priority to all other debts.*

(2) The debts payable under Clause (a) and Clause (b) of sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate proportions.

*f. From the above it is clear that it is only limited class of secured creditors who have priority over all others in accordance with Section 529A and the priority of the secured creditor is only to the extent that any part of the said security is lost in favour of the workmen consequent to demands made by the Liquidator under Clauses (a) or (b) or Clause (c) to provide to Section **529(1)**. It is therefore clear that the workmen's due is pari passu with the claim of any secured creditor.*

4.3 In this regard the following Judgments are relied upon by the Id. AR:

a. In *Jitendra Nath Singh* in (2013) 1 SSC 462, wherein it was held as follows:

“16.1. A secured creditor has only a charge over a particular property or asset of the company. The secured creditor has the option to either realize his security or

relinquish his security. If the secured creditor relinquishes his security, like any other unsecured creditor, he is entitled to prove the debt due to him and receive dividends out of the assets of the company in the winding-up proceedings. If the secured creditor opts to realize his security, he is entitled to realize in a proceeding other than the winding-up proceeding but has to pay to the liquidator the costs of preservation of the security till he realizes the security.

16.2. Over the security of every secured creditor, a statutory charge has been created in the first limb of the proviso to Clause (c) of Sub-section (1) of Section 529 of the Companies Act in favour of the workmen in respect of their dues from the company and this charge is pari passu with that of the secured creditor and is to the extent of the workmen's portion in relation to the security of any secured creditor of the company as stated in Clause (c) of Sub-section (3) of Section 529 of the Companies Act.

16.3. Where a secured creditor opts to realise the security then so much of the debt due to such secured creditor as could not be realized by him by virtue of the statutory charge created in favour of the workmen shall to the extent indicated in Clause (c) of the proviso to Sub-section (1) of Section 529 of the Companies Act rank pari passu with the workmen's dues for the purposes of Section 529-A of the Companies Act.

16.4. The workmen's dues and where the secured creditor opts to realize his security, the debt to the secured creditor to the extent it ranks pari passu with the workmen's dues under Clause (c) of the proviso to Sub-section (1) of Section 529 of the Companies Act shall be paid in priority over all other dues of the company.

Section 529A was inserted by Companies (Amendment) Act, 1985. By incorporation of this provision, workmen's dues rank pari passu with secured creditors. In other

words, the workmen of the company in winding up acquire the status of secured creditors. Pertinently, while inserting Section 529A in the Companies Act by the Companies (Amendment) Act, 1985, the proviso to Sub-section (1) of Section 529 was also inserted which provides that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion.

4.4 He also relied on the judgment in the case of Bank of Maharashtra V/s Pandurang Keshav Gorwardkar and others reported in (2013) 7 SSC 754, wherein it has been held as follows:

“63. A cumulative reading of Sections 529A and 529(1)(c) proviso ends to an irresistible conclusion that where a company is in liquidation, a statutory charge is created in favour of workmen in respect of their dues over the security of every secured creditor and this charge is pari passu with that of the secured creditor. Such statutory charge is to the extent of workmen's portion in relation to the security held by the secured creditor of the company. This position, in our opinion, is equally applicable where the assets of the company have been sold in execution of the recovery certificate obtained by the bank or financial institution against the debtor company when it was not in liquidation but before the proceeds realized from such sale could be fully and finally disbursed, the company had gone into liquidation. Stated differently, pending final disbursement of the proceeds realized from the sale of security in execution of the recovery certificate issued by the DRT, if debtor company becomes company in winding up, Sections 529A and 529(1)(c) proviso come into operation immediately and statutory charge is created in favour of workmen in respect of their dues over such proceeds.

4.5 Further, he submitted that from the above two judgments it is very clear that a statutory charge is created in favour of workmen in respect of their dues over the security of every secured creditor and this charge is pari passu with that of the secured creditor. Such statutory charge is to the extent of workmen's portion in relation to the security held by the secured creditor of the debtor company. Further without removal of this charge, the property cannot be sold and there would be no takers also. The statutory charge acts as an encumbrance over the property and therefore it is necessary that the company first settles the dues of the workmen thus enabling the company to dispose off the property. He drew our attention to the following judgments:

1. Gopeenath Paul & Sons and another vs DCIT 278 ITR 240 (Cal)
2. CIT vs Shakuntala Kantilal 190 ITR 56 (Cal)
3. CIT vs Bradford Trading Company Pvt. Ltd., 261 ITR 222 (Mad) &
4. CIT vs Abrar Alvi 247 TR 312 (Bom)

4.6 Alternatively he submitted that the payment also qualifies for deduction u/s. 37(1), as the same was made on the

grounds of commercial expediency. The need for such payments was imposed by a statutory liability. As a corollary the existence and continuity of the business has to be inferred. It was a fact that the Assessee Company would not have been able to secure release/possession of the property but for the compromise reached and approved by Madras High Court and the payment made. Thus the payment made to secure the release of the property and further to comply with the compromise reached qualifies for deduction u/s. 48(1). He also relied on the judgment of the Madras High Court in the case of CIT vs A. Venkataraman (1982) 137 ITR 846, wherein it was held that retrenchment compensation paid to the employees in terms of the agreement to sell was an allowable deduction incurred wholly and exclusively in connection with the sale of the asset. The case of Bawa Cherian Vs ITO (Cochin) was also considered among similar lines. He further relied on the judgment of the Punjab & Haryana High Court in the case of Ambala Cantt Electric supply corporation Vs CIT 133 ITR 343.

5. Regarding settlement to the Secured Creditor to Bank, it was submitted that the settlement made to the secured creditor was essential and without which the property would not have been sold at all. It is also submitted that the said property was mortgaged to the Bank as a security for the loans taken. It is also submitted fact that SARFAESI proceedings were initiated by the Bank. It is settled proposition of law once SARFAESI proceedings are initiated then the same operates as an attachment over the said property and the property can be sold without satisfying or duly discharging the dues to the secured creditor. In this context it would be more than useful to reply in Section 13(13) of the SARFAESI Act. It reads as follows: No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.

5.1 It is submitted that no borrower shall, after receipt of notice under Section 13(2), transfer by way of sale, lease or otherwise any of his secured assets referred to in the notice,

without prior written consent of the secured creditor. This also means that Section 13(13) of the SARFAESI Act operates as an attachment/injunction restraining the borrower from disposing of the secured assets and therefore, any right created after such notice would be null and void.

