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IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "B", HYDERABAD

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No. 1764/Hyd/2017
Assessment Year: 2010-11

Apollo Munich Health Insurance Company Ltd., Hyderabad. PAN – AAGCA 1654H	vs.	Dy. Commissioner of Income-tax, Circle – 16(2), Hyderabad.
(Assessee)		(Respondent)

Assessee by	:	Shri Baldev Raj
Revenue by	:	Shri Sunku Srinivas

Date of hearing	02/08/2018
Date of pronouncement	19/09/2018

O R D E R

PER S. RIFAUR RAHMAN, A.M.:

This appeal filed by the assessee is directed against the order dated 25/07/2017 of CIT(A) – 1, Hyderabad for AY 2010-11.

2. Brief facts of the case are, the assessee company engaged, in the business of health insurance, filed its return of income for the A.Y. 2010-11 on 27.09.2010 declaring a loss of Rs.91,32,94,819/- for the AY 2010-11. The case was selected for scrutiny and the assessment was completed u/s.143(3) on 13.03.2013, determining the loss at Rs.91,31,88,142/-. The CIT-1, Hyderabad found that the order passed u/s.143(3) dated 13.03.2013 was erroneous and prejudicial to the interests of revenue. The CIT-1, Hyderabad passed an order u/s.263 dated 16.12.2014, setting aside the order of the Assessing Officer. The Assessing Officer completed the assessment u/s.143(3) r.w.s.263 on 29.01.2016 by making addition of Rs.3,51,40,716/- towards write off of rent deposits.

2.1 During the assessment proceedings, Assessing Officer issued notices u/s.143(2) and u/s.142(1) calling for information regarding the claim of 'write off of rent deposit of master piece building' of Rs.3,51,40,716/-. In response to the notices, the Assessee submitted that it had appropriated security deposits towards the rent payable to the landlord M/s. Finest Promoters Pvt Ltd for the remaining period of lock-in-period treating it as revenue expenditure. The security deposit was given by the assessee in terms of the lease deed and was for the purposes of taking the premises on lease. The fact that the lease has been cancelled does not change the nature and purpose for which the deposit was given it will still be treated as intimately connected with smooth operations of Assessee Company. The assessee further stated that it was wrongly described the transaction as write-off of the security deposit, however, in substance, it was only a manner of settlement of rent payable by the assessee towards unexpired lock-in-period of lease and incidental to business of the assessee.

2.2 The Assessing Officer not accepted the assessee's submissions. The Assessing Officer concluded that the security deposits given by the assessee for securing the premises on rent are not given as part of the regular business, but by making refundable security deposit. The Assessing Officer also concluded that the assessee had obtained right to use the property (tenancy right) which is a capital asset, as per Section 55(2) of the IT Act, the tenancy right is a capital asset. Therefore, the write off of rental deposit cannot be construed as Revenue Expenditure. The Assessing Officer relying on the decision of Hon'ble High Court in the case of CIT Vs. Triveni Engineering Industries Ltd in 343 ITR 245 disallowed write off of rent deposit amounting to Rs.3,51,40,716/- .

3. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A).

4. Before the CIT(A), the assessee submitted that it had entered into an agreement titled "Lease Deed" with Finest Promoters Private Limited for the purposes of taking the premises "The Masterpiece" owned by Finest on lease for carrying out its business operations from the said premises. The assessee submitted that as per terms of Lease agreement, the assessee had paid Interest Free Security deposit to M/s. Finest Promoters Private Ltd of Rs.3,51,40,716/- which was refundable to the assessee company on event of expiry/cancellation of lease deed. The Assessee submitted that it had given notice to M/s. Finest Promoters Pvt Ltd for vacating the premises from 30.11.2008 and at the time 35 months period was remaining considering the Lock-in-period of 4 years and 6 months as defined in Lease deed. The assessee submitted that M/s. Finest Promoters Pvt ltd has to pay Rs.10,28,43,755/- towards rent for the unexpired period of lock-in-period i.e., 35 months. The assessee submitted that it negotiated with M/s. Finest Promoters pvt. ltd to waive off the said minimum lease payment. After negotiations with landlord to reduce the rent payable for lock-in-period and it was agreed among the parties that appropriation of Security deposit against the minimum receivable by landlord would be made for negotiated amount instead of cash payment by the assessee and security deposit appropriation was agreed as follows:

Month of commencement of rent by new tenant	Amount of deposit to be appropriated (Rs.)
December 2008	26,355,781
January, 2009	27,819,990
February, 2009	29,284,2009
March, 2009	30,748,410
April, 2009	32,212,620
May, 2009	33,676,830
Thereafter	35,140,716

4.1 The assessee submitted that on the basis of these negotiations created a provision for doubtful debts towards the Security deposit according to the Generally Accepted Accounting Principles in March,

2009. The assessee submitted that M/s. Finest Promoters Pvt Ltd raised the invoices for the said rent during March, 2009 to June,2009 with applicable service tax which were accounted for by the assessee during FY 2009-10. The assessee submitted that they paid Rs.13,19,230/- vide Cheque No.6752 dated 29.01.2012 to M/s. Finest Promoters Pvt Ltd as full and final payment of dues after adjusting the Security deposit. The assessee submitted that they had taken allowance of the security deposit appropriated towards rent payable to M/s. Finest promoters Pvt ltd for the remaining portion of lock-in-period treating it as revenue expenditure as per Section 37 of the IT Act, 1961. The assessee submitted that they did not obtain any enduring benefit by giving Security deposit to M/s. Finest Promoters Pvt ltd and its subsequent appropriation. The assessee also submitted that the right to use the premises was for limited period which was restricted to the carrying out the activities related to its insurance business as permitted by its Memorandum and Articles of Association. The assessee submitted that appropriation of security deposit against minimum rent payable as per lease agreement terms is business expenses and is revenue in nature. The assessee submitted that appropriation of security amount against negotiated minimum lease rent is business expenses and revenue in nature and admissible expenses u/s.37 of the Income Tax Act, 1961.

4.2 The assessee submitted the following documents:

1. Certificate of Incorporation and HDFC Bank statement for the month, 2010.
2. Financial statements for the FY 2009-10.
3. Lease agreement dated 27.04.2007.
4. Letter dated 28.07.2008 regarding termination of lease deed and confirmation from M/s Finest Promoter Pvt Ltd.

4.3 The assessee also relied on various case law, which were mentioned by the CIT(A) at page 7 of his order.

5. After considering the submissions of the assessee as well as analysing the issue with various case law, the CIT(A) held that the loss on account of non-recovery of rent deposit of Rs. 3,51,40,716/- was not in the nature of a revenue loss allowable as a deduction and accordingly, he upheld the disallowance made by the AO.

6. Aggrieved by the order of CIT(A), the assessee is in appeal before us raising the following grounds of appeal:

> *"1. That on facts and in law order dated 25/07/2017 as passed by the Commissioner of Income- tax (Appeals) - 1 Hyderabad [in short "Ld. CIT(A)]' affirming the order dated 29/01/2016 passed by the Assessing Officer [in short "Ld. AO"], is bad in law and void ab initio.*
>
> *2. That on facts and in law the Ld. CIT(A) grossly erred in holding that the expenditure incurred by the Assessee to the tune of Rs. 3,51,40,716/- as was capital expenditure, not allowable as deduction.*
>
> *The Assessee craves to leave, add, amend, modify, delete and/or change all or any of the grounds on/or before the date of hearing."*

7. Before us, ld. AR of the assessee submitted that there is a factual error in the findings of the AO and CIT(A) that when the assessee had paid rent for the remaining period of lock-in-period and appropriated that rent from security deposit towards and claimed as revenue expenditure, and the finding of the AO and CIT(A) is on the subject that rent security written off. He relied on the following case law:

> 1. United Motors (India) Ltd. Vs. ITO, 6 Taxmann.com 32 (Mum.).
> 2 IBM World Trade Corporation Vs. CIT (Bombay HC), [1990] 48 Taxman 11 wherein it was held as under:
> 3. CIT Vs. Mysore Sugar Co. Ltd., [1962] 46 TR 649 (SC),
> 4. CIT Vs. Mahalakshmi Textile Mills Ltd., [1967] 66 ITR 710 (SC),
> 5. CIT Vs. Khaitan Chemicals and Fertilizers Ltd., [2010] 326 ITR 114 (Del.)
> 6. Empire Jute Co. Ltd. Vs. CIT [1980] 3 Taxman 69 (SC).