5.2 In this context the Id. AR relied on the judgment in the case of *Transcore v. Union of India (UOI) Anr.*, 1 SSC 125 – wherein it has been held by the Supreme court as follows:

“Para 23 : Reading the scheme of Section 13(2) with Section 13(4), it is clear that the notice under Section 13(2) is not a mere show cause notice and it constitutes an action taken by the bank/FI for the purposes of the NPA Act. Section 13(6) inter alia provides that any transfer of secured asset after taking possession or after taking over of management of the business, under Section 13(4), by the bank/FI shall vest in the transferee all rights in relation to the secured assets as if the transfer has been made by the owner of such secured asset. Therefore, Section 13(6) inter alia provides that once the bank/FI takes possession of the secured asset, then the rights, title and interest in that asset can be dealt with by the bank/FI as if it is the owner of such an asset. In other words, the asset will vest in the bank/FI free of all encumbrances and the secured creditor would be entitled to give a clear title to the transferee in respect thereof. Section 13(7) refers to recovery of all costs, charges and expenses incurred by the bank/FI for taking action under Section 13(4). Section 13(7) provides for priority in the matter of recovery of dues from the borrower . It inter alia provides for payment of surplus to the person entitled thereto. Section 13(8) inter alia states that if the dues of the secured creditor together with all costs, charges and expenses incurred are tendered

to the secured creditor before the date fixed for sale/transfer the secured asset shall not be sold or transferred by the Bank/FI to the asset reconstruction company and no further steps shall be taken in that regard. Section 13(9) inter alia states that where a financial asset is funded by more than one bank/FI or in case of joint financing by a consortium, no single secured creditor from that consortium shall be entitled to exercise right under Section 13(4) unless exercise of such right is agreed upon by all the secured creditors. Section 13(9) provides for one more instance when permission of DRT may be required under the First proviso to Section 19(1) of the DRT Act. The agreement between the secured creditors in such cases is required to be placed before the DRT not as a fetter on the rights of the secured creditors but out of abundant caution. Generally, such agreements are complex, in measure, particularly because rights of each of the secured creditor in the consortium may be required to be looked into. However, if before the DRT, all the secured creditors in such consortium enter into an agreement under Section 13(9) then no such further inquiry is required to be made by the DRT. In such cases, the DRT has only to see that all the secured creditors in the consortium are represented under the agreement. The point to be noted is that the scheme of the NPA Act does not deal with disputes between the secured creditors and the borrower. On the contrary, the NPA Act deals with the rights of the secured creditors inter se. The reason is that the NPA Act proceeds on the basis that the liability of the borrower has crystalized and that his account is classified as non-performing asset in the hands of the bank/FI. Section 13(9) also deals with pari passu charge of the workers under Section 529-A of the Companies Act, 1956, apart from banks and financial institutions, who are secured creditors. Section 13(10) inter alia states that where the dues of the secured creditors are not fully satisfied by the sale proceeds of the secured assets, the secured creditor may file an Application to DRT under Section 17 of the NPA Act for recovery of balance amount from the borrower. Section 13(10), therefore, shows that the bank/FI is not only free to

move under NPA Act with without leave of DRT but having invoked NPA Act, liberty is given statutory to the secured creditors (banks/FIs) to move the DRT under the DRT Act once again for recovery of the balance in case where the action taken under Section 13(4) of the NPA Act does not result in full liquidation of recovery of the debts due to the secured creditors. Section 13(10) fortifies our view that the remedies for recovery of debts under the DRT Act and the NPA Act are complementary to each other. Further, Section 13(10) shows that the First Proviso to Section 19(1) of DRT Act is an enabling provision and that the said provision cannot be read as a condition precedent to taking recourse to NPA Act. Section 13(11) of the NPA Act inter alia states that, without prejudice to the rights conferred on the secured creditor under Section 13, the secured creditor shall be entitled to proceed against the guarantor/pledger; that the secured creditor shall be entitled to sell the pledged assets without taking recourse under Section 13(4) against the principal borrower in relation to their secured assets under the NPA Act. Section 13(3) states that, no borrower shall, after receipt of notice under Section 13(2), transfer by way of sale, lease or otherwise any of secured assets referred to in the notice, without prior written consent of the secured creditor. Thus, Section 13(13) further fortifies our view that notice under Section 13(2) is not merely a show cause notice. In fact, Section 13(13) indicates that the notice under Section 13(2) in effect operates as an attachment/injunction restraining the borrower from disposing of the secured assets and, therefore, such a notice, which in the present case is dated 6-1-12003 is not a mere show cause notice but it is an action taken under the provision of the NPA Act.

5.3 The Id. AR, relied on another judgment reported in Sree Lakshmi Products rep. by its Partner Vs. State Bank of India 2007(2) CTC 193 and according to him, from the above judgment, it is clear that the bank/FI is entitled to take actual

possession of the secured assets from the borrower or from any other person in terms and Section 13(4) of the SARFAESI Act. Any transfer of secured assets after taking possession of the same by the Bank/FI shall vest in the transferee all rights in relation to the secured assets as if the transfer has been made by the owner of such secured assets. Any party aggrieved by such dispossession will have to take recourse to approaching the DRT under Section 17(4) of the SARFAESI Act. If the party is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the status quo ante. By virtue of Section 17(4) read with Section 35 of the SARFAESI Act, if in a given case the measures undertaken by the secured creditor under Section 13(4) come in conflict with the provisions of any State law, then notwithstanding to such conflict, the provisions of Section 13(4) shall override the local law. Section 13(13) of the SARFAESI Act operates as an attachment/injunction restraining the borrower from disposing of the secured assets and therefore, any tenancy created after such notice would be null and void. Any tenancy created by the mortgager after the mortgage in

contravention of Section 65-A would not be binding on the bank/FI, and in any event such tenancy rights shall stand determined once action under Section 13(4) has been taken by the bank/FI. When the petitioner is claiming a tenancy prior to the creation of mortgage and such tenancy is disputed by the bank the remedy of the petitioner is to approach DRT by way of an application under Section 17 of the SARFAESI Act to establish its rights.

5.4 From a reading of the above two judgments, he inferred that the assessee after receipt of SARFAESI notice, without prior consent of the secured creditor, could not have done anything at all to dispose the property. According to the Id. AR, sec.13(13) indicates that the notice under sec.13(2) in effect operates as an attachment/injunction restraining the borrower from disposing of the secured assets and for that property to fetch a higher rate dues of the bank had to be settled. The notice under SARFAESI acted as an encumbrance and the expenditure incurred to remove the said encumbrance certainly would fall within sec.48(i) of the Act. It is well admitted fact that the payment was made to Bank of Baroda only to clear the

encumbrance it held in its favour, to facilitate transfer. It is also a fact that without removing this encumbrance, which was enforceable and the bank had already initiated measure to enforce the same, the transfer of property would have been impossible.

5.5 In this regard, he made reference to the following judgments:

1. Gopeenath Paul & Sons and another vs. DCIT 278 ITR 240(Cal)
2. CIT vs. Shakuntala Kantilal 190 ITR 56 (Cal)
- 3 CIT vs. Bradford Trading Company Pvt. Ltd. 261 ITR 222 (Mad) &
4. CIT vs. Abrar Alvi 247 ITR 312 (Bom.)

6. Regarding payment made to the sales tax department to the tune of ` 97,49,342/- to secure/raise the attachment made by the sales tax department, it is submitted that there was a further charge over the property by the Sales tax department. Since there was an outstanding due towards sales tax, the department, had initiated action and had created charge over the property of the company. The sales tax department made it very clear by their letter dated 10.4.2008, that only on depositing the necessary monies, the charge and the attachment on the land will be lifted. Thereafter the

assessee entered into negotiations and availed the SAMADHAN SCHEME and settled the entire dues of the sales tax department by depositing a sum of ` 97,49,342/- and only after the entire attachment and charges over the land were removed on 25.2.2009, thus facilitating this assessee to proceed with the sale of land with a third party as mentioned above. It is submitted that without lifting of the attachment/charge, this assessee could not have done anything with the lands and there would have been no takers for the land also. The attachment/charge orders of the sales tax department acted as an encumbrance in order to sell the property and for that property to fetch a higher rate dues of the Sales tax department had to be settled. It is submitted that the encumbrance and the expenditure incurred to remove the said encumbrance certainly would fall within sec.48(i). It is well admitted fact that the payment was made to Sales tax department only to clear the encumbrance it held in its favour , to facilitate transfer. It is also a fact that without removing this encumbrance, which was enforceable the transfer of property would have been impossible. According to the Id. AR, therefore the monies paid

to the sales tax department would fall within the category of sec.48(i) of the Act.

7. Regarding payment of commissions to those who facilitated in completing the transaction, it is submitted that the payment of commission to brokers for facilitating smooth transaction would fall under the category of “the expenditure incurred wholly and exclusively in connection with such transfer”. However, the expenditure incurred towards payment of commission has been disallowed on the ground that the most of the recipients were related to the assessee and that of lack of evidence / material regarding the services rendered by these persons, without appreciating that there was no other reason for the assessee to make the payment. It should be seen that the assessee had produced all the evidences which are more than adequate to establish such fact, genuineness, necessity and purpose of such payment, which were further corroborated by the fact of filing of returns thereof by the recipients.

7.1 It was submitted that with the production of fairly reasonable evidences pointing to such fact or even raising

probabilities thereof would amount to discharge of onus by the assessee and thereafter the onus shift to the Department to disprove the same with more cogent and material evidence, supporting rejecting of evidences produced by the assessee.

Further it was submitted that no reasons have been recorded in the impugned order to show that the assessee has not utilized the services of the recipients, except predominant prevalence of presumption of bad faith about the assessee and conjectures that no services would have been rendered by those brokers, to reject the all the good evidences produced by the assessee and the confirmations thereon made by the respective recipients. Further the AO and the CIT(A) had not rejected the payments of commission on the grounds that the same was excessive.

7.2 It was submitted that the commission totally worked out to less than 5% of the total sale consideration which is reasonable considering the difficulties surrounding the sale of a property which had a chequered history.

7.3 It is submitted that both the Assessing Officer and the Learned Commissioner of Income Tax, had not doubted the

veracity (genuineness) of the payments made. The only ground attributed to was that evidences that were let in were inadequate, forgetting the fact that the higher (if not the highest) sale consideration received amidst the adverse circumstances (of adverse conditions in which the assessee found itself in), and that, too within an incredibly shorter time constitute a kind of unimpeachable evidence which cannot be arbitrarily rejected.

7.4 It is submitted that the assessee had furnished all the details like, (i). payments were made through account payee cheques, which reflected in the bank statements of both the assessee and payees, (ii). payments were subject to TDS, (iii) all the recipients confirmed the commission of payments and (iv) the recipients had also appropriately shown these receipts in their respective income tax returns.

7.5 According to the Id. AR, the AO had selectively summoned some of the recipient, examined hem and also recorded their statement. The entire scenario was explained. In spite of this, both the AO and CIT(A) have rejected on the ground that (i) some of the recipients were relatives of the MD

of the assessee company, (ii) some have accounted the payments in the next assessment year, (iii) the buyer has also paid commission. It is pertinent to point out that the books of accounts of the assessee have not been questioned. Nor the genuineness and regularity have been doubted. He relied on the following judgments :

(i) In Medical Technologies Ltd (2013) 32 taxmann.com 386 (Guj), it was held that when the assessee had payments of commission to agents and the same was approved by the management it was an allowable expenditure.

(ii) In CIT vs. Rama Multitech Ltd. 33 taxmann.com 13(Guj), it was held that when there was no defect in maintenance of books of account on the part of the assessee there could not be any disallowance.

(iii) In Asgar Jain vs. CIT (2008) 298 ITR 60 (Kar) , it was held that where commission was paid for sale of property and amount of commission paid had been reflected by recipient of commission in his income tax returns and same was accepted by the department, disallowance of such commission while computing capital gain in assessee's hands was not justified.

(iv) It was held in *Dhansiram Agarwala vs. CIT* 217 ITR 4 (Gau) that where the genuineness and regularity of the accounts have not been challenged, the accounts are prima facie proof of the entries and the correctness thereof under section 34 of the Evidence Act, 1872.

8. Regarding business lull, it was submitted that the assessee could not carry on its business, owing to factors beyond its control, as already stated supra. The Management was forced to sell the property only to pave the way for resumption of business, at the earliest. The Technological obsolescence was yet another primary factor that also forced the management of the assessee to dispose of the old and obsolete machineries. Just because certain properties were either sold or planned to be sold, it cannot be a ground to draw an inference that the Company is in the process of winding up. Winding up is a process of law and it cannot be assumed, unless the same has happened.

8.1 The Companies Act provides for sale of its entire undertaking or part of its undertaking, through Sec.293 of Companies Act and yet remain in the thick of its business and

its existence is not disturbed. The Companies Act does not provide for compulsory winding up, even in the wake of disposal of its undertaking. The Companies Act does not even assume that in the wake of such sale of its undertaking, the primary business of the Company would come to an end or ceased to be carried on. Thus even disposal of its undertaking cannot lead to an inference of winding up.

8.2 He submitted that the Income Tax Act, too, provides for an occasion, through Sec.54G, wherein the assessee may dispose of its entire undertaking and even remain without any assets and yet continue to remain as a business entity, to resume its business. Thus both the Companies Act and the Income Tax Act do not provide for any ground for any assumption that disposal of majority (even all) of its assets, would amount to winding up. The winding up being a legal process it cannot be assumed otherwise.

8.3 It is submitted that what had happened was a temporary suspension of its business activities, albeit longer period. The Act of the management in challenging the winding up petition/direction of BIFR, is a clear indication in this direction.

Even disposal of its assets or termination of its employees would not provide for an inference to the contrary.

8.4 According to the Id. AR, the authorities below erred on an incorrect notion assumed the assessee was on the brink of winding up and as there was no manufacturing activity all the expenditure need to be disallowed and had accordingly disallowed, including those pertaining to bad debts written off, depreciation etc., Generation of revenue is neither important nor a necessity to claim expenses, if such expenditure is otherwise claimable. Generation of revenue is not a sine qua non, for allowance of expenditure.

8.5 The assessee relied on the CIT v. Vikram Cotton Mills Ltd. (1988) 169 ITR 597 (SC), wherein extreme conditions prevailed wherein the Company was closed down and a petition for winding up was presented. A major secured creditor intervened, took possession of the fixed assets and to pay off the creditors and a scheme of lease of the mills was evolved by the High Court, the Supreme Court held that there had been temporary suspension of business only.