8. Ld. DR relied on the orders of revenue authorities.

9. Considered the rival submissions and material on record as well as case law cited by ld. AR of the assessee. In the following two cases, the respective Courts have held as under:

1. In the case of United Motors (India) Ltd. Vs. ITO, 6 Taxmann.com 32 (Mum.), it was held that the view taken by the AO that the loss of Rs. 40,20,388/- arising on account of the write off of the advances against rental properties was a loss incidental to the business could not be said to be unsustainable in law. In this view of the matter, the AO was right in allowing the aforesaid amount as a deduction and his action could not be called erroneous or prejudicial to the interests of revenue.

2. IBM World Trade Corporation Vs. CIT (Bombay HC), [1990] 48 Taxman 11 wherein it was held as under:

"We are in agreement with Shri Dastur that the principles in this regard are laid down by the Supreme Court in its judgement in Mysore Sugar Co. Ltd.'s case (supra) that even assuming that a lease for a period of 10,15 or 20 years would amount to an advantage of enduring nature, it is not that every advantage of enduring nature would result in a capital outlay. What is required to be seen is whether the advantage of enduring nature is in the capital field. As the acquisition of a premises on lease would not ordinarily be in the capital field, we have no hesitation in holding that the moneys advanced by the assessee in pursuance of these agreements to the landlord for the purposes of and in connection with the acquisition of the premises on lease were for the purpose of business. Naturally, therefore, when such advances are lost to the assessee, the loss would be a business loss and not a capital loss. The decisions relied upon by Dr. Balsubramanian, according to us, have no bearing on the question involved herein. In the supreme Court decision, the question was of third party's liability to pay estate duty and the discharge by an assessee. It was obviously a purpose unconnected with the business of the assessee. The other two decisions, viz., Uttar Bharat Exchange Ltd.'s case(supra) and Taj Mahal Hotel's case (supra) refer to the expenditure incurred by an assessee on alterations and additions made by an assessee in a leasehold premise. No doubt, such expenditures were held to be of capital nature. We

fail to understand how those decisions have any bearing on the point in issue before us."

9.1 From the above decisions, it is clear that the rental advance, when it becomes unrecoverable, it becomes the business loss and not capital loss. But in the given case, it is not unrecoverable but it was adjusted towards agreed rent for lock in period as per agreement between the assessee and landlord. Therefore, in our considered view, the assessee has taken conscious decision to vacate the leased property and as per agreement, assessee has obligation towards lock in period as per the lease agreement. Therefore, the negotiated settlement for the lock in period can only be treated as business loss as the premises was taken on rent for the purpose of business.

9.2 The facts in the case of Triveni Engg. Industries Ltd. (supra) were that the company was amalgamated and in the amalgamated company, advances given for securing the premises could not be recovered. Therefore, the unrecovered advances of rent was not allowed as revenue in nature. But, in the given case, it was recovered and settled for the rent for lock in period. Therefore, it is distinguishable on facts to the case of the assessee. Hence, the grounds raised by the assessee are allowed.

10. In the result, appeal of the assessee is allowed.

Pronounced in the open Court on 19th September, 2018.

Sd/-	**Sd/-**
(P. MADHAVI DEVI)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Hyderabad, Dated: 19th September, 2018

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Copy to:-

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2) *DCIT, Circle – 1(1), Hyderabad.*
3) *CIT(A) – 1, Hyderabad.*
4) *Pr. CIT – 1, Hyd.*
5) *The Departmental Representative, I.T.A.T., Hyderabad.*
6) *Guard File*