9. Regarding disallowance of bad debts, it is submitted that CIT(A) had confirmed the disallowance of bad debts claimed on the ground that the assessee did not furnish details to show that these amounts were offered as income in the earlier years.

9.1 It is submitted that the Learned Commissioner of Income Tax (Appeals) failed to appreciate that the bad debt, considering its nature, would not have come up in the first place, without offering the same as income either in an earlier year or in the same year. It may be noted that the amount of debt, written off as bad debts, etc. on the genesis of this account/amount, before the Assessing Officer.

9.2 It is submitted that the only ground on which this amount was disallowed by the Assessing Officer was that there no manufacturing activity during the year. It is to be seen that the Learned Commissioner of Income Tax (Appeals), did not even allude to the same ground to confirm the disallowance made by the Assessing Officer, instead Learned Commissioner of Income tax(Appeals) has stated as his grounds of confirmation of disallowance that “the assessee could not furnish the details to show that these amounts were offered as income in the

earlier years. During the course of appellate proceedings, the assessee could not furnish any details to satisfy the conditions of sections 36(1)(vii) rws 36(2) of the Income Tax Act”.

9.3 Further, it is submitted that no such information was ever asked for in the course of appellate proceedings. He submitted that the claim of bad debts needs to be allowed in view of the following judgments:

(i) CIT vs. Ahmedabad Electricity Company Limited (262 ITR 97(Guj.)

(ii) Jethahirji and Jethabhaj Ramdas vs. CIT (120 ITR 792)(Bom).

(iii) Kamala Cotton vs. CIT (226 ITR 605)(Guj.)

(iv) TRF Limited vs. CIT (2010) 323 ITR 397(SC) & (2010) 190 Taxman 321(SC).

(v) Southern Technologies Limited vs. Joint CIT (20120) 320 ITR 577 (SC).

10. Regarding disallowance of claim of set off business expenditure/loss against long term capital gain, it is submitted that this claim was disallowed on the ground that there was no business activity of spinning and manufacturing of yarn and the expenses could not be claimed. However the department has

not produced any evidence to prove that the assessee was making efforts not to continue the business activities.

11. Regarding disallowance of claim of loss due to deterioration in value of stock-in-trade, it was submitted that the assessee's claim of loss arising out of deterioration in the value of goods/stock in trade, which was disallowed by the Assessing Officer on the ground that there was no manufacturing activity during the year was confirmed on the same ground without considering the contentions of the assessee that it was only undergoing lull and the business was not discontinued. Indeed the assessee was forced to defer the resumption of the business activities owing to high pitched assessment order and consequent harsh recovery measures taken by the department which resulted in incorrigible and substantial reduction in required financial resources required to resume business activities with new plant and machineries.

12. Regarding interest receipts, it was submitted that treating interest receipts amounting to ` 56,17,361/- as income from other sources instead of business income as claimed by the assessee. It is to be seen that the department has not

produced any evidence to prove that the assessee was not making efforts to continue the business activities.

13. The additional ground raised by the assessee is as follows:

“The Commissioner of Income-tax(Appeals) ought to have considered the legal position that the company has earned business income in the form of interest receipts and consequently the business loss arising out of the business activities should be set off against the capital gain on sale of business assets.”

He prayed that above additional ground to be admitted in view of the judgment of the Supreme Court in the case of NTPC v. CIT (229 ITR 383)(SC) and according to him, it was inadvertently not raised before the CIT(Appeals).

13.1 It was submitted that the Commissioner of Income-tax(Appeals) ought to have considered the amount of ` 56.17 lakhs credited to profit and loss account as interest which has arisen in the course of carrying on of normal business activities. The Commissioner of Income-tax(Appeals) ought to have considered the fact that in the subsequent years the business activities of the company have been revived and consequently, as the business of the company has been started again, the loss from business activities should be allowed. The above

sales have been supported by sale bills and TNVAT Returns and which have been over looked by the assessing authority also.

13.2 The Commissioner of Income-tax(Appeals) ought to have considered the fact that the licenses and registrations such as Sales Tax (TIN) were all in currency and this indicates that the company is engaged in the process of revival activities. The Commissioner of Income-tax(Appeals) ought to have considered the fact that the company has vehemently contested the winding up order passed by BIFR before the High Court of Madras and the company has got favourable by dismissal winding up order of BIFR. This clearly shows the company's genuine intention of reviving its business activities. In I.V.E. Vairavan Chettiar v. CIT (1969) 72 ITR 114, the Madras High Court held that maintaining the establishment and waiting for improved market conditions in a business which the assessee had temporarily stopped, the business must be deemed to have continued as there was nothing to show that he had completely abandoned or closed that business.

13.3 The CIT(Appeals) has erroneously concluded that the business activities are totally stopped by voluntary action of the Board of Directors which is factually incorrect and because of the labour unrest/outcry the Directors could not enter into the mills premises and do business. The CIT(Appeals) ought to have considered the fact that the statutory auditors have certified the status of going concern of the company. The CIT(Appeals) has overlooked the fact that the business expenditure debited to the profit and loss account represent expenditure which in the nature of revenue and which have been crystalized in the financial year ended 31.03.2009 and 31.3.2010 and hence property claimed in those years. The Assessing Officer has disputed the allowability or otherwise of the expenditure in the assessment order.

13.4 The Commissioner of Income Tax(Appeals) has failed to consider the fact that the expenditure have never been claimed in any earlier years and only when it became crystalized the company has claimed the same which is clearly admissible in law. In the case of CIT v.

Hariprasad & Co. (P) Ltd. (99 ITR 118,), the following observations of the Apex Court could be relevant “From the charging provisions of the Act, it is discernible that the words ‘income’ or ‘profits and gains’ should be understood as including losses also, so that, in one sense ‘profits and gains’ represent plus ‘income’ whereas losses represent ‘minus income’. In other words, loss is negative profit. Both positive and negative profits are of a revenue character. Both must enter into computation, wherever it becomes material, in the same mode of the taxable income of the assessee”

14. The Id. AR submitted that the CIT(Appeals) ought to have considered the amount of ` 56.17 lakhs credited to profit and loss account as interest which has arisen in the course of carrying on of normal business activities. The CIT(Appeals) ought to have considered the fact that in the subsequent years the business activities of the company have been revived and consequently, as the business of the company has been started again, the loss from business activities should be allowed. The above

sales have been supported by sale bills and TNVAT Returns and which have been over looked by the assessing authority also. The Commissioner of Income Tax (Appeals) ought to have considered the fact that the licences and registrations such as Sales Tax (TIN) were all in currency and this indicates that the company is engaged in the process of revival activities. The CIT(Appeals) ought to have considered the fact that the company has vehemently contested the winding up order passed by BIFR before the High Court of Madras and the company has got favourable by dismissal winding up order of BIFR. This clearly shows the company's genuine intention of reviving its business activities.

15. Regarding the disallowance of commission payment, the learned DR has made very elaborate submissions. The Assessing Officer in his assessment order has stated "The AR was specifically asked to produce the list of persons engaged in the transfer of land to M/s Alliance Mall Developers Co. Pvt. Limited. The assessee vide letter dated 6.12.2011 has submitted the details of commission paid to 51 persons totaling

to `1,98,17,992/-". The Assessing Officer based on this information verified few of the persons namely six persons and concluded that these people are either relatives or associates of the Managing Director of M/s Sivananda Mills Limited, Shri P.Murugesan. None of the commission agents were involved in the broking of the transfer of land with Alliance Mall. The Assessing Officer further stated that most of the persons have filed revised return or accounted receipt in the next year as they were following cash method of accounting. The Assessing Officer obtained clarification from M/s Alliance Mall Developers Co. Pvt. Ltd., Mumbai regarding the commission agents who were mediating transfer between M/s Sivananda Mills Ltd and M/s Alliance Mall Developers Co. Pvt. Ltd. M/s Alliance Mall Developers Co. Pvt. Ltd has sent a ledger copy of the commission agent name M/s Hind Wastra Bandar who was paid ` 55,15,100/- as brokerage for the purchase of the said property. Hence, the Assessing Officer concluded that the commission was not paid for the services rendered and the expenditure incurred was not wholly and exclusively in connection with such transfer.

16. During the course of appellate proceedings, the AR was also asked to furnish the nature of services rendered by the persons to whom the amounts were paid. An opportunity was also given to the AR to also furnish the Income tax details and bank accounts of the agents to prove the claim. The AR only stated that the services include referral services, services on providing access to network of targeted audience, convening or making arrangements for a meeting between the parties concerned or their agents, providing information or providing means for exchange of information required for proper evaluation of facts and / or for decision making, identification of parties / things / assets / properties concerned and providing assistance in bringing about transaction or conclusion of transaction on mutually acceptable terms and conditions. The AR has made elaborate submissions without specifically mentioning the services rendered by the 51 agents to whom brokerage / commission payments were made. One of the fundamental requirements for allowing deduction in respect of commission payment is that there should be evidence of some services being rendered. He relied on the order of the Kolkatta

Bench, ITAT in the case of United Traders Vs TRO 27 Taxman.com 293 (2012), wherein it was held that “It is a compulsory requirement for allowing deduction in respect of commission payment that there should be evidence of some services being rendered”. The AR could not specify the services rendered by any agents and also did not produce any of the agents to whom commissions were paid for necessary verification during the course of appellate proceedings. It is also surprising that 51 persons who are closely associated with the MD were paid these commission payments without services being rendered by these persons, and prayed to confirm the disallowance made by the Assessing Officer.

17. Regarding the disallowance of payment made to workmen, the Id. DR submitted that the assessee company was incurring losses from the year 1989 and was closed because of workmen agitation in the year 1991. The workmen compensation / retrenchment were on account of business liability of the assessee company. It has nothing to do with the transfer of the property done by the company. A letter was also addressed to the assessee company on 24.01.2013 wherein

clarifications were sought from the assessee company. As seen from the Memorandum of Compromise, wages were to be paid from June to December 1993. The bonus was to be paid for the year 1991-92 and 1992-93 and the earned leave encashment for the year 1992 and 1993. The assessee was asked to clarify with regard to the amounts claimed in the regular return of income for the assessment year 1991-92, 1992-93 and 1993-94 with respect to the wages and bonus. The wages, if they were claimed in the profit and loss account for the assessment year mentioned at, the claim to allow the same against the capital gain will amount to double deduction. Hence, the assessee was asked to clarify and provide evidence with regard to details of returns filed for the assessment year 1991-92 to 2007-08. The assessee in his reply dated 8th February 2013 submitted that the amounts were not claimed by the management in any of the previous years. However, no evidence with regard to this was filed before me to appreciate the facts. It is also to be mentioned that any retrenchment compensation paid to ex-employees on sale of business assets is not allowable u/s.48(1) as compensation so paid has no

connection with the transaction of sale of land building and it is connected only with the closure of the business. The Bombay High Court made this observation in the case of CIT v. Radia Talkies (238 ITR 872). On examination of the facts of the case, it is very clear that the retrenchment compensation was on account of closure of business and the arrears of wage / bonus was related to the business of the assessee and has nothing to do with the sale of business assets. He placed reliance on the judgment of the Delhi High Court in the case of Sitananda vs. CIT (2001) 251 ITR 575, wherein it was held that the assessee has to pay the interest to the lessor for the delayed payment of lease amount. It was held that it was not an expenditure incurred wholly and exclusively in connection with the transfer. In the case of the assessee also there were interest payments to the workers and this expenditure cannot be said to be wholly and exclusively incurred in connection with the transfer and cannot be allowed as deduction while computing the capital gain. Hence, the Assessing Officer has rightly disallowed the expenditure claimed on account of payments made to workmen and settlement of staff.

18. Regarding the disallowance of payment to the Bank of Baroda, the Id. DR submitted that from the details furnished by the assessee, it is seen that the dues as on 31.3.2007 with the Bank of Baroda as on 28.4.2007 was ` 34,83,76,311/-. It is also seen from the credit facilities of Bank of Baroda, the security agreement shows the hypothecation of stocks, book debts, plant and machinery, pledge of stocks, equitable mortgage of factor land and buildings. It is pertinent to see from the nature of loan obtained by the assessee that they were in the nature of cash credit and term loans. Term loans are usually utilized by the company for purchase of plant and machinery and other assets of the company. The assessee could have claimed depreciation in the earlier years on the assets purchased from the loans taken by the company. The major amount was on account of term loans and also demand loans. As on 31.10.1991 only, the assessee had given equitable mortgage of all the fixed assets of the company and the charge on the equitable mortgage was originally credit on 16.7.1982 which was modified from time to time. The equitable mortgage of fixed assets of the company was modified in May

1991 by reduction of charge from `6,04,71,000/- to `5,94,51,000/- and extension of charges for securing sufficient demand loans of ` 10,00,000/- thereby increasing the total amount secured by the charge from `5,94,51,000/- to `6,04,51,000/-. The rate of interest per annum was at 16%. There was also an opening interest of 16% per annum per quarter since the assessee has not paid the dues regularly. As per letter dated 28.4.2007 filed by the assessee, the loan account has been classified as non-performing assets as on 31.3.1991 in accordance with the RBI directives and guidelines. As seen from the facts in this letter, the assessee has defaulted in payment of interest on the above loans during the assessment year 1989-90, 1990-91 and 1991-92.

18.1 He submitted that in view of the above failure of the assessee to pay the dues of loan along with interest, the bank has in letter dated 28.04.2007 stated to discharge the liabilities to bank aggregating to ` 34,83,311/-. Taking this letter into consideration, a letter was addressed to the assessee by the CIT(Appeals) on 24.01.2013 asking the assessee to file the details regarding the charge with respect to the land and

buildings, Plant and Machinery and stock pledged to the bank till December 2007. The assessee was also requested by the CIT(Appeals) to clarify regarding the utilization of the term loan during the various financial years. However, in the letter dated 08.12.2013 filed before the CIT(Appeals) by the assessee did not file any of the required details but only stated that the banks invariably took all the properties as a single security cover for all the advances / loans lent by it and does not distinguish or differentiate either the properties or lands and the entire amount of loan repayment needs to be allowed u/s 48(i).

18.2 The assessee did not furnish any details regarding utilization of term loan from which Plant and Machinery and other assets were purchased and also the details of depreciation claimed in the earlier years on all those assets. In the absence of these details, it is not possible to know whether the assessee has claimed deduction in the earlier years on account of depreciation on the assets purchased by utilizing the term loan. As discussed earlier, the assessee has approached the High Court for according permission to sell the vacant land of 14.68 acres out of the total extent of 25.66 acres. In the

judgment of the Hon'ble High Court delivered on 3.12.2007 (at Page 4, Para 2), it is clearly mentioned that the bank has accepted the one time settlement and received the amount of ` 18 crores towards the one time settlement in no lien account. This clearly proves that the assessee has received Rs.18 crores from the prospective buyer i.e., M/s Alliance Mall Developers Co. Pvt. Ltd. before approaching the High Court to sell the vacant lands. Since the BIFR proceedings are pending before the High Court, the assessee has filed the application before the High Court to permit the assessee to sell the vacant land. This clearly proves that the payment to the bank is not an expenditure related to the transfer of the property. As seen from the information filed during the course of assessment proceedings, a letter was filed from the Bank of Baroda (August 6, 2012) stating that the said finance limits have been closed and settled in full, out of the sale proceeds of the property on 17.12.2007. A letter was addressed by the Bank of Baroda on 17th December 2007 to M/s Alliance Mall Developers Co. Pvt. Ltd. stating as follows :

“As per your letter of even date addressed to us, we state that we have debited your account for the sum of

‘18 crores only against the one time settlement of ` 18 crores in respect of dues of M/s Sivananda Mills Ltd. and further that we have credited the balance of maturity amount of fixed deposit held by you under TD108 Scheme bearing Receipt No. 799948 in the current account held by you with us. We shall hand over all the title deeds of the scheduled properties in our possession directly to you on receipt of the sale from the Debts Recovery Tribunal.”

18.3 According to the Departmental Representative, this clearly proves that the amount was paid on account of debt of the company and has nothing to do with the payments in connection with the transfer. Before the High Court, the bank has accepted that the amounts of ` 18 crore was received and kept in a no lien account. This was before the proceedings of the High Court on 3rd December 2011. As seen from the assessment order, the assessee made an agreement for sale on 12th December 2007. This states that the purchaser had deposited the amount of ` 18 crores in a no lien account before the date of sale of agreement. All these facts clearly state that the expenditure incurred with regard to the payment to the bank has nothing to do with the transfer of the land and is not an allowable expenditure u/s 48(1) of the Income Tax Act. It is not an expenditure incurred wholly and exclusively in connection

with such transfer. The words “in connection with such transfer” are very relevant to allow the transfer. Mere payment to discharge the mortgage cannot be allowed as either cost of improvement or as deduction from consideration as held by the High Court of Madras in the case of CIT Vs Vajrapani Naidu 242 ITR 560. The High Court followed the decision of the Supreme Court in the case of Arunachalam Vs CIT (1997) 227 ITR 222. The Apex Court held that outstanding dues, against mortgaged property, not to be deducted (CIT Vs Attil N Rao (2001) 252 ITR 880 (SC)]. The CIT(Appeals) agreed with the Assessing Officer in disallowing the expenditure relating to the bank payment and the order is confirmed.

19. The other ground raised by the assessee is that the Commissioner of Income-tax(Appeals) erred in sustaining the disallowance made by the Assessing Officer regarding the claim of set off of business expenditure/loss against Long Term capital gain, on the ground that there was no business activity of spinning and manufacturing of yarn and the Departmental Representative supported the orders of the lower authorities.

20. We have heard both the parties and perused the material on record. The claim of the assessee in this appeal is with regard to payment of Rs. 18 crores to Bank of Baroda and Rs. 8,07,43,083/- to workmen as a deduction out of consideration received from sale of capital asset.

21. Under sec.48 of the Act, the income chargeable under the head "capital Gains" shall be computed by deducting from the full value of the consideration received or accrued as a result of the transfer of asset following the amounts viz.,

- i) expenditure incurred wholly and exclusively in connection with such transfer,
- ii) the cost of acquisition of the capital asset and cost of any improvement thereto.

Sec.48 of the Act, broadly contemplates three amounts for the purpose of computing income chargeable under the head "Capital Gains". The first is the full value of the consideration for which the capital assets has been transferred. The second is the expenditure incurred wholly and exclusively in connection with such transfer and the third and last is the cost of acquisition of the capital asset including the cost of any improvement thereto.

22. We have already referred in earlier para the relevant facts of the case as in Authorised Representative of assessee's submissions. It cannot be disputed that the property in dispute was mortgaged with Bank of Baroda. They also taken the symbolic possession of the assets charged to them under the provisions of SARFAESI 2002 which is evidenced from the letter dated 7.7.2007 kept on record at page 2 of the paper book. Further, they have also given possession notice vide letter dated 7.7.2007 which is kept on record at page 3 of the paper book. Thus, it cannot be disputed that unless the assessee had settled the dispute with Bank of Baroda, the sale transaction with M/s. Alliance Mall Developers Co. Pvt. Ltd. vide sale deed dated 11th June, 2008 could not have materialized, there would perhaps have no question of capital gains. The sale would not have taken place. Being so, the full value of consideration in this case was not apparent consideration. The Legislature while using the expression "full value of consideration" in our opinion, has contemplated both additions to, as well as deductions from the apparent value. What it means is the real and effective

consideration. That apart, so far as clause (i) of sec.48 is concerned, we find that the expression used by the Legislature in their wisdom is “the expenditure incurred wholly and exclusively in connection with such transfer”. The expression “in connection with such transfer” is, in our opinion, certainly wider than the expression “for the transfer”. Once again, we are of the view that any amount the payment of which is absolutely necessary to effect the transfer will be an expenditure covered by this clause. In other words, if, without removing any encumbrance, sale or transfer could not be effected, the amount paid for removing that encumbrance will fall under clause (i). In this case, sale or transfer could not be effected and the amount paid for removing that encumbrance will fall under clause (i) of sec.48 of the Act. The same view was taken by the Bombay High Court in the case of CIT v. Shakuntala Kantilal (190 ITR 56). This decision is followed by the Madras High Court in the case of CIT v. Bradford Trading Co. P. Ltd. (261 ITR 222), wherein it was held that the amount paid by the assessee to a third party to settle the pre-existing claim against transfer of asset as also litigation expenses

constitute the expenditure incurred wholly and exclusively for transfer of capital asset and was deductible in computation of capital gain; amount reimbursed by the vendee towards such claim constitute part of sale consideration but deductible while computing capital gain. Similar view was taken by the Bombay High Court in the case of CIT v. Abrar Alvi (247 ITR 312). Further, Calcutta High Court in the case of Gopee Nath Paul And Sons And Another v. DCIT (278 ITR 240), held that the criteria is the perfection of title in order to effect the sale. In that case, without removing the liability of the Allahabad Bank, the title of the purchaser could not be perfected. Having regard to the facts and circumstances of that case and the position in law, the meeting of the liability of the Allahabad Bank relating to the assets of Gobindo Sheet Metal was an expenditure incurred wholly and exclusively in connection with the transfer. Further the Delhi High Court in the case of CIT v. Eagle Theatres (205 taxman 278), wherein it was held that the amount paid to the tenants for vacating the premises for effecting the sale of building is required to be deducting in computing the capital gains of the building sold as incurred

wholly and exclusively in connection with transfer. Further, the Andhra Pradesh High Court in the case of Naozar Chenoy v. CIT (234 ITR 95), observed as under :

“As regards the expenditure incurred by the assessee towards payment of the amount to the tenants for vacating the premises, which is the subject-matter of the sale transaction, we are of the view that it has nexus with the transaction as without the tenants vacating the premises, the building cannot be sold. Therefore we are of the view that the said expenditure was incurred for effecting the transaction and therefore he is entitled for deduction of the amounts incurred towards vacation of the tenants, in computing the capital gain of the building sold.”

23. Similar view has been taken by the Madras High Court in the case of CIT v. A. Venkatraman And Others (137 ITR 846) . In view of the above discussions, we are of the opinion that the above two payments to be allowed. It is needless to say that had the assessee not paid to the workmen, who had taken the possession of factory premises of the assessee could not be allowed to transfer the said capital asset. However, if the assessee had claimed any amount out of this, in any assessment year , same to be reduced from this amount i.e. Rs. 8,07,43,083/- by AO while giving effect to this

order. Accordingly, the grounds relating to these issues are allowed.

24. The next ground is with regard to disallowance of commission payment.

25. The contention of the Id. DR is that these payments are not properly vouched and doubted the services rendered by the recipients. Further, the contention of the Id. Departmental Representative is that most of the recipients of this commission are either relatives or associates of the Managing Director of Sivananda Mills, Mr. Murugesan. The AO has given a finding that none of the commission payments were involved in the brokering of the transfer with Alliance Mall Developers Co. P. Ltd. (purchaser). Most of the persons have filed revised return or accounted the receipts in the next year as they were following cash method of accounting. Further, the contention of the Id. DR is that the purchaser had a broker viz. M/s. Hind Wastra Bandar, who has received the payment of Rs 25.15 lakhs as brokerage. From this, the DR inferred that there is no necessity of payment of commission by the assessee. In our opinion, the reason given by the AO to deny the payment of

commission is not proper. It is not unusual that both, purchaser and seller having separate brokers or middlemen to complete the transaction of transfer. The CIT(Appeals) has given a finding that the assessee has not produced brokers to show that they have rendered services. The power of the CIT(Appeals) is coterminous that of the AO and he should have issued summons, once the assessee has furnished the names and addresses of the parties. This exercise has not been done by the revenue authorities. Hence, out rightly disallowing the entire commission payment is not appropriate. However, there is lapse on the assessee also as noticed by the AO as mentioned in earlier para. In our opinion, the payment of commission of rs 1,98,17,992/- is very excessive. As per trade practice, when the transaction of such volumes took place, usually in real estate field, commission payment is at one percent of the sale value of the property would be paid. Accordingly, we direct the AO to allow one percent of the total sale value of the property as commission payment towards transfer of property. This ground is partly allowed.

26. The next ground is with regard to sustaining the disallowance made by the AO in respect of claim of set off of business expenditure/loss against long term capital gain, on the ground that there was no business activity of spinning and manufacturing of yarn.

27. According to the revenue authorities, the assessee has stopped manufacturing of yarn since 1993 and the liabilities and expenditure relating to those earlier years have been claimed as expenditure in the assessment year 2009-10. According to the assessee, there was an intention to resume the same and the company was not wound up as there was transfer of company, land selling, selling of machineries, settlement of bank and employees demand. Further, the contention of the assessee's counsel is that in subsequent year, the activities of the company have been revived and suddenly, the company was started against and the loss from the business activities should be allowed. There is nothing on record to show that the assessee has completely closed the business of the assessee. However, the copy of the assessment order for the assessment year 2012-13 to show that wherein the AO taxed the cessation

of liability u/s.41(1) of the Act. The Id. AR submitted that the expenditure claimed by the assessee was capitalized in the assessment year under consideration. Being so, in our opinion, this issue requires re-examination by the AO. Since the above evidence was brought on record, we suggest that the company only withhold the business activity due to strike and other factors and there was no intention to carry on the business activity, for the time being and it was not wound up the business. Therefore, issue is to be reexamined by the AO, whether it is reasonable or excessive. Accordingly, he is directed to disallow only that portion of the expenditure if he finds any amount excessive or unreasonable. Further, regarding the claim of bad debts, the same to be examined in terms of sec.36(1)(vii) r.w.sec. 36(2) of the Act. With regard to statutory liability like sales tax, ESI, PF etc., is to be allowed on actual payment basis in the assessment year under consideration in terms of sec.43B of the Act. Hence, we remit this issue to the file of the AO for fresh consideration.

28. The assessee has raised the additional ground that the company has earned business income in the form of interest receipts and consequently the business loss arising out of the

business activities should be set off against the capital gain on sale of business assets.

29. In our opinion, the assessee deposited certain fund out of the amount received from sale of land and interest earned from that deposit as income from other sources and in view of the judgment of the Supreme Court in the case of Tuticorin Alkali Chemicals And Fertilizers Ltd. v. CIT (227 ITR 172), wherein it was held that interest earned by the assessee on short term deposit in bank out of term loan is income under the head 'other sources'. Hence, this issue is dismissed.

29.1 In the result, the assessee's appeal in ITA No.1216/Mds/2013 is partly allowed for statistical purposes.

ITA N0.2106/Mds/13:

30. The first ground in this appeal is with regard to the disallowance of the claim of expenditure towards payment of commission at 100% and site clearing charges at 75% while calculating long term capital gains.

31. The facts of the case are that the assessee has disposed off land measuring about 10.98 acres. The assessee has also realised that all the plant and machineries which in turn became rusty due to years of non-operation and also became unviable because of

obsolescence of the machinery. During the sale of this property, the assessee made commission payments to about 39 persons. According to the assessee, it has provided a list of persons to whom such payments have been made together with corresponding quantum of payments made to each of such persons. All the payments were made through bank channels and all the payments were subjected to TDS. The Assessing Officer was of the opinion that the evidence brought on record is not sufficient to show the services rendered by these persons and the commission payments of ` 1,42,24,000/- and the AO was of the opinion that the expenditure cannot be considered as wholly and exclusively incurred with the transfer of the land. He disallowed the same. Against this, the assessee is in appeal before the CIT(Appeals).

32. The CIT(Appeals) observed that none of the parties who have received the payments were produced for examination. and most of the persons who have received payments said to be relatives and the assessee has not furnished details before the CIT(Appeals). Further, the

observed that Shri Sivaraj Chetty, HUF, Shri Sivaraj Chetty, Individual, Smt. Ananthalakshmi Sivaraj CHetty and M/s. Vishnu Vardhini Agencies were received ` 8 lakhs each totalling ` 32 lakhs on 31.3.2010. Further, address of all the persons mentioned as at 11, Bharathi Park Road, Coimbatore – 641 043. Further, S/Shri Ram Ganesan Venkatesan, HUF, V. Kathikeyan, Mrs. Meenakshi Venkatesan were also paid ` 8 lakhs, all said to be having address of No.10, Archbishop Mathias Avenue, R.A.Puram, Chennai – 600 028. Similarly, Smt. Vidya Rahul Reddy and Mr. Dipur Krishnamurthi were also paid ` 8 lakhs and both are staying at 12, Sathyanarayana Avenue, R.A.Puram, Chennai – 600 028. This made suspicious in the mind of CIT(Appeals) and disallowed the claim of commission payment. Against this, the assessee is in appeal before us.

33. Regarding the payments made to the workers for clearing the premises, the facts are that the assessee claimed this expenditure for the land sold to M/s. Alliance Mall Developers Co. (P) Ltd. This amount was reduced

from the total sale consideration of the land at ` 40.78 crores in the computation of income from long term capital gains by the assessee. According to the AO, that expenditure is not supported by proper evidence and disallowance ` 48,80,215/-.

34. On appeal, the CIT(Appeals) observed that these amounts are paid by cash. However, the vouchers have been made in the month of April to June 2009 but the ledger shows cash payments were made in March 2010. According to the CIT(Appeals), the daily wage labour does not wait for so much time to receive wages. However, there is no evidence to show that the assessee engaged in labour contract to carry out this work. Hence, CIT(Appeals) directed the AO to allow 25% of the expenditure on account of site clearing charges. Against this, the assessee is in appeal before us.

35. The Id. AR, submitted that the CIT (A) ought to have seen the comprehensive list of persons to whom such payments have been made together with corresponding quantum of payments made to each of such persons. All the

payments were made by account payee crossed cheques and all the payments were subjected to TDS requirements as required. It is also submitted position and well settled position of law that payment of commission to brokers for facilitating smooth transaction would fall under the category of “the expenditure incurred wholly and exclusively in connection with such transfer”.

35.1 It is further submitted that the expenditure incurred towards payment of commission has been disallowed on the ground that the most of recipients were related to the Assessee and that of lack of evidence / material regarding the services rendered by these persons, without appreciating that there was no other reason for the Assessee to make the payment. It should be seen that the Assessee had produced all the evidences which are more than adequate to establish such fact, genuineness, necessity and purpose of such payment, which were further corroborated by the fact of filing of returns thereof by the recipients.

35.2 The Id. Authorised Representative of assessee further submitted that in many cases that with the production of fairly reasonable evidences pointing to such fact or even raising probabilities thereof would amount to discharge of onus by the Assessee and thereafter the onus shift to the Department to disprove the same with more cogent and material evidence, supporting rejecting of evidences produced by the Assessee.

35.3. According to the Id. AR, no reasons have been recorded in the impugned order to show that the Assessee has not utilized the services of the recipients, except predominant prevalence of presumption of bad faith about the Assessee and the conjectures that no services would have been rendered by those brokers, to reject the all good evidences produced by the Assessee and the confirmations thereon made by the respective recipients. It is submitted that both the Assessing Officer and the Learned Commissioner of Income Tax, had not doubted the veracity (genuineness) of the payments made.

35.4 The Id. Authorised Representative of assessee further submitted that the Assessee had engaged the persons, who had rendered services and the Assessee had also paid for their

services. In the process of the sale of land, the assessee had to cause cleaning up of the land to enable exact measurement of land, marking of boundaries and present the subject matter of land for sale, comprehensive, clean and clear. In such process the assessee had to employ scores of personnel to cut, remove and weed out bushes, remove debris from the areas over several period of days, intermittently. The assessee had to engage personnel specially skilled in doing such kind of jobs who were illiterate and working in an unorganized manner. These personnel did not normally come and work regularly but were coming and working erratically. Besides they had to be paid in cash only. However the CIT (A) has allowed only 25% of the expenditure for the cleaning charges. The CIT (A) ought to have allowed fully the expenditure. According to the Id. AR the CIT (A) wrongly allowed only 25%. Learned Assessing Officer has grossly erred in disallowing all the claims of the Assessee on the commission payment made to facilitate conclusion of the sale of immovable property u/s 48(i) of the Act, and site clearing charges also under sec. 48(i) of the Act, drawing untenable non-existent inference, purely based on

suspicious, surmises, conjectures, presumption of bad faith etc., which runs contrary to the facts obtaining very much from the return of income and explanations offered.

36. On the other hand, the Id. DR relied on the findings of the CIT(Appeals).

36.1 We have heard both the parties and perused the material on record. The issue relating to the payment of commission was already decided by us in ITA No.1216/Mds/13 for the assessment year 2009-10. Accordingly, we direct the AO to allow commission payment at 1% of the sale value of the capital asset.

36.2 Regarding clearing charges of the site, we are of the opinion that the assessee has not placed contemporaneous evidence before the lower authorities so as to prove the genuineness of the claim of the assessee. Hence, we are inclined to remit this issue to the file of the AO with direction to the assessee to place necessary evidence in support of its claim. This issue is partly allowed.

37. The next ground is with regard to disallowing the claim of the assessee on the right to set off of the business losses against the long term capital gains and also the claim of payment of interest made in the previous year under sec.40(ia) of the Act.

38. According to the lower authorities, no business activities have been conducted in the year 2010-11. However, the assessee claimed expenses of Rs. 15,08,35,525/- during the assessment year 2010-11. The expenditure which was no nexus with manufacturing of yarn cannot be allowed as expenditure for the purpose of business. Winding up of the company was in progress and no business activity was carried out by the assessee and the above expenditure was disallowed and no set off of long term capital gains of the assessee. Against this, the assessee carried the matter before the CIT(Appeals), who confirmed the order of the AO. Against this, the assessee is in appeal before us.

39. We have heard both the parties and perused the material on record. This issue was considered by us in ITA

No.1216/Mds/13 in earlier para. Accordingly, this issue is remitted to the AO to disallow only the expenditure which he finds excessive or unreasonable as per our direction in ITA No.1216/Mds/13.

40. In the result, ITA No.2106/Mds/13 is partly allowed for statistical purposes.

Order pronounced on Friday, the 17th of June, 2016 at Chennai.

Sd/- (जी. पवन कुमार) (G. Pavan Kumar) न्यायिक सदस्य/Judicial Member	Sd/- (चंद्र पूजारी) (Chandra Poojari) लेखा सदस्य/Accountant Member
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चेन्नई/Chennai,
दिनांक/Dated, the 17th June, 2016.
mpo*

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